



BEFORE THE MADURAI BENCH OF THE MADRAS HIGH COURT

Reserved on : 14.11.2017

Pronounced on : 21-12-2017

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CORAM:

THE HONOURABLE MR. JUSTICE R. SUBBIAH**and****THE HONOURABLE MR. JUSTICE A.D. JAGADISH CHANDIRA**

Criminal Appeal (MD) No. 436 of 2016

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Selvam

.. Appellant/Sole Accused

Versus

State represented by
The Inspector of Police
T. Kallupatti Police Station
Madurai District
(Crime No.192/2013)

.. Respondent/Complainant

Appeal filed under Section 374 (2) of Code of Criminal Procedure against the Judgment dated 25.02.2016 passed in Special S.C. No. 11 of 2014 on the file of Sessions Judge, Mahila Court, Mahalir Neethimandram, Madurai

For Appellant : Mr. S. Mahendrapathy

For Respondent : Mr. C. Ramesh
Additional Public ProsecutorJUDGMENTR. SUBBIAH, J

The appellant was the sole accused in Special S.C. No. 11 of 2014 on the file of Sessions Judge, Mahila Court, Mahalir Neethimandram, Madurai, in which, after trial, he was convicted and sentenced to undergo imprisonment for various terms, which are tabulated hereunder:-

Provision of law	Period of sentence	Fine
Section 364 of IPC	To undergo rigorous imprisonment for a period of ten years	Rs.1,000/- failing which to undergo simple imprisonment for a period of one year



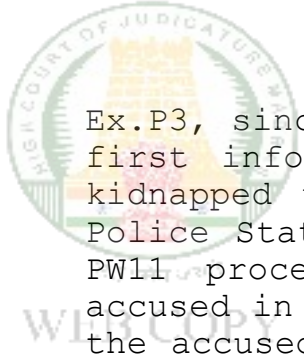
Section 377 of IPC	To undergo rigorous imprisonment for a period of ten years	Rs.1,000/- failing which to undergo simple imprisonment for a period of one year
Section 302 of IPC	To undergo imprisonment for life	Rs.5,000/- failing which to undergo simple imprisonment for a period of one year
Section 201 of IPC	To undergo rigorous imprisonment for a period of three years	Rs.1,000/- failing which to undergo simple imprisonment for a period of one year
Section 4 of The Protection of Children from Sexual Offences Act, 2012	To undergo imprisonment for life	Rs.5,000/- failing which to undergo simple imprisonment for a period of one year.

2. The sentences imposed on the accused by the trial court, were, however, ordered to be run concurrently.

3. The case of the prosecution, as could be unfolded from Ex.P1, complaint dated 22.07.2013 is that the deceased in this case is Minor Muthukrishnan, aged 4 years. The deceased is the son of PW1. PW2 is the wife of PW1 and mother of the deceased. According to PW1, he is working as a mason and residing along with his wife, PW2, the deceased/son and another daughter Nandhini, who was aged 2 ½ years by then. On 22.07.2013, at about 07.00 p.m. when PW1 returned home after his avocation, he could not find his son and therefore he asked his wife/PW2 as to where he is. PW2 replied that she gave tea to the deceased at 5.30 pm and after drinking tea, he went outside to play and he might be playing some where near the house. However, when PW1 searched for the deceased, he could not be located anywhere. PW1 continued his frantic search for the minor son only to be informed that he was not seen by any one. PW2 also started to search for the deceased. At that time, PW2 happened to meet PW3 and 4 and asked them as to whether they have seen the minor boy. PW3 and 4 replied that they have seen the deceased in the company of the accused/appellant near the channel. PW1 and 2 therefore went to the house of the accused but he was not there. In spite of extensive search, PW1 and 2 could not locate the whereabouts of the minor son. PW1 has therefore given a complaint to Kallupatti Police Station at about 23.00 hours on 22.07.2013. In the complaint, PW1 has indicated that his son was wearing blue colour t-shirt and blue colour half trouser on that day.

<https://hcservices.ecourts.gov.in/hcservices/>

4. On receipt of the complaint from PW1, PW7 - Sub Inspector of Police registered a case in Crime No. 192 of 2013 under the caption "Boy missing". Ex.P3 is the First Information Report and it was forwarded to the higher authorities by PW7. On receipt of



Ex.P3, since the name of the accused is prominently indicated in the first information report as the person who is suspected to have kidnapped the deceased, PW 11, Inspector of Police, T. Kallupatti Police Station proceeded to search for the accused. On a tip-off, PW11 proceeded to Subbulapuram Bus Stop where he arrested the accused in the presence of Selvam/PW3 and Pandi/PW4. On his arrest, the accused gave a voluntary confession and it was recorded by PW11 in the presence of witnesses. On the basis of such confession, PW11 altered the case in Crime No. 192 of 2013 from the caption 'Boy missing' into one under Section 364, 302, 377 of Indian Penal Code read with Section 6 of the Protection of Children from Sexual Offences Act, 2012 (in short POSCO). Ex.P14 is the altered report. On the basis of the confession given by the accused, PW11 accompanied the accused to Vannivalampatti Periya Odai (Channel) where PW11 found the dead body of the deceased amidst a heap of mud. The dead body was recovered by PW11 in the presence of Prabhu and Kannan/PW5. On the same day, at the occurrence spot, PW11 drew an Observation Mahazar, Ex.P2 and rough sketch, Ex.P8. Thereafter, PW11 recovered the half pant and t-shirt worn by the deceased and sent it to the Court under Form 95. PW11 also sent the accused/appellant for remand. PW11 had thereafter arranged to send the body of the deceased for Postmortem to the hospital through Murugan, Head Constable, PW6. Accordingly, PW6 had taken the body of the deceased to Thirumangalam Government Hospital where PW11 conducted an inquest in the presence of witnesses between 08.00 and 10.00 am. Thereafter, PW11 gave a requisition letter for postmortem through Women Head Constable, Grade I, PW8. PW9, Doctor attached to Thirumangalam Government Hospital conducted postmortem. Ex.P4 is the postmortem certificate in which it was stated as follows:-

"The body was first seen by the undersigned at 1.10 pm on 23.07.2013, condition then was Rigor mortis present on body parts. Postmortem commenced on 01.10 pm on 23.07.2013.

Appearance found at the postmortem:-

Eyes partially opened. Mouth partially opened. Both lower limbs partially flexed at Knee/UL extended.

Opinion as to cause of death:

- (a) Reserved pending report of _____
- (b) The deceased would appear to have died of Asphyxia due to strangulation. Time of death - 16 to 24 hours prior to autopsy.

External Examinations:-

* Multiple irregular criss cross linear abrasions over left and right carotid region of neck (around 2 x 0.5 cm each)/Dark brown in colour. Cut section showing patchy haemorrhages.

* Multiple abrasions over lower lip and left cheek region (around 0.5 x 0.5 cm each/dark brown in colour.

* Linear abrasion (5 x 0.5 cm over left glutea region present/Dark brown in colour

* External anal sphincter patulous and admits 2



fingers / No other obvious external anal injury marks
(surgeon consulted)

Internal Examinations :-

Heart : - Skull - No injury

Brain - No injury

Neck - Thyroid cartilage (N.C.) cartilage and Hyoid
bone fractural Trachea - No injury

Thorax - Heart - congested

Lung - congested

Pleura, Pericardium - N, Ribs, intact

Abdomen - Stomach contains 100 ml of partially
digested food. Intestine congested. Kidney, liver,
spleen - intact. Genitals - N/U B Normal. Mucosal
injury present over rectal internal sphincter (N.C.) on
incision of Rectum

1. Oral swab

2. Rectal Swab

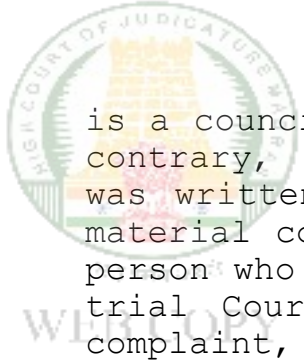
3. Rectal Smear

4. Oral Smear - Sent for analysis of sperm

5. In the course of his investigation, PW11 recorded the statements of Kannan (PW5), Lakshmi (PW2), Selvam (PW3), Pandi (PW4), Castro, and another Pandi and Prabhu. During the course of his investigation, PW11 also sent a letter of requisition dated 26.07.2013 to the Court requesting to send the accused for medical examination. On 07.08.2013, PW11 had examined the Postmortem Doctor and recorded his statement. PW11 also sent a letter of request dated 22.10.2013 addressed to the Court seeking to extend the time for completion of the investigation. Thereafter, on 17.05.2014, PW11 completed his investigation and filed the charge sheet against the accused for the offences stated supra.

6. During the course of trial, in order to prove the complicity of the charges against the accused, prosecution has examined PW1 to PW11 as witnesses on their side, filed Exs. P1 to 14 and exhibited Material Objects MO1 and MO2. However, on the side of defence, neither a witness was examined nor any document was marked. When the trial court questioned the accused under Section 313 of Code of Civil Procedure as regards the incriminating materials made available against him by the prosecution, he pleaded not guilty. The trial Court, upon conclusion of trial in the case, found the accused guilty of the charges and therefore, convicted and sentenced him for various terms of sentence, as described above.

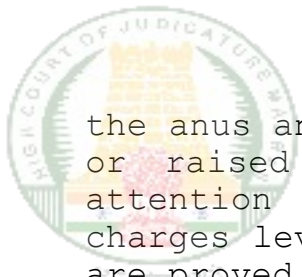
7. The learned counsel for the appellant would contend that the prosecution failed to prove the guilt of the accused beyond all possible and reasonable doubts and therefore, the appellant is entitled to be acquitted. According to the learned counsel for the appellant, the prosecution rests on the circumstantial evidence and failed to prove the chain of circumstances leading to the guilt of the accused. The learned counsel for the accused/appellant invited the attention of this Court to the deposition of PW1 and contended that PW1, in his chief examination, has stated that he gave the complaint at 9.00 p.m. and such complaint was written by Castro, who



is a councilor of the Village before the respondent police. On the contrary, in the cross-examination, he deposed that the complaint was written by PW7, Sub Inspector of Police and therefore, such a material contradiction in the deposition of PW1, with regard to the person who had written the complaint has not been considered by the trial Court. He would further contend that even though in the complaint, Ex.P1 the name of the accused was indicated as the suspected person, the complaint was registered only under the caption 'Boy missing'. However, no explanation is forthcoming from the prosecution with regard to the registration of the case under the caption 'boy missing' when PW1 claimed that the accused had kidnapped the deceased. Further, even though PW3 and 4 have stated that they have last seen the deceased in the company of the accused, PW3 in the cross-examination has deposed that the respondent/investigation officer intimated to him that the accused was arrested at 2.15 am and through whom he came to know about the occurrence. Further, the Postmortem Doctor has categorically stated that there is no external injury in the anus and no semen was taken for examination from the accused appellant. This would indicate that the manner in which the prosecution proceeded to implicate the appellant as if he committed unnatural sex is without any proof and basis. Further, even though PW4 also claimed to have seen the deceased in the company of the appellant on that day, PW4 turned hostile. Therefore, it is contended that the prosecution failed to prove the last seen theory and he prayed for setting aside the judgment of the court below.

8. Per contra, the learned Additional Public Prosecutor appearing for the State would contend that the prosecution did not implicate the accused based on mere circumstantial evidence but on the basis of clear and cogent evidence adduced by PW3, who has seen the deceased in the company of the accused on the fateful day. PW3 in categorical terms has deposed that he had seen the deceased in the company of the accused at about 5.30 pm. In fact, PW3 questioned the accused as to where he is taking the deceased for which the accused replied that he is taking him to pluck and give him *jamun* fruit as desired by the deceased. Thereafter, PW3 went to his house. At about 7.00 p.m. PW2 happened to meet PW3 and asked him as to whether he saw her son for which PW3 has stated that he saw him in the company of the deceased at about 5.30 p.m. According to the learned Additional Public Prosecutor, PW3 is residing in the same Village and both PW1, PW2 and the accused were known to him. In the cross-examination of PW3, nothing could be elicited to lend support to the defence case. Further, the medical evidence support the ocular evidence and therefore, the learned Additional Public Prosecutor would contend that the prosecution has proved the case against the accused beyond reasonable doubt. The learned Additional Public Prosecutor therefore prayed for dismissal of the appeal and to confirm the judgment of conviction passed by the trial court.

9. We have considered the rival submissions and perused the materials placed on record. The charges against the accused/appellant are that he had taken custody of the minor boy on the fateful day with an intent to commit unnatural sex and accordingly he committed acts of aggravated penetrative offence in



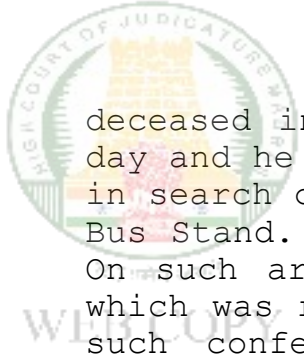
the anus and mouth of the minor boy and when the minor boy protested or raised an alarm, fearing that such alarm would invite the attention of others, he strangulated him to death. Whether such charges levelled by the prosecution as against the accused/appellant are proved beyond reasonable doubt or not has to be examined.

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10. The prosecution has strongly cemented their case against the accused on the basis of the 'last seen theory'. PW3 and PW4 have been projected by the prosecution to say that they saw the deceased in the company of the accused at about 5.30 p.m. on the fateful day. Of course, PW4 turned hostile. However, PW3 in his chief examination has stated that when he was walking towards the Village at about 5.30 pm, he saw the deceased in an inebriated condition. At that time, the minor boy (since deceased) followed the accused by saying "daddy.. daddy..". When PW3 asked the accused as to where he is taking the minor boy, he replied that the minor boy asked for jamun fruits and therefore he is going to pluck and give him some fruits. Thereafter, at about 7.00 p.m. PW2 met PW3 and asked him as to whether he had seen the minor boy. Immediately, PW3 replied that he saw the deceased in the company of the *Sakkudi* (nick name of the accused) at about 5.30 pm and asked PW2 to enquire the accused about the whereabouts of the child. Immediately, PW1, 2 and others went in search of the minor boy to the house of the accused. Thereafter, at about 02.30 am in the morning, the police called upon PW3 and enquired him as to whether he saw the deceased in the company of the accused. PW3 reiterated that he saw the deceased at about 5.30 p.m. in the company of the accused. During the course of cross-examination, PW3 withstood firm and unshaken in his deposition and affirmed that at about 5.30 p.m. he saw the deceased in the company of the accused and he also interacted with the accused as to where he is taking the minor boy for which the accused replied that he is going to pluck and give jamun fruits to him. Thus, nothing has been brought in the cross-examination to discredit the evidence of PW3. On appreciation of the evidence of PW3, both in his chief-examination as well as cross-examination, we are of the view that the prosecution has established the 'last seen theory' whereby it correctly implicated the accused for having committed the offence.

11. Furthermore, the medical evidence supports the ocular evidence in this case. The Doctor, who was examined in this case has clearly deposed that the deceased was subjected to aggravated penetrative offence that the anus of the deceased admits two fingers, otherwise, in the normal course, such an admission of two finger is remotely impossible.

12. To summarise, PW1 and 2 searched for the deceased at all places from 6 pm but they could not trace him. PW3 informed PW2 that he had seen the deceased in the company of the accused at 5.30 pm. Therefore, PW1, PW2 and other Villagers went to the house of the accused but he was not available in his house. After frantic search, PW1 gave a complaint, Ex.P1 dated 22.07.2013 at 11.00 pm. On receipt of the First Information Report, PW11, Inspector of Police, on suspicion searched for the accused. PW1 also caused enquiry with PW3 at 2.30 am as to whether he had really seen the



deceased in the company of the accused at 5.30 pm on the previous day and he affirmed his earlier version. Thereafter, PW11 proceeded in search of the accused and he had zeroed in on him at Subbulapuram Bus Stand. It was PW3 and PW4 who identified the deceased to PW11. On such arrest, the accused gave a voluntary confession statement which was recorded in the presence of PW3 and PW4. On the basis of such confession, the accused himself had taken PW11 and other witness to the place where he had discarded the dead body of the deceased beneath a heap of mud. It was the accused who pulled the leg of the dead body of the deceased from such a heap of mud. Thus, it was the accused, who had identified the body of the deceased beneath a heap of mud and it is he who had pulled the leg of the deceased, but for which the whereabouts of the deceased could not have been identified by any one. Thus, the deceased was identified by the accused beneath a heap of mud, which place was known only to the accused.

13. In this back drop, it has to be seen as to whether the inconsistencies pointed out by the learned counsel for the appellant would in any manner vitiate the case projected by the prosecution. Of course, there were some inconsistencies in the deposition of the witness with respect to the time at which Ex.P1 complaint was written and given in the police station and the time at which the accused was arrested. Given the extent at which the prosecution had marched the witnesses to prove the guilt of the accused, who have deposed against the accused clearly and cogently, we are of the view that when the prosecution has pitched in such witnesses to speak about the sequence of events thoroughly that led to the arrest of the accused. In such circumstances, we are of the view that the minor inconsistencies, pointed out by the learned counsel for the accused/appellant, may not be given any credence to tumble the case of the prosecution.

14. The learned counsel for the first accused/appellant would also contend that in this case, there is no eye witness available to prove that it was the accused who committed the offence. The prosecution relied on circumstantial evidence to prove the alleged guilt of the accused/appellant but the evidence leading to formation of such a chain is not complete and therefore, the entire case of the prosecution is vitiated. At this juncture, it would be useful to rely upon the decision of the Honourable Supreme Court in the case of (State of Rajasthan vs. Kashi Ram) reported in (2006) 12 SCC 254 wherein in para No.23 and 24, it was held as follows:-

"23.The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categorical in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge his burden cast upon him



by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the Court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in *Naina Mohd. Re. AIR 1980 Mad 218*.

24. There is considerable force in the argument of counsel for the State that in the facts of this case as well it should be held that the respondent having been seen last with the deceased, the burden was upon him to prove what happened thereafter, since those facts were within his special knowledge. Since the respondent failed to do so, it must be held that he failed to discharge the burden cast upon him by Section 106 of the Evidence Act. This circumstance, therefore, provides the missing link in the chain of circumstances which prove his guilt beyond reasonable doubt."

15. In this case, PW3 has categorically stated in his evidence that he had seen the accused in the company of the deceased just prior to the occurrence. While so, the burden is on the accused/appellant to show as to how and when he parted company with the deceased. However, in this case, no such explanation has been offered by the accused/appellant and thereby the accused/appellant failed to discharge the burden cast upon him under Section 106 of The Indian Evidence Act. In such view of the matter, we hold that such an absence of explanation on the part of the accused/appellant establishes the incriminating chain of events operating against him beyond reasonable doubt. Consequently, we reject the argument putforward on behalf of the accused/appellant that the prosecution failed to prove the circumstances leading to the guilt of the accused/ appellant. At any rate, as mentioned above, it was the deceased who identified the dead body of the deceased by pulling his leg beneath heap of a mud, but for which, the deceased could not have been identified by any one.

16. For all the reasons aforesaid, we confirm the Judgment dated 25.02.2016 passed in Special S.C. No. 11 of 2014 on the file of Sessions Judge, Mahila Court, Mahalir Neethimandram, Madurai. The Criminal Appeal fails and it is dismissed.

Sd/

Assistant Registrar (CSIII)



To

1. The Sessions Judge
Mahila Court
Mahalir Neethimandram
Madurai
2. The Inspector of Police
T. Kallupatti Police Station
Madurai District
3. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai

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RL/4C/9P/KKR/SAR4/12/2/2018

Judgment in

Crl.A. (MD) No. 436 of 2016

21-12-2017