



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 14.09.2017

CORAM:

THE HONOURABLE MR.JUSTICE V.BHARATHIDASAN

WEB COPY

Crl.A(MD)No.233 of 2016

and

Crl M.P (MD)No.9740 of 2016

Thangapandy

... Appellant/Sole Accused

vs.

State through the
Inspector of Police
A.W.P.S.Thirumgalam
Crime No.3 of 2006

... Respondent/Complainant

Criminal Appeal filed under Section 374(ii) Cr.P.C., to call for the records in S.C.No.388 of 2006 on the file of the Additional District and Sessions Court (Mahila Court), Madurai and set aside the judgment dated 17.06.2016 passed in S.C.No.388 of 2006.

For Appellant

: Mr.R.Shanmugasundaram
Senior Counsel
for Mr.S.Ravi

For Respondent

: Mr.C.Mayilvahana Rajendran
Additional Public Prosecutor.

JUDGMENT

The appellant is the sole accused in S.C.No.388 of 2006 on the file of the Additional District and Sessions Court (Mahila Court), Madurai. He stood charged for the offence under Sections 376(1) and 506(ii) IPC. The trial Court convicted the appellant/accused for the offence under Section 376(i) IPC and sentenced him to undergo ten years rigorous imprisonment and to pay a fine of Rs.10,000/-, in default to undergo six months simple imprisonment and he has also been convicted for the offence under Section 506(ii) IPC and sentenced to undergo two years rigorous imprisonment and pay a fine of Rs.500/- in default to undergo six months simple imprisonment. Now, challenging the above said conviction and sentence, the appellant is before this Court with



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

(i)PW2 is the victim girl in this case and she was studying 7th standard at the time of occurrence. PWs.1 and 3 are her parents. The accused is closely related to PW2. The sister of the accused married the brother of PW2. On the date of occurrence, while the victim girl went to their agricultural field to get leaves for the goats, the accused forcibly took her to a nearby motor pump-set room and forcibly had sexual intercourse with her. Thereafter, he threatened the victim not to disclose the same to anybody, otherwise he will wipe out her entire family. Hence, she did not disclose the same. Thereafter, after three months from the date of occurrence, the victim girl fell ill and hence she was taken to Government Hospital, Thirumangalam on 27.03.2006, where a pregnancy test was conducted and the result has come as positive. Thereafter, PW2, told her mother PW3, that the accused has raped her and threatened her not to disclose the same to anybody, hence, she did not disclose the same to her. Thereafter, a mediation was conducted by the village elders but the accused refused to marry the victim. Hence, on 31.03.2006, PW.1 has given the complaint (Ex.P1) to the respondent police.

(ii)Based on the complaint, PW22, The Inspector of Police registered a case in Crime No.3 of 2006 for the offence under Sections 376(1) and 506(ii) IPC. Then she arrested the accused on the very same day and remanded him to judicial custody, and commenced investigation, proceeded to the place of occurrence, prepared observation mahazar (Ex.P7) and rough sketch (Ex.P6) and on 31.03.2006 she sent the victim girl for medical examination and also obtained a report (Ex.P5). Since the victim girl claims to be a minor, he has taken steps to conduct radiology test, and she has also obtained certificate from the school authorities to prove her age. After recording statement of doctors and other witnesses, she filed final report on 29.05.2006. Thereafter, on 08.11.2006, the victim girl has given birth to a female child at Thirumangalam Government Hospital. Subsequently, based on the order passed by the trial Court, she has taken steps to conduct DNA test for the victim girl, new born baby and accused.

(iii)Earlier, a DNA test was conducted at Government Forensic Lab, Chennai, and a opinion has been given that the accused is excluded from the paternity of the female child Jayakodi, and the female child is not born to the accused. Not being satisfied with the report, and DNA test conducted at Forensic Lab, Chennai, PW1, father of the victim has filed another application before this Court to conduct another DNA test at Central Forensic Science Laboratory, Hyderabad and as per the order passed by this Court, second DNA test was conducted in the Forensic Lab, Chennai. The second test also proved negative that the accused is not the biological father of the baby Jeyakodi but PW2 is the biological mother.



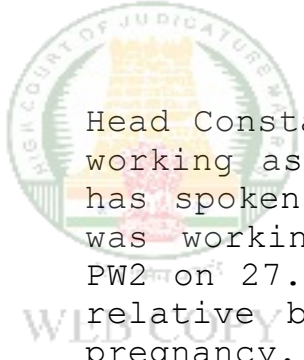
3. Based on the above materials, the trial Court framed charges for the offence under Sections 376(1) and 506(ii) IPC. The accused denied the same. On the side of the prosecution, in order to prove its case, as many as 23 witnesses were examined and 8 documents were exhibited and the DNA report issued by the Forensic Lab, Chennai has been marked as Ex.C1 and the DNA report issued by the Central Forensic Science Lab, Hyderabad has been marked as Ex.C2.

4. Out of the witnesses examined, P.W.1 is the father of the victim girl. According to him, the accused has forcibly raped her daughter, subsequently, she got pregnant. Thereafter, he arranged for a mediation and asked the accused to marry her daughter, but he refused and offered two lakhs as compensation, he did not accept the same and has given the complaint.

5. PW2 is the victim in this case. According to her, on the date of occurrence, after returned from school, at about 06.00 pm, she went to their garden to pluck some leaves to feed the goats. At that time, the accused took her into a pump-set room and raped her forcibly against her will. Thereafter, he threatened her not to disclose the same to anybody, and hence she kept quiet. After some time, she has fallen ill and she was taken to Government Hospital, Thirumangalam by her mother, where some tests were conducted, and the doctor told her that the victim girl was pregnant by 90 days. Then only she disclosed the occurrence to her mother. Thereafter, a mediation was conducted and the accused refused to marry her. Then, PW1 has given the complaint.

6. PW3 is the mother of PW2. She has also stated that after PW2 fell ill, she took her to hospital, where she was told by the doctor that PW2 was pregnant. Then the victim girl told her that only the accused has committed rape. Then they have arranged for mediation which was failed and therefore, they have given the complaint.

7. PW4 belongs to PW1's village. He has known PWs.1 to 3. He went along with PWs.1 to 3 to police station and preferred complaint. PW5 turned hostile. PW6, who took photograph at the scene of occurrence. PW7, the doctor who was working in the primary Health Centre, Sathangudi, first examined PW2. She has given some medicine and asked PW3 to take her to Government Hospital, Thirumangalam. PW8 is the Principal of an Engineering College, where the accused was studying. PW9, the doctor, who examined the accused has given certificate, Ex.P5, stating that he is not an impotent. PW10, the Head Constable in the respondent police station, took PW2 to the radiologist. PW11, Lab Technician, has conducted pregnancy test on PW2 and given report Ex.P4. PW12, Headmaster of the school, where PW2 was studying and he issued a certificate stating the date of birth of PW2 is 25.07.1992. PW13,



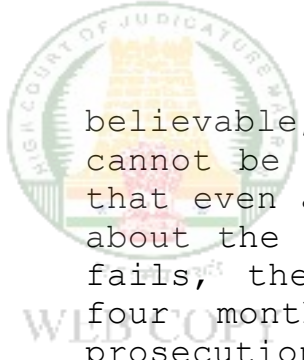
Head Constable, took the accused for medical examination. PW14 was working as a nurse in the Primary Health Centre, Sathangudi. She has spoken about the test conducted by PW7. PW15, the doctor, who was working in the Government Hospital, Thirumangalam, examined PW2 on 27.03.2006. At that time, the victim told her that a known relative boy has raped her. She examined PW2 and confirmed her pregnancy. PW16, a nurse working in the Government Hospital, Thirumangalam, was also present at the time of examination of PW2. At that time, PW2 told that a known relative boy has raped her. PWs.17 and 18 turned hostile. PW19 is one of the mediators, who conducted mediation between the accused family and PW1's family. According to him, in the mediation, the accused denied his involvement in the offence. They advised PW1 to get compensation but he refused to accept it. PW20 turned hostile. PW21, the Doctor, has examined PW2 on 04.04.2006 and given report that PW2 was pregnant by 12 weeks. Ex.P5 is the report. PW22, the Inspector of Police, registered the complaint, arrested the accused, conducted investigation and after completing investigation, filed final report. PW23, the Judicial Magistrate, Melur, recorded the statement of the victim under Section 164(3) Cr.P.C.

8. When the above incriminating materials were put to the accused under Section 313 Cr.P.C., he denied the same. He did not examine any witness and did not mark any document. The two DNA test reports were marked as Exs.C1 and C2.

9. The trial Court after considering all the materials available on record, convicted the appellant/accused and sentenced him to undergo imprisonment as mentioned in paragraph No.1 of this judgment. Challenging the said conviction and sentence, the appellant is before this Court with this Appeal.

10. Heard Mr.R.Shanmugasundaram, learned Senior Counsel appearing for the appellant and Mr.C.Mayilvahanarajendran, Additional Public prosecutor appearing for the respondent.

11. The learned Senior Counsel appearing for the appellant would contend that the prosecution has miserably failed to prove that the accused has committed the offence. The DNA test conducted by the two Forensic Laboratories have clearly held that the appellant is not the biological father of the baby born to PW2 and the DNA test is the conclusive proof for parentage and it proved negative against the accused. The Court below without considering the above aspect, has mechanically convicted the appellant/accused. It is the definite case of the prosecution that there was only one occurrence, in which the accused has committed rape and due to the same she has got pregnant and then she gave birth to a female child. But, now the DNA test, totally disproved the case of the prosecution. In the above circumstances, the appellant cannot be found guilty for the offence under Section 376 IPC. Apart from that, the evidence of the victim girl is not trustworthy and



believable, based on her interested testimony, the appellant cannot be convicted. The learned Senior Counsel further contended that even as per the evidence of PWs.1 and 3, after coming to know about the occurrence, they convened a mediation and the mediation fails, thereafter, they have given the complaint, nearly after four months from the date of the alleged occurrence. The prosecution has failed to explain the long delay in filing the complaint. At the first instance, the victim girl was examined by PW15, the doctor who was working in the Government Hospital, Thirumangalam, before whom, she has not stated anything about the appellant but she has stated that one known relative boy raped her, which was confirmed by another staff nurse (PW16), who was also working in the same hospital. In the above circumstances, absolutely there is no evidence available on record against the appellant/accused that he has committed the offence. So far as the age of the victim girl is concerned, the prosecution has only relied upon the certificate issued by the Headmaster of the school, where PW2 was studying. It is not an admissible evidence and it is not a school record and the same cannot be relied upon to ascertain the age of the victim girl. Further it is contended that even though radiology test was conducted on the victim girl, report was not produced by the prosecution and the doctor who conducted radiology test also not been examined. Hence, the prosecution has deliberately failed to prove the age of the victim girl and come out with a case that she was a minor.

12. Per contra, the learned Additional Public Prosecutor appearing for the respondent police would contend that, the victim girl has clearly stated in her evidence that only this accused has forcibly taken her to a motor pump-set room and raped her against her will and he has also criminally intimidated her that if she discloses the same to anybody, he will wipe out her entire family. Only out of fear, PW2 did not disclose the occurrence to anybody and only after getting pregnant, she disclosed the same to her parents, thereafter, the complaint has been given. The evidence of PW2 is reliable and trustworthy and that alone is sufficient to convict the accused. Apart from that, the Headmaster of the school has also given a certificate to show that at the time of occurrence, PW2 was a minor. When the school certificate has been produced, non filing of the radiologist report would not affect the case of the prosecution and there is no necessity to examine the radiologist to establish the age of the victim girl. The learned Additional Public Prosecutor further submitted that PWs.1 and 3, the parents of the victim girl also corroborated the evidence of PW2. The trial Court, after considering all those materials, has rightly convicted the appellant/accused and there are no infirmities in the judgment of the Court below.

<https://hcservices.ecourts.gov.in/hcservices> considered the rival submissions made on either side and perused the records carefully.



14. PW2 is the victim girl in this case. According to her, there was only one incident. On the date of occurrence, the appellant/accused forcibly took her to a motor pump-set room and forcibly raped her against her will and also criminally intimidated her not to disclose the same to anybody. Thereafter, she fell ill. PW3, the mother of the victim girl, took her to the Government Hospital, Thirumangalam. PW15, the doctor, examined her and found that she was pregnant. When she enquired about the cause of pregnancy, the victim girl refused to disclose anything. However, P.W.2 told PW16, a staff nurse, working in the same hospital that a known relative boy has had sexual intercourse with her. At that time, she did not disclose the name of the accused. According to PW3, when she questioned PW2, she disclosed the name of the accused, in turn, PW3 informed the same to PW1. Then a mediation was arranged which ended in failure. Then, they have given the complaint. But the pregnancy was not terminated. Thereafter, PW2 gave birth to a female child. After birth of female child, the prosecution filed a petition before the trial Court, seeking to conduct a DNA test, and as per the orders of the trial Court, DNA test was conducted to the new born baby and accused in the Government Forensic Science Lab, Chennai. In the report, it is stated that the accused is not the father of the female child. Not being satisfied with the report, PW1, father of PW2 filed another petition before this Court seeking to conduct another DNA test in the Central Forensic Science Lab, Hyderabad, and pursuant to the orders passed by this Court, DNA test has been conducted at the above lab, and it is also concluded that the accused is not the biological father of the baby. But, PW2 is the biological mother of the baby. Both reports have been marked as Exs.C1 and C2.

15. According to the learned Senior Counsel, result of DNA test is a conclusive proof and as per the evidence of PW2, it is a solitary incident, in which, she got pregnant. In the said circumstances, once DNA test was proved negative against the appellant, absolutely there is no reason to convict the appellant. The learned Senior Counsel has relied upon several judgments to show that DNA test is a conclusive proof.

16. Now, the question is, whether in view of the DNA test, which proved negative, the appellant is entitled for acquittal. Recently, the Hon'ble Supreme Court in **Sunil Vs. State of Madhya Pradesh [(2017) 4 Supreme Court Cases 393]** at paragraph -4, has held as follows:

"From the other provisions of Section 53-A of the Code and the decision of this Court in Krishan Kumar it does not follow that failure to conduct the DNA test of the sample taken from the accused or prove the report of DNA profiling as in the present case would necessarily



result in the failure of the prosecution case. As held in *Krishan Kumar* (para 44), Section 53-A really "facilitates the prosecution to prove its case". A positive result of the DNA test would constitute clinching evidence against the accused if, however, the result of the test is in the negative i.e favouring the accused or if DNA profiling had not been done in a given case, the weight of the other materials and evidence on record will still have to be considered."

In the said circumstances, merely because DNA test is proved negative against the appellant/accused, he is not automatically entitled for acquittal and the Court should consider the other materials available on record.

17. In the instant case, PW2 is the victim girl and PWs.1 and 3 are her parents. They have spoken about the occurrence but they are only hearsay witnesses. PW2, the victim girl is the only solitary witness. It is a settled principle of law that in a cases like this, conviction can be imposed based on the solitary evidence of the victim, provided the evidence of victim is trustworthy and inspire confidence of the Court. In the instant case, it is the evidence of PW2 that, it was a solitary incident, in which the accused committed rape and thereafter, she got pregnant and gave birth to a female child. Hence, according to PW2, the accused is the father of the child. But, DNA profile did not support her case and the two Laboratories have concurrently given opinion that the appellant/accused is not the biological father of the child. Hence, the act of sexual intercourse by the appellant/accused with PW2 is not the cause for pregnancy of the victim. Under the said circumstances, the Court can presume that PW2 might have had sexual intercourse with some other person and got pregnant and subsequently gave birth to the child. But it is the evidence of PW2 that it was only solitary incident, in which, the appellant/accused has had sexual intercourse forcibly and out of which, she got pregnant and then she gave birth to the child, which creates doubt on PW2 and it also difficult to believe her evidence. In the said circumstances, it is highly unsafe to rely upon the evidence of PW2 to convict the appellant/accused for the offence of rape. Apart from that, PW2 and accused are closely related to each other and it is the case of PW2 that the accused has threatened and intimidated her not to disclose the occurrence to her family members and hence she kept quiet. But, it is also difficult to believe that when the parties are closely related, there is no reason for PW2 to keep quiet till her pregnancy was deducted. Apart from that, at the first instance, where she was examined by the doctor, PW15 she did not disclose the name of the accused and she stated that only a known relative boy has had intercourse with her. Thereafter only, she has come out with a new story that only this accused has had sexual intercourse against her will. All these circumstances, clearly create a doubt in the



evidence of PW2.

18. So far as the evidence of PWs.1 and 3 is concerned, after occurrence, they tried for mediation, but the appellant/accused refused to marry PW2 and denied his involvement in the occurrence and after consulting with others, they have given complaint before the police. The conduct of PWs.1 and 3 would also create a doubt regarding the involvement of the accused. Considering all those circumstances, I am of the considered view that the prosecution has failed to prove the charges against the appellant/accused beyond reasonable doubt and hence, he is entitled for acquittal. The Court below without considering the entire materials available on record in proper perspective has wrongly convicted the appellant/accused. Hence, the judgment of the Court below is liable to be set aside.

19. In the result, this Criminal Appeal is allowed. The conviction and sentence passed in S.C.No.388 of 2006 on the file of the Additional District and Sessions Court (Mahila Court), Madurai are set aside. The appellant/accused is acquitted. Consequently, CrI.MP(MD)No.9740 of 2016 is closed.

Sd/-
Assistant Registrar (RTI)

/True copy/

Sub Assistant Registrar

To

1. The Additional District and Sessions Court
(Mahila Court), Madurai.
2. -Do- Through the Principal District Judge,
Madurai.
3. The Judicial Magistrate,
Thirumangalam.
4. -Do- Through the Chief Judicial Magistrate,
Madurai.
5. The District Collector,
madurai.
6. The Director General of police,
mylapore, Chennai.



8. The Inspector of Police
All Women Police Station, Thirumgalam.

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

+ 1 CC TO MR.S.Ravi, ADVOCATE IN SR No.78930

mj

MK/MR KKR/SAR-1/13.10.2017/9P/11C

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