

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.06.2016

CORAM

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU
and
THE HONOURABLE MR.JUSTICE V.BHARATHIDASAN

Criminal Appeal No.438 of 2015

Somasundaram @ Kanagaraj ... Appellant/Accused

-Vs-

State Rep. by
The Inspector of Police
W-15 All Women's Police Station
Royapuram, Chennai. ... Respondent/Complainant

This Criminal Appeal has been preferred to set aside the conviction and sentence imposed by judgment dated 09.07.2012 made in S.C.No.356 of 2011 on the file of the Mahilar Sessions Court, Chennai.

For Appellant : Mr.D.J.Venkatesan
For Respondent : Mr.M.Maharaja
Additional Public Prosecutor

J U D G M E N T

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

The appellant is the sole accused in S.C.No.356 of 2011 on the file of the Mahila Sessions Court, Chennai. He stood charged for offences under Sections 366-A (3 counts), 342 (3 counts), 376 (3 counts) and 506(ii) (3 counts) IPC. By judgment dated 09.07.2012, the Trial Court convicted him under all the charges and sentenced him to undergo rigorous imprisonment for 10 years for each count and to pay a fine of Rs.10,000/- for each count in default to undergo simple imprisonment for 6 months for the offence under Section 366-A IPC; to undergo rigorous imprisonment for one year for each count for the offence under Section 342 IPC; to undergo imprisonment for life for each count and to pay a fine of Rs.10,000/- for each count, in default to undergo simple imprisonment for 6 months for the offence under Section 376 IPC and to undergo rigorous imprisonment for 5 years for each count and to pay a fine of Rs.5,000/- for each count in default to undergo imprisonment (simple or rigorous imprisonment not mentioned) for 6 months for the offence under Section 506(ii) IPC. Challenging the said conviction and sentence, the appellant is before this Court with this appeal.,

2. The case of the prosecution in brief is as follows:-

P.Ws.1 to 3 are the victims in this case. At the time of occurrence, they were 12 years, 10 years and 11 years of aged respectively. P.W.4 is the mother of P.W.1. P.W.5 is the mother of P.W.3. P.W.13 is the father of P.W.2. They were all residing at Vannarapettai in Chennai city. The accused at the time of occurrence was aged around 74 years. He was also residing in the same locality. P.Ws.1 to 3 were studying in a local school. Their parents and other family members used to go for work outside. It is alleged that on 01.03.2010, the accused took them to his house. According to P.W.1, the accused took her into the house made her to see an obscene film in the television and then despite her resistance, he had sexual intercourse with her. The accused threatened her and warned her not to disclose the same to anyone. P.W.2- the second victim was similarly taken into the house of the accused and much against her resistance had sexual intercourse with her after tying her legs and hands. The accused closed the mouth of the victim by using a plaster. After the occurrence, the accused untied her, removed the plaster and sent her back with a warning not to disclose the same to anyone. P.W.3 - the third victim of the crime has stated that the accused took her once to his house. He had shown her an obscene film in the television. Then he tied her legs and hands with a rope and closed her mouth with a plaster. Then much against her resistance, he had sexual intercourse with her. Then, he untied her, removed the plaster and sent her with a warning not to disclose the same to anyone. All the victims did not disclose to anyone about the occurrence out of fear for the accused. After some time, P.W.1 complained of abdominal pain. Therefore, P.W.4 the mother of P.W.1 took her to a private hospital. The Doctor on examination found that she had been sexually exploited. She told the same to P.W.4. Then P.W.4 took her back to the house. Thereafter, P.W.4 along with her husband went to the police station and made a complaint. Ex.P13 is the complaint. P.W.16 - the then Inspector of Police on receipt of the complaint in Ex.P13 registered a case in Crime No.179 of 2010 under Sections 366-A, 342, 376 and 506(ii) IPC against the accused. Ex.P14 is the FIR. He forwarded both the documents to the Court, which were received by the learned Magistrate at 3.30 p.m. on 12.04.2010.

3. P.W.16 took up the case for investigation. He went to the place of occurrence and prepared an observation mahazar and a rough sketch in the presence of P.W.10 and another witness. He examined P.Ws.1 to 3 and recorded their statements. He forwarded them to the Doctor for medical examination. P.W.7 - Dr.Suganya Devi examined all the three victims on 03.04.2010 and found that they had been sexually exploited. The hymen was found intact in respect of P.Ws.1 and 2 and was not intact in respect of P.W.3. P.W.16 then arrested the accused and forwarded him to the hospital for examination. P.W.15 - Dr.Santhakumar examined him on 16.04.2010 and gave opinion that he was capable of performing penal sexual intercourse with women. The

investigation was later on taken up by P.W.17. On completing the investigation, he laid charge sheet against the accused.

4. Based on the above materials, the trial Court framed charges as detailed in the first para of this judgment against the accused. The accused denied the same. In order to prove the case of the prosecution, on the side of the prosecution, as many as 17 witnesses were examined and 17 documents were exhibited, besides 3 Material Objects viz., M.O.1- Television, M.O.2 - Onida DVD player, M.O.3 - Compact disk containing obscene film were marked.

5. Out of the said witnesses, P.Ws.1 to 3 have vividly spoken about the entire occurrence and that the accused had sexual intercourse with them against their resistance. P.Ws.4 and 5 mothers of P.Ws.1 and 3 respectively have stated that P.Ws.1 and 3 have told them about the occurrence. P.W.6 is the Head Constable who took the accused to the Doctor for examination. P.W.7 has spoken about the medical examination conducted on P.Ws.1 to 3. She has opined that all the three victims had been sexually exploited. P.W.8 has stated that she took the victims to the hospital for medical examination. P.W.9 has spoken about the arrest of the accused. P.W.10 has spoken about the preparation of Observation Mahazar and Rough Sketch. P.W.11 - father of P.W.3 has deposed on the basis of hearsay evidence. P.W.12 - an NGO has stated that P.W.3 had narrated the entire occurrence to her. P.W.13 - the father of P.W.2 has stated that P.W.2 told him about the occurrence. P.W.14 has spoken about the Observation Mahazar. P.W.15 has spoken about the medical examination conducted on the accused. He has opined that the accused is potent. P.Ws.16 and 17 have spoken about the investigation done and final report filed.

6. When the above incriminating materials were put to the accused under Section 313 Cr.P.C., he denied the same as false. His defence was a total denial.

7. Having considered all the above materials, the trial Court convicted the appellant as stated in the first paragraph of this judgment. Challenging the same, the appellant is before this Court with this Criminal Appeal.

8. We have heard the learned counsel for the appellant and the learned Additional Public Prosecutor appearing for the State and we have also perused the records carefully.

9. P.Ws.1 to 3 are the victims in this case. They have vividly spoken about the entire occurrence. They were not cross examined by the accused. Thus, the fact spoken by them have not been challenged at all. Similarly, other witnesses were also not cross examined. Relying on the evidences of P.Ws.1 to 3 coupled with the medical evidence, the trial Court had convicted the accused under all the charges.

10. The learned counsel for the appellant would submit that the conviction of the accused was not fair, since no opportunity was offered to the accused to cross examine the witnesses. Thus, according to the learned counsel for the appellant, the trial of the case, which resulted in the conviction of the accused violates Article 21 of the constitution of India. Therefore, the conviction and sentence imposed on him should be set aside.

11. The learned Additional Public Prosecutor would submit that despite sufficient opportunity offered and despite the fact that the accused has engaged a counsel, he did not choose to cross examine any of the witnesses. The learned Additional Public Prosecutor would further point out that the petition filed by the accused to recall the prosecution witnesses was also allowed and even thereafter, the accused did not choose to cross examine them. Thus, according to the learned Additional Public Prosecutor, the trial held against the accused was fair.

12. We have considered the above submissions.

13. Article 21 of the Constitution of India mandates that life and liberty of an individual cannot be deprived of without following the procedure established by law. The Hon'ble Supreme Court has interpreted the expression "fair procedure" to include fair trial and also speedy trial. The Hon'ble Supreme Court has also held that fair trial does not mean that the Trial should be fair only to the accused. The Court should be fair to the victims of crimes as well as to the society. Thus, fairness is not one sided concept to protect the interest of the accused alone.

14. The learned counsel for the appellant has relied on the judgment of the Hon'ble Supreme Court in the case of Mohd.Hussain alias Julfikar Ali v. State (Government of NCT of Delhi) reported in (2012) 9 SCC 408 wherein, in Paragraphs 42 and 43, the Hon'ble Supreme Court has held as follows:-

"42. Insofar as the present case is concerned, it has been concurrently held by the two Judges who heard the criminal appeal that the appellant was denied due process of law and the trial held against him was contrary to the procedure prescribed under the provisions of the Code since he was denied right of representation by counsel in the trial. The judges differed on the course to be followed after holding that the trial against the appellant was flawed.

43. We have to consider now, whether the matter requires to be remanded for a de novo trial in the facts and circumstances of the present case. The incident is of 1997. It occurred in a public transport bus when that bus was carrying passengers and stopped at a bus-stand. The moment the bus stopped an explosion took place inside the bus that ultimately

resulted in death of four persons and injury to twenty-four persons. The nature of the incident and the circumstances in which it occurred speak volume about the very grave nature of offence. As a matter of fact, the appellant has been charged for the offences under Sections 302/307 IPC and Section 3 and, in the alternative, Section 4(b) of the ES Act. It is true that the appellant has been in jail since 9.3.1998 and it is more than 14 years since he was arrested and he has passed through mental agony of death sentence and the retrial at this distance of time shall prolong the culmination of the criminal case but the question is whether these factors are sufficient for the appellant's acquittal and dismissal of indictment. We think not."

Relying on the same, the learned counsel for the appellant would submit that in the instant case, there was no fair trial offered to the accused.

15. A perusal of the records would go to show that P.Ws.1 to 3 were examined by the prosecution on 02.11.2011. These witnesses were examined not only in the presence of the accused, who was produced from custody, but also in the presence of the counsel engaged by him. The learned counsel informed the Court that he was not prepared to do cross examination on the same day. The same was recorded by the Trial Court. Thereafter, the accused filed a petition under Section 311 Cr.P.C., requesting the Court to recall the said witnesses. The Trial Court considering the plea of the accused and considering the legal position that the accused is entitled for fair trial allowed the said petition and recalled the said witnesses. In pursuance of the same, the witnesses again appeared in Court. But the accused did not choose to cross examine them. Therefore, the Trial Court proceeded further. Thereafter, the accused absconded without attending the court proceedings. The Trial Court had to issue Non-bailable warrant to secure his presence. After that the accused surrendered before the court and got the Non-bailable warrant recalled. Even thereafter, he did not choose to make any plea to recall the witnesses. The case was listed for hearing the arguments on 19.06.2012, 27.06.2012 and 02.07.2012. On those dates, though the accused made appearance, his counsel did not appear. The Trial Court proceeded to hear the learned Public Prosecutor. On considering the said arguments and after going through the evidence, the Trial Court convicted the accused.

16. The narration of these events would go to show that it is not as though, the accused was not given fair trial. As we have already pointed out, for the reasons best known, the accused had instructed his counsel not to cross examine the witnesses on the date when the prosecution witnesses were examined. Having chosen to file a petition later on, to recall the witnesses, the accused did not come forward to cross examine them, though they were recalled and

they made appearance. In this regard, it needs to be mentioned that P.Ws.1 to 3 are the victims of heinous crime of rape at the age of around 10 and they cannot be allowed to be harassed repeatedly by making them to appear before the Court and to explain themselves. The trauma caused by the act of the accused would be everlasting and the depression out of the said trauma will have an impact on the children. Having made a thorough analysis of the ill effects in the mental faculty of the children, who are sexually exploited, now the parliament has made it mandatory in the Protection of Children from Sexual Offences Act, that the children should not be taken to the Court room atmosphere and exposed, and they should not be made to see the perpetrator of the heinous crime of rape, because it will again cause serious damage to their mental stability adding to their agonies.

17. In the light of the said truth, in our considered view, in the instant case, the Trial Court was right in proceeding further and delivering the judgment, without unnecessarily waiting for the accused to make an application again to recall the child witnesses. It is also seen from the records that until the judgment was delivered, the accused did not make any plea for recalling the witnesses. For the first time, during the course of argument, an oral appeal was made by the learned counsel to remand the matter back to the Trial Court and to afford an opportunity to the accused. In our considered view, it will not be fair on the part of this Court to allow these child victims to appear before the Court again and again, as it will have serious impact on their mental faculty. In other words, compelling P.Ws.1 to 3 to come to Court again would be violative of their fundamental rights guaranteed under Article 21 of the Constitution.

18. In this regard, we may refer to the judgment of the Hon'ble Supreme Court in Bablukumar and others v. State of Bihar and another reported in 2015 8 SCC 787 on the concept of fair trial. In Para 18, the Supreme Court held as follows:-

"18. Keeping in view the concept of fair trial, the obligation of the prosecution, the interest of the community and the duty of the Court, it can irrefragably be stated that the Court cannot be a silent spectator or a mute observer when it presides over a trial. It is the duty of the court to see that neither the prosecution nor the accused play truancy with the criminal trial or corrode the sanctity of the proceeding. They cannot expropriate or hijack the community interest by conducting themselves in such a manner as a consequence of which the trial becomes a farcical one. Law does not countenance a 'mock trial'. It is a serious concern of the society. Every member of the collective has an inherent interest in such a trial. No one can be allowed to create a dent in the same. The court is duty bound to see that neither the prosecution nor the defence takes unnecessary

adjournments and take the trial under their control..."

19. Thus, fair trial is not a concept guaranteed only to the accused. Trial should be fair to the victims and the society as well. Recalling the child witness to the Court at the whims and fancies of the accused may amount to unfair treatment violative of Article 21 of the Constitution. We cannot allow the accused to hijack the trial. We hold, in this case, the accused was afforded fair trial and thus, there is no need to remand the matter to the Trial Court for further trial. Therefore, we are not inclined to interfere with the conviction and sentence imposed on the accused. From the testimonies of P.Ws.1 to 3 coupled with the medical evidence, we are fully convinced that the prosecution has proved all the charges against the accused any beyond reasonable doubt. Thus, the Trial Court was right in convicting the accused.

20. Now turning to the quantum of punishment, the Trial Court has taken into account the heinous nature of crime committed by the accused. There are no mitigating circumstances warranting the reduction of sentence. In our considered view, the Trial Court was right in imposing the sentences of various terms for the offences. Thus, we do not find any merit at all in this appeal.

21. In the result, the criminal appeal fails and accordingly, the same stands dismissed and the conviction and sentence imposed by the trial Court is confirmed.

Sd/-
Asst.Registrar (CS IV)

/true copy/

Sub Asst. Registrar

To

1.The XV Metropolitan Magistrate,
George Town, Chennai.

2.-do- thro'The Chief Metropolitan Magistrate,
Egmore, Chennai.

3.The Mahilar Sessions Court,
Chennai.

4.The Principal Sessions Judge, Chennai.

5.The Inspector of Police
W-15 All Women's Police Station
Royapuram, Chennai.

6.The Superintendent, Central Prison, Puzhal, Chennai.

7.The District Collector, Chennai.

8.The director General of police, Mylapore, Chennai.

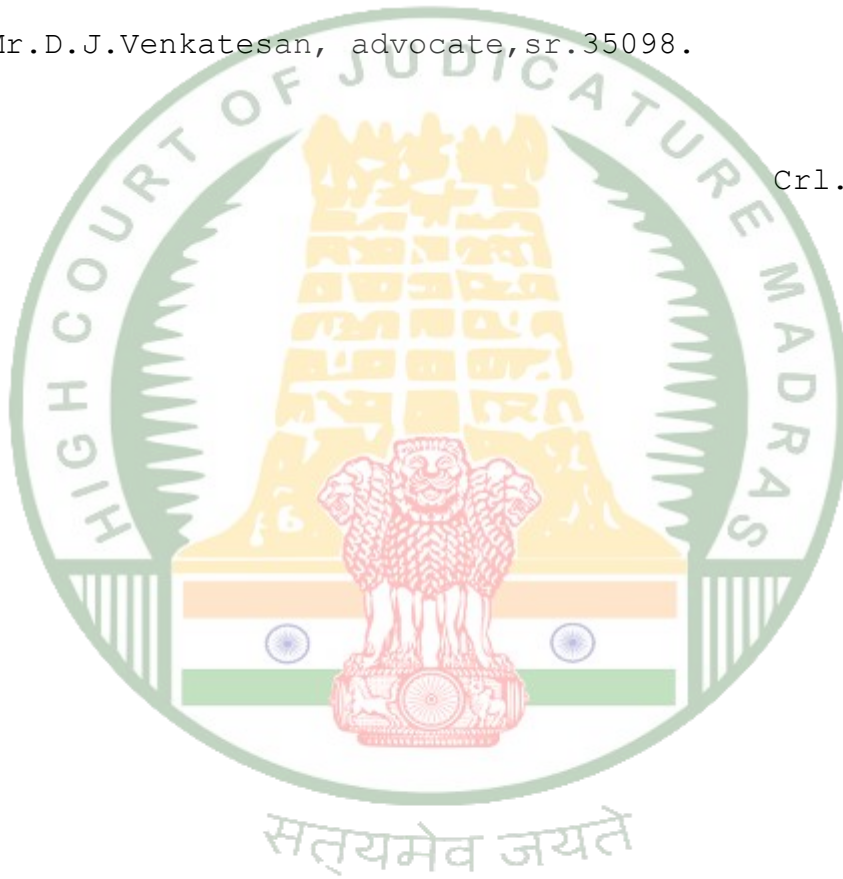
9.The Public Prosecutor
High Court, Chennai.

10.The Section Officer,
Criminal Section, High Court, Madras.

+1 cc to Mr.D.J.Venkatesan, advocate,sr.35098.

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krd 1/8

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