

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.06.2018

CORAM:

THE HON'BLE MR. JUSTICE P.N. PRAKASH

Crl.O.P.No.3373 of 2017 and Crl.M.P. Nos.2451 and 2872 of 2017

K. Bharathi

Petitioner

vs.

1 The State by
the Deputy Superintendent of Police
CB-CID
Chennai
(Cr. No.1 of 2013)

2 Annadurai

Respondents

Criminal Original Petition filed under Section 482 Cr.P.C. seeking to set aside the order made in Crl.M.P. No.21277 of 2016 in S.C. No.230 of 2014 on the file of the Principal Sessions Judge at Chennai.

For petitioner Mr. S. Anantha Narayanan
Senior Counsel
for Mr.S.M. Nandhidevan

For R1 Mr. C. Raghavan
Govt. Advocate (Crl. Side)

For R2 Mr. R. Ganapathy Subramaniam
for Mr. K. Jayaraman

ORDER

This Criminal Original Petition has been preferred seeking to set aside the order made in Crl.M.P. No.21277 of 2016 in S.C. No.230 of 2014 on the file of the Principal Sessions Judge at Chennai.

2 For the sake of convenience, the petitioner and the second respondent are referred to by their name.

3 On the complaint lodged by Bharathi, the first respondent police registered a case in Cr. No.1 of 2013 and after completing the investigation, filed a charge sheet against

Annadurai and the case is now pending trial in S.C. No.230 of 2014 before the Principal Sessions Court, Chennai for the offences under Sections 294(b), 417, 506(ii) IPC, Section 4 of the Dowry Prohibition Act read with Section 3(1)(xii) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

4 The case of the prosecution is as under:

Bharathi is a Dalit and was working as Woman Police Constable. Sometime in 2005, she came in contact with Annadurai, a caste Hindu, who was working as Sub Inspector of Police. It is the case of Bharathi that they were in love with each other and that Annadurai had promised to marry her and on that premise and assurance, he deflowered her. It is her further contention that Annadurai took her to the Murugan temple at Palani and tied thali around her neck and they both lived as man and wife at the police quarters in various places where they were posted. However, Annadurai refused to marry Bharathi on the ground that she is a Dalit and further, he started demanding huge dowry from her as a condition precedent for marriage. Pushed to her wit's end, she lodged a complaint, based on which, the CB-CID registered a case and the trial is pending before the Principal Sessions Court, Chennai, as stated above.

5 While so, the CB-CID filed two applications, viz., CrI.O.P.Nos.21276 of 2016 under Section 311 Cr.P.C. and 21277 of 2016 under Section 173(8) Cr.P.C. In both the petitions, the CB-CID contended that the investigation in this case was conducted by an officer who had retired and that the said officer had failed to include the name of the expert witnesses who had conducted the potency test and other tests during investigation, in the memo of evidence appended to the charge sheet.

6 As regards CrI.M.P. No.21277 of 2016, the prosecution contended that Bharathi had recorded the conversation she had with Annadurai in her mobile phone, in which, Annadurai is said to have spoken certain aspects, which would incriminate him in the case. It is also seen that earlier, the Investigating Officer has recorded a further statement under Section 161(3) Cr.P.C., by which, a compact disc containing the conversation has been handed over to him. It is the case of the prosecution that the Investigating Officer should have obtained the voice sample of Annadurai and Bharathi and should have sent the compact disc to the voice expert, for opinion, which he had failed to do. Therefore, the prosecution sought permission for further investigation and also for a direction to Annadurai and Bharathi to give their voice sample. Annadurai resisted the said application. The Trial Court dismissed CrI.M.P. No.21277 of 2016 vide order dated 22.12.2016 on the following grounds:

- i. that the Investigating Officer had not filed any affidavit; and
- ii. that the Investigating Officer has not given to the Court, the contents of the compact disc.

Challenging the aforesaid order passed in Crl.M.P. No.21277 of 2016, Bharathi is before this Court.

7 Heard Mr. S. Anantha Narayanan, learned Senior Counsel representing Mr.S.M. Nandhidevan, learned counsel for Bharathi and Mr. R. Ganapathy Subramaniam, learned counsel representing Mr. K. Jayaraman, learned counsel for Annadurai.

8 Mr. Anantha Narayanan, learned Senior Counsel appearing for Bharathi submitted that the Trial Court ought not to have dismissed the application filed by the prosecution for further investigation, especially in a case of this nature, where, the victim is a Police Constable and the accused is her superior officer and should have appreciated the constraints under which the CB-CID would have conducted the investigation. That apart, according to the learned Senior Counsel, when the Trial Court had recognised the fact that the earlier Investigating Officer had failed to include the names of material witnesses in the memo of evidence and had allowed Crl.M.P. No.21276 of 2016, the same parameters should have been applied for deciding Crl.M.P. No.21277 of 2016 as well. He further submitted that the best evidence should not be kept away in a criminal trial.

9 Per contra, Mr. R. Ganapathy Subramaniam, learned counsel appearing for Annadurai submitted that all the prosecution witnesses have been examined and at this belated stage, the prosecution should not be permitted to conduct further investigation as that would cause undue prejudice to the case of Annadurai, inasmuch as, the defence of Annadurai has been revealed and it is possible that the police can destroy the defence taken by Annadurai to his detriment. He also submitted that Annadurai cannot be compelled to give his voice sample especially when the matter is still under seizin by the Supreme Court. The learned counsel also contended that the mobile phone of Bharathi was not seized and therefore, the contents in the compact disc are only a secondary evidence which cannot be relied upon.

10 This Court gave its anxious consideration to the rival submissions.

11 At the outset, in our criminal jurisprudence, even illegally collected evidence, if it is otherwise relevant, cannot be shut out. The question is whether the material is

relevant to decide the fact in issue. In this case, the conversation was prior to the registration of the F.I.R. In all fairness, the Investigating Officer should have seized the mobile phone of Bharathi and should have obtained the voice samples of Annadurai and Bharathi and sent them to the expert for opinion. This having not been done, it does not mean that the Court should throw its hands up in despair and plead helplessness. After all, a criminal trial is a voyage to unearth the truth and to bring the guilty to book.

12 Though the Supreme Court has not yet decided on the legality of voice test, yet, a learned Single Judge of this Court, in P. Kishore vs. State represented by Additional Superintendent of Police, SPE/CBI/ACB/Chennai [2018 1 MLJ (Crl.) 208], has considered all these aspects and has held that giving of voice sample will not violate Article 20(3) of the Constitution of India relating to self incrimination.

13 However, the learned counsel appearing for Annadurai has placed reliance upon a judgment of a Single Judge of the Gujarat High Court in Natvarlal Amarshibhai Devani vs. State of Gujarat and another [2017 Cri.L.J. 1911], wherein, it has been held that in the absence of a specific provision of law for voice test, the same cannot be permitted. It is pertinent to point out that I am required to follow the law laid down by a coordinate Bench of this Court in preference to the law laid down by a coordinate Bench of the Gujarat High Court.

14 As regards the submission of Mr. Ganapathy Subramaniam that Bharathi's mobile phone was not recovered and therefore, the source of voice becomes suspect, these are aspects which can be decided during cross-examination of Bharathi and the Investigating Officer.

15 It is brought to the notice of this Court that the prosecution had failed to place before the Trial Court, the transcript of the conversation recorded in the compact disc in order to prima facie show that the conversation would be relevant to decide the fact in issue.

16 Admittedly, the compact disc was handed over to the police by Bharathi during investigation. Therefore, this Court directs the first respondent police to first take a transcript of the conversation recorded in the compact disc and submit the transcript along with the original compact disc, to the Trial Court. Thereafter, the Trial Court shall furnish a copy of the transcript to Annadurai and decide whether the same should be sent to the Tamil Nadu Forensic Science Laboratory for the purpose of voice test. In the event of the Trial Court arriving at the opinion that the transcript will be relevant for the just

decision of the case, Bharathi and Annadurai can be directed to give their voice sample.

17 The Trial Court shall complete the said exercise within a period of one month from the date of receipt of a copy of this order. It is made clear that the period of one month will not include the time that is required by the Forensic Science expert to give his report. It is further made clear that all defences that are available to Annadurai with regard to the admissibility and relevancy are kept open and whatever is stated above is only for deciding this application and shall not, in any way, abridge the right of Annadurai to such defences. That apart, Annadurai will be entitled to further cross-examine Bharathi and the Investigating Officer on these aspects.

This Criminal Original Petition stands disposed of in the above terms. Connected Crl.M.P. are closed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

cad

To

- 1 The Deputy Superintendent of Police
CB-CID
Chennai
- 2 The Principal Sessions Judge
Chennai
- 3 The Public Prosecutor
High Court of Madras
Chennai 600 104

+1cc to M/s.S.M.Nandhidevan, Advocate Sr.No.36778
+1cc to M/s.K.Jayaraman, Advocate SR.No.37120

VBA(CO)
GSP:18.6.2018

Crl.O.P. No.3373 of 2017