

Bail Slip

The Appellant/Accused, namely Udhayakumar S/o.Mani was directed to be released on bail as per order dated 23.12.2009 in CRL MP.NO.1/09 IN CRL A.NO.620/2009 on the file of this Hon'ble court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 18.06.2019	Delivered on 29.07.2019
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CORAM

THE HONOURABLE MR.JUSTICE A.D.JAGADISH CHANDIRA

Crl.A.No.620/2009

Udayakumar
Appellant

Vs

State rep.by:
The Inspector of Police
H-2 Manali Police Station
Chennai 600 068.
Respondent

Prayer:- This Criminal Appeal is filed u/s.374[2] Cr.P.C., to call for the records in SC.No.525/2002 from the file of the learned Assistant Sessions Judge, Ponneri and to examine the same and to set aside the judgment of conviction pronounced on 03.09.2009 in the above SC.No.525/2002 and to set the appellant/accused at liberty.

For Appellant : Mr.G.Prabhakaran

For Respondent : Mr.K.Prabakar, APP

JUDGMENT

This Criminal Appeal is filed against the judgment of conviction and sentence, dated 03.09.2009 made in SC.No.525/2002 by the learned Assistant Sessions Judge, Ponneri. The appellant stood charged and tried for the commission of the offences under sections 342 & 376[2][f] IPC and the Trial Court, vide impugned judgment dated 03.09.2009, had found the appellant guilty for the commission of the offences under sections 376 [2][f] and

342 IPC and convicted him and sentenced him to undergo 9 months simple imprisonment and to pay a fine of Rs.900/- with a default sentence of one month simple imprisonment for the commission of the offence u/s.342 IPC and to undergo rigorous imprisonment for 9 years and to pay a fine of Rs.9000/-, in default, to undergo one year rigorous imprisonment for the offence under Section 376(2)(f) of IPC. The sentences were ordered to run concurrently and set-off was also granted u/s.428 Cr.P.C.

2 The brief facts of the case as per the charges framed against the appellant/accused is that on 16.01.2002 at about 1.15 p.m. the appellant/accused with an intent to commit rape, took the victim /PW.2 aged about 5 years, inside the lavatory room and bolted the room from inside and committed forcible intercourse with her, thereby the appellant/accused was charged for offences punishable under Sections 342 and 376 IPC.

3 The case was taken on file in PRC No.31/2002 on the file of the learned District Munsif cum Judicial Magistrate No.2, Tiruvotriyur and subsequently, the case was made over to the Trial Court, viz., the learned Assistant Sessions Judge, Ponneri, in SC.No.525/2002 and necessary charges were framed. The accused had denied the charges and sought for trial. In order to bring home the charges against the accused, the prosecution examined 12 witnesses as PW.1 and PW.12 and out of the witnesses, PW.1 is the mother of the victim/defacto complainant. PW.2 is the victim/minor girl, whose evidence was not recorded by the Trial Court on the ground of lack of rationality. PW.3 is the father of the victim. PW.4 is the passerby in the street and a witness to the occurrence and he has also stood as a witness to all the mahazars. PW.5 and PW.6 are the witnesses for the arrest and confession of the appellant/accused and both the witnesses have turned hostile. PW.7 is the Doctor who examined the appellant/accused for potency test. PW.8, PW.10 and PW.12 are, respectively the police officers who have registered the FIR; conducted initial investigation and laid the final report. PW.9 is the Doctor who had examined the victim girl/PW.2 in respect of sexual assault and PW.11 is the Forensic Expert.

4 On completion of the evidence on the side of the prosecution, the accused was questioned under Section 313 [1][b] Cr.PC as to the incriminating circumstances found in the evidence of prosecution witnesses and the accused had come with the version of total denial and stated that he has been falsely implicated in this case due to existing enmity between the families. On behalf of the defence, two inmates of the Scene of Occurrence /vicinity, viz., DW.1-

Vijaya and DW.2-Raja were examined and however, no documentary evidence was marked on the side of the defence. It is the defence of the appellant/accused that a false case has been foisted against him due to existing enmity to wreck vengeance against the family of the appellant/accused by PW.1 with the aid of PW.4 and his friends. The motive being that, scene of occurrence/vicinity contains 5 row typed residential tenements (compound houses) and let out to various tenants including PW.1's family. The family of the defacto complainant resides in one portion and the family of the appellant/accused resides in another portion. The mother of the appellant/accused had been on behalf of the owner/landlord of the premises, taking care of the maintenance of the entire property including collection of rent, payment of electricity bills, cleaning, etc,. The mother of the appellant/accused had objected to the frequent visits of PW.4 to the portion of PW.1 in the absence of her husband and the same had resulted in quarrel between them and on the information passed on the mother of the appellant/accused, the landlord had directed PW.1 to vacate the premises, which resulted in enmity between the families. D.Ws.1 and 2 have spoken about the visits of P.W.4 to the house of P.W.3 during his absence to meet P.W.1 and the enmity between P.W.1 and the mother of the appellant/accused regarding the same.

5 The Court below, after hearing the arguments advanced on either side and also looking into the materials available on record, convicted the appellant/accused for the offences under sections 342 and 376[2][f] IPC and awarded punishment, as referred to above, which is challenged in this Criminal Appeal.

6 The learned counsel for the appellant/accused while assailing the impugned judgment of conviction and sentence, would put forth the following contentions:

- a) The victim/P.W.2 has not spoken anything about the incident and anything against the appellant/accused. The trial Court has miserably failed to appreciate the evidences of PW.1 , PW.3 and PW.4 in proper perspective and had erroneously convicted the appellant/accused with a predetermined mind.
- b) The evidence of PW.1 who was having enmity towards the appellant/accused and his mother, was full of contradictions and embellishments and lacks credence and the Trial Court erred in believing the evidence.
- c) The trial Court failed to take into consideration the negative report given by the Doctor who had examined the victim girl/PW.2, within few hours which was in total contradictions to the exaggerated versions of PW.1, PW.3 and PW.4 with regard to the injuries said to have been found on the victim girl/PW.2. There were no external injury on the victim girl/PW2. PW.9 , the

doctor who had clinically examined the victim girl within a few hours of the occurrence had categorically deposed in her evidence that there were absolutely no internal or external injuries in the vagina of the victim and the hymen was intact and there was no traces of oozing of blood in the vagina and no seminal stains found in the vagina. Whereas contrary to the independent medical examination, PW.1, PW.2 and PW.3 had given exaggerated versions as if there was oozing of blood from the vagina and swelling and tenderness of the vagina and thereby belying the evidence of the witness who were in enimical terms with the appellant/accused and his family.

- d) The trial Court failed to take into consideration that the appellant/accused had also not sustained, any injury on his private part and that the allegation of penetration to the victim to the extent of causing bleeding injury is palpably false.
- e) The trial Court failed to take into consideration the non examination of the other occupants in the tenements/compound houses and also failed to take into consideration the evidence of defence witnesses namely DW.1 and DW.2 who have supported the case of the defence.
- f) Though PW.1 had deposed that PW.4 is a stranger, the relationship between PW.1 and PW.4 was categorically proved by the admission of PW.4 and the false evidence of PW.1 with regard to the relationship between her and PW.4 would prove that she is not a trustworthy witness and thereby their evidence is not credible particularly when the defence of the appellant/accused was that there was illicit intimacy between P.W.1 and P.W.4 and there has been enmity since the mother of the appellant/accused questioned the same.
- g) The trial Court on misreading of the evidence and records had arrived at a finding that, as per evidence of PW.11 and his forensic report [Ex.P.11], that the seminal stain was found and detected in the under garment of the appellant/accused and that the appellant/accused failed to offer any explanation for the same and the rape stands proved. The evidence of seminal stain in an inner wear of a young man can exist because of variety of reasons and that it in itself would not necessarily connect the appellant to the evidence of rape. As per the prosecution the rape was allegedly committed by a fully developed man on a girl of 8 years, who was a virgin. Whereas the hymen was intact and that absence of the injuries on the private part of the appellant/accused would only point out to his innocence. The evidence of PW.9/ Doctor falsifies the evidence of PW.1. Hence, the learned

counsel would pray for allowing of the appeal and for setting aside the impugned judgment of conviction and sentence.

7 In support of his contentions, the learned counsel for the appellant placed reliance upon the judgment reported in 1973 AIR [SC] 343 [Rahim Beg V. The State of U.P] and 2011(3) MLJ [Cr1] 349[Ramesh V. State by Inspector of Police, M3 Kovilpalayam Police Station, Coimbatore].

8 Per contra, the learned Additional Public Prosecutor appearing for the respondent would submit that the victim girl was aged about 8 years. Though the girl has not deposed anything about the incident, the trial Court, taking into consideration the age of the victim, had observed that she being a minor child, consent was not necessary. He would submit that the prosecution case has been proved by the evidence of PW.1/the mother of the victim, who has seen the appellant/accused fleeing out of the lavatory immediately after the occurrence. The evidence of PW.1 is corroborated by the evidence of PW.3 and PW.4. The dresses worn by the appellant/accused were recovered and that they have been analyzed and that as per Ex.P11[Forensic Expert opinion], seminal stains were present and the trial Court had rightly convicted the appellant/accused based on cogent evidence and would submit that the judgment of the trial Court does not warrant any interference and prays for dismissal of the said appeal.

9 I have given my careful and anxious consideration to the rival contentions put forward by either side and thoroughly scanned through the entire evidence available on record and also perused the impugned judgement of conviction, including the relevant provisions of Law and authorities of various Courts.

10 The points for consideration are:

[a]Whether the prosecution has proved the case beyond all reasonable doubts?; and

[b]Whether the evidence of the witnesses adduced on the side of the prosecution, can be believed?

[c]Whether the Trial Court was right in convicting and sentencing the appellant/accused?

11 While analyzing the evidence of the witnesses PW.1/Shanthi, the mother of the victim, had deposed that on 16.01.2002 at around 1.15 P.M. her daughter/PW.2 who was playing inside the compound, was found missing and she had searched for her, she had heard PW.2's cry from a lavatory inside the compound, when PW.1 had raised alarm, witnesses

PW.4 and one Jayapal, who were passerby, had come there and at that time PW.2 had opened the lavatory door and came out weeping and when they have seen inside the lavatory, they found the appellant /accused and on seeing them, he fled away from that place. When PW.1 had seen the private part of her daughter/PW.2 she had seen blood oozing from the private part and she had also seen swelling and tenderness of the vagina and there were injuries on vagina and that she had given a complaint to the respondent police which was marked as Ex.P1. She had further deposed that her daughter/PW.2 was taken to the hospital.

[b]PW.2/the victim had been examined and that she has not stated anything about the incident and anything against the appellant/accused. The Trial Judge had found that the witness does not have rationality.

[c]PW.3 is the father of the victim and husband of PW.1. He had deposed that the victim/PW.2 is his daughter and that on 16.01.2002 he had been to his work and that he received an information at 2 p.m., that the appellant/accused had raped his daughter, inside the lavatory and he came back home and that he along with his wife, went to the police station and gave a complaint.

[d]PW.4 / Udhayakumar had deposed that on 16.01.2002, around 1.15 p.m., while he was on his way to his company along the house of PW.1 he had heard the cry of PW.1 and when he had gone there, PW.1 had informed him that her daughter was crying inside the lavatory and that it was found locked from inside and that he along with one Jayapal opened the lavatory door and on opening the door, the appellant/accused fled away from there and that he had found the victim crying there and that he had informed the father/PW.3 and thereafter the respondent police came to the scene of occurrence and prepared the observation mahazar [Ex.P2] in which he along with the said Jayapal attested and thereafter the police recovered M.O.1-the dress owned by the victim and M.O.2-an undergarment belonging to a male under Mahazar [Ex.P3]. He had further deposed that the respondent had arrested the appellant/accused and kept him in the police station and during that time the Shirt-M.O.3 and lungi-M.O.4 and the undergarment-M.O.5 worn by the appellant/accused were recovered under the mahazar [Ex.P4] and thereafter the respondent police visited the SOC on the next day and prepared observation mahazar [Ex.P5] and that he had signed in it.

[e]PWs.5 and 6 have turned hostile and have not supported the case of the prosecution. PW.7 - doctor, who had been examined to prove that the appellant/accused was potent. He had deposed that he had examined the appellant/accused and he had opined that the appellant / accused was capable of having sexual intercourse and that

the medical certificate issued by him was marked as Ex.P6. He had not noticed any injuries on the private parts of the appellant. He had further certified that the age of the appellant /accused was between 17-20 years and the age certificate was marked as Ex.P7. PW.8 -The Sub Inspector of Police, he had deposed that on 16.01.2002 when he was in the Police Station, PW.1 appeared before him and had given a complaint under Ex.P1, based on which he had registered a case in Cr.No.18/2002 and prepared the printed FIR which was marked as Ex.P8.

[f]PW.9- The doctor, who had examined the victim girl, had deposed that on 16.01.2002, while she was working as Civil Surgeon in RSRM hospital, Royapuram the victim, was brought to her for medical examination in respect of sexual offence and that she had examined the victim and issued the certificate[Ex.P9]. She had certified the age of the victim to be between 5 and 6 years which was marked as Ex.P10. The chemical analysis report of the vaginal swab test was marked as Ex.P11. She had deposed that she had done swab test for presence of semen and there was no evidence of semen as per the chemical analysis report, Ex.P11. She had in cross examination opined that there was no symptom to suggest that the victim was subjected to sexual assault.

[g]PW.10-The Inspector of Police attached to the Ennor Police Station who was in-charge of Manali Police Station had deposed that on 16.01.2002, he had taken up the case in Cr.No.18/2002 for investigation based on Exhibit P8 and visited the scene of occurrence and prepared observation mahazar[Exs.P2 and P5] in the presence of the witness and examined witnesses present in the scene of occurrence and recorded their statements and on the same day, he arrested the appellant/accused at 6 p.m. near MRL junction, in the presence of the witnesses. He had seized MO.3 to MO.5 under Ex.P4 and thereafter recovered the cloths worn by the victim viz., MO.1 and MO.2 under mahazar [Ex.P3] and thereafter sent the appellant/accused for judicial remand. Further, he had sent the material objects for chemical analysis.

[h]PW.11- the chemical examiner had deposed that on 23.01.2002, she had received MO1 to MO5 for chemical analysis through the learned Judicial Magistrate, Thiruvettriyur and that she had given a report after completing the analysis under mahazar [Ex.P11]. She had deposed that sperms were found in MO.4.

[i]PW.12.-the Investigation Officer had deposed that on 19.01.2002 while he was working as an Inspector of police, Manali Police Station, has taken the case for further investigation and examined the witnesses and doctors and after obtaining the medical certificates and other reports filed the final report.

12 At the outset, the defence story remains that PW.1 and the family of the appellant/accused were living in a compound house / row house consisting of five tenements and that the mother of the appellant/accused was taking care of the maintenance of the entire property including collection of rents and payment of EB bills, cleaning, etc., on behalf of the landlord. The mother of the appellant/accused had objected to the frequent visits of PW.4 to the portion of PW.1 in the absence of her husband and that the same has resulted in quarrel between them and that on information being passed by the mother of the appellant/accused, the landlord had directed PW.1 to vacate the premises. D.W.1 and D.W.2 have spoken about the same and the prosecution was not able to discredit them.

13 In this case, P.W.2, the victim having not spoken anything about the incident and anything against the appellant/accused, this Court has to carefully look into the evidence of the other witnesses. PW.1 had deposed in the Chief examination as to how she had come to know that the appellant/accused committed rape on her child inside the lavatory. As per the evidence of PW.1 it is clear that she could not have seen what had happened inside the lavatory. Immediately after rescuing the child from the lavatory, she had claimed that she had enquired the child and the child had narrated the happenings which took place inside the lavatory. Whereas in her cross-examination, she had admitted that she has not stated anything in the complaint as well as during the interrogation as if her child had narrated about the incident to her. She has also further admitted that she has not stated anything in the contents of the complaint that she came to know about the rape on the basis of the narration of the child. PW.3- Father of PW.2 has also not claimed anything as if himself or PW.1 came to know about rape on the basis of the assertion of the child. PW.4 who is stated to have come to the place of occurrence on hearing the cry of PW.1, has also admitted in his cross examination that the child has not narrated anything as to what had happened to her inside the lavatory. The Investigation Officer also confirms that PW.1 and PW.4 have not stated anything during the investigation as if they came to know about the happenings which took place inside the lavatory, on enquiring the child.

14 The next limb of evidence of PW.1 and PW.4 is that they had inferred the commission of rape on seeing the oozing of blood from vagina and swelling and tenderness of the vagina. Their statement is belied by the evidence of PW.9, Doctor who has clinically examined the victim within few hours of the occurrence. PW.9 had

deposed that there was no external or internal injuries and there was no injuries on the vagina and the hymen was intact and there was no bleeding and no seminal stains were found in the vaginal swab test as per Ex.P11 and that she had issued Ex.P9 in respect of the certificate of examination for sexual offences wherein she had stated that there was no indication that the child was subjected to rape. She had further confirmed that in case of penetration, the victim being the child, there was high possibilities for the presence vaginal injuries and oozing of blood from such injuries and also tear of hymen. She had also stated that there were no traces or effects of any penetration found in the victim. As stated above, it is in total contradiction to the evidence of PW.1 and PW.3.

15 Now, coming to the evidence of PW.10-the Investigation Officer, he had deposed that PW.1. PW.3 and PW.4 have not stated anything about the seminal stains or blood stains at the scene of occurrence and that it was also not mentioned in the observation mahazars. PW.1 has not claimed that she found seminal or blood stains over the dresses of her child. Whereas as per Ex.P1 complaint, she had stated that immediately, after the occurrence she had washed her daughter and also washed the clothes worn by her daughter.

16 Regarding the credibility of PW.1, she had claimed that PW.4 is a total stranger and that he is a passerby who has never visited her house earlier and not related to her. Whereas PW.4 in his cross examination, had admitted that he had frequently visited the house of PW.1 and that he could not count how many times he has visited her house and that he has further claimed that the premises where PW.1 was living, was rented out to her at his instance. He has also given a vivid picture about the physical features of the house of PW.1. This evidence of PW.4 would certainly go to show that the PW.1 is not a trustworthy witness and that she has made a false deposition by describing PW.4 as a stranger for the purpose of portraying himself as an independent witness to derive strength for her false case. When the evidence of PW.1, is weighed with the evidence of DW.1 and DW.2 it probabilise the case of the defence that PW.1 had purposely concealed her relationship with PW.4 and the evidence of P.W.1 is incredible.

17 PW.3 -husband of PW.1 is not a witness to the occurrence and he had come to the scene of occurrence only on information PW.1, PW.3 and PW.4 have given an exaggerated version as if they witnessed the oozing of blood from the private part of the victim/P.W.2; whereas their testimonies have been belied by the evidence of PW.9-

doctor who has examined the victim within few hours of the incident. PW.1 had further deposed that the complaint was scribed by one Jayapal who is the friend of PW.4 and he has not been examined. The non-examination of Jayapal creates a doubt. PW4 has been portrayed by the prosecution as an independent chance witness. The numerous material contradictions between the evidence of PW.1 and PW.4 would demonstrate that he is a planted witness and records have been cooked up to show him as a chance witness. The discrepancies in the mahazars would show that they have been doctored to project as if PW.4 and Jayapal rushed to the scene of occurrence on hearing the cry of PW.1. Further though there were several houses present in the compound, the prosecution has not examined the other tenants in the compound which creates a grave suspicion in the prosecution case.

18 As per Ex.P4-Mahazar, a grey colour undergarment was said to have been recovered from the accused whereas from the report of the Forensic Expert, the seminal stain was found and detected in Item No.4-blue colour under garment. As per the evidence of PW.1, the undergarment of the victim was washed immediately after the occurrence. The investigating officer and P.W.1 also admit the same. The blue colour undergarment which was said to be the undergarment of the victim as per Ex.P3, was not identified as the undergarment of the victim by PW.1. Further a serious discrepancy prevails as to where and when it was recovered P.W.4 through whom it was marked, claims in his chief examination that it was recovered at the scene of occurrence when the investigating officer came to prepare observation mahazar in his presence. In his cross examination, PW.4 had taken a u-turn and had asserted that the dresses of the victim were seized and kept in the police station and he came to know about the same through the parents of the victim and he also asserted that he was not present when the dresses were seized. Whereas the evidence of the investigating officer reveals that the clothes were stated to have been handed over along with the complaint and thereupon they were seized. The serious discrepancies in the recovery of the material objects also creates a doubt. Further the seminal stain found in Item No.4 was not matched and compared scientifically with that of the appellant/accused.

19 The Trial Court had rendered a finding that as per the evidence of PW.11 and her report, Ex.P11, seminal stains were found and detected in the undergarment of the appellant/accused and that the appellant/ accused had failed to offer any plausible, proper and reasonable explanation for the same and thereby, arrived at a conclusion that the offence of rape has been proved. This

Court is of the opinion that the Trial Court has absolutely misread the evidence and the materials on record.

20 In 1973 AIR (SC) 343 [Rahim Beg Vs. State of UP], the Honourable Supreme Court, has held in para 25 and 26 that :

"25. We may now advert to the stains of human blood on the bush shirt of Mahadeo and the stain of semen on the Langot of Rahim Beg. So far as the blood stains on the bush shirt of Mahadeo are concerned, it may be stated that no question was put to Mahadeo during the course of his statement under Section 342 of the Code of Criminal Procedure that his bush shirt was stained with blood. Mahadeo not having been asked to furnish an explanation regarding the stain of human blood on his bush shirt no interference can be drawn against Mahadeo on that account. As regards the stain of semen on the Langot of Rahim Beg, we find that Rahim Beg is a young man of 22. The Langot in question was dirty at the time it was taken into possession. It cannot be said as to how old was the semen stain on the Langot. The semen stain on the Langot of a young man can exist because of a variety of reasons and would not necessarily connect him with the offence of rape.

26. According to Dr. Katiyar, Medical Officer of District Jail Rae Bareilly, if a girl of 10 or 12 years who is virgin and whose hymen is intact is subjected to rape by a fully developed man, there are likely to be injuries on the male organ of the man. No injury was, however, detected by the doctor on the male organ of any of the two accused. The absence of such injuries on the male organs of the accused would thus point to their innocence. The examination of the two accused by Dr. Katiyar was on August 5, 1969. The two accused, however, had been arrested, according to the prosecution, on the morning of August 4, 1969. No cogent explanation has been furnished as to why they were not soon thereafter got medically examined by the police."

21 The trial Court is not justified in arriving at a conclusion that Ex.P11 would prove the case whereas actually it has not been proved by the scientific

evidence. The Trial Judge had in fact, deviated from the Cardinal Principles of Criminal Jurisprudence regarding burden of proof.

22 Further, as stated above, the date of occurrence was on 16.01.2002, the day next to Pongal and PW.1 and PW.4 have admitted that all the neighbors and inmates in the nearby houses were present and that they had, on hearing the alarm, come out and witnessed the occurrence. PW.3 had also confirmed that there is no enmity with other inmates of the houses. In this back drop, it is strange that the intimates of the nearby houses who would be naturally available witnesses, have been deliberately withheld to be examined, thereby creating a doubt in the prosecution case. Whereas, two of the intimates, who are the residents in the same compound, have been examined as defence witnesses, DW.1 and DW.2, and they have deposed contrary to the version of the prosecution story, particularly, DW.1 had denied that the appellant/ accused had committed wrongful sexual assault on the victim, PW.2 and thereby it is clear that they have been willfully withheld to conceal the truth. In such circumstances, the trial Court ought to have drawn an adverse inference against the prosecution.

23 Further, in this case, PW.2 victim child, who was aged 8 years at the time of examination in Court, had not deposed about the incident or about the accused. She was stated to be studying in the 3rd Standard in a School. The Trial Court, considering her age, had put few questions to her and doubting her rationality had asked her whether she would be able to speak about the case and since she had stated that she may not, had concluded that she is incapable of giving evidence. In such circumstances, the Trial Court, as a Rule of practical wisdom, ought to have carefully analysed the other corroborative materials to arrive at a conclusion regarding the charge against the appellant/accused. In this case, the evidence of PW.1, mother, PW.3 father and PW.4, passerby do not inspire confidence and their evidence is not worthy of credence. Further, the entire case of the prosecution is belied by the scientific evidence. Further the evidence with regard to the finding of seminal stains in MO.4 is also highly doubtful. In fact, it has not been proved that M.O.4 belongs to the appellant/accused. The Trial Court, on wrong application of rule of evidence, had found the accused guilty, stating that non-explanation by the appellant/ accused with regard to the presence of sperms in the MO.4 undergarment raises presumption against him.

24 Though the victim was aged about 8 years at the time of giving evidence, she had not deposed anything about the occurrence and that the reasoning of the learned Trial

Judge with regard to the rationality, is also not convincing. In such circumstances, this Court has to look into the other attended facts and circumstances engulfing this case.

25 In this case, the Trial Court had not taken into consideration the plea of false implication on account of enmity and the evidence let in by the appellant/ accused by way of defence to prove the enmity between the families of him and PW.1, defacto complainant. Further, the alleged offence was stated to have been committed in a common lavatory used by the residents of five tenements/houses in a compound on a holiday and as per the evidence of PW.1, all the residents were available in their houses. None of them have been examined by the prosecution whereas the appellant/accused had examined D.W.1 and D.W.2. D.Ws.1 and 2 are independent witnesses and their evidence was not shaken in cross examination by the prosecution and there is nothing on record to discredit and discard their evidence. As stated above, the evidence of P.W.1, P.W.3 and P.W.4 is improbable and untrustworthy as it is belied by the evidence of P.W.9-Doctor.

26 In 2018 SCC OnLine SC 1042 (Sham Singh Vs. State of Haryana), it was held as under:-

25. The fact that at the residential house of the appellant, wherein all the inmates of the house including the mother, children, sister and wife of the accused were living, such a brutal offence of rape could not have been executed without attracting the attention of anyone at that point of time, would make the prosecution version seriously improbable. We are of the view that the doubtful and suspicious nature of the evidence sought to be relied upon to substantiate the circumstances in this case themselves suffer from serious infirmities and lack of legal credibility to merit acceptance in the hands of the court of law. Having regard to the material on record, we find that there is every possibility of false implication of the accused in this matter to take revenge against the family of the accused because of the longstanding disputes inter se between the two families.

26. The evidence of the victim/prosecutrix and the Aunt PW10 are unreliable, untrustworthy inasmuch as they are not credible witnesses. Their evidence bristles with contradictions and is full of improbabilities. We cannot resist ourselves to place on record that the

prosecution has tried to rope in the appellant merely on assumptions, surmises and conjectures. The story of the prosecution is built on the materials placed on record, which seems to be neither the truth, nor wholly the truth. The findings of the court below, though concurrent, do not desire the merit of acceptance or approval in our hands with regard to the glaring infirmities and illegalities vitiating them, and the patent errors apparent on the face of record resulting in serious and grave miscarriage of justice to the appellant.

27. We find that the Trial Court and the High Court have convicted the accused merely on conjectures and surmises. The Courts have come to the conclusion based on assumptions and not on legally acceptable evidence, but such assumptions were not well founded, inasmuch as such assumptions are not corroborated by any reliable evidence. Medical evidence does not support the case of the prosecution relating to offence of rape."

27 In 2019 4 SCC 522 (Digamber Vaishnav and another Vs. State of Chattisgarh), it was held as under:-

"One of the fundamental principles of criminal jurisprudence is undeniably that the burden of proof squarely rests on the prosecution and that the general burden never shifts. There can be no conviction on the basis of surmises and conjectures or suspicion howsoever grave it may be. Strong suspicion, strong coincidences and grave doubt cannot take the place of legal proof. The onus of the prosecution cannot be discharged by referring to very strong suspicion and existence of highly suspicious factors to inculcate the accused nor falsity of defence could take the place of proof which the prosecution has to establish in order to succeed, though a false plea by the defence at best, be considered as an additional circumstance, if other circumstances unfailingly point to the guilt."

28 For the reasons stated above and in the light of the decisions cited supra, this Court is of the considered view that the prosecution has not proved its case beyond reasonable doubt and the trial Court erred in convicting the appellant/accused on wrong appreciation of facts

necessitating interference of this Court to set aside the impugned judgment.

29 In the result, the criminal appeal is allowed and the impugned judgment of conviction and sentence imposed on the appellant/accused by the trial Court in SC.No.525/2002 vide judgment dated 03.09.2009 are hereby set aside. The appellant/accused is acquitted of all charges levelled against him. Bail bonds executed by him stand discharged. Fine amount, if any paid, shall be refunded to him.

Sd/-

Assistant Registrar(co)

//True Copy//

Sub Assistant Registrar

AP

To:

- 1.The Assistant Sessions Judge,
Ponneri.
- 2.The Principal District Judge
Tiruvallur.
- 3.The District Munsif cum Judicial Magistrate No.2
Tiruvotriyur.
- 4.The Chief Judicial Magistrate
Tiruvallur.
- 5.The Inspector of Police
H-2 Manali Police Station
Chennai 600 068.
- 6.The Superintendent of Prisons
Central Prison, Puzhal, Chennai.
- 7.The Public Prosecutor,
High Court, Madras.

Copy to:

The Section Officer,
Criminal Section,
High Court,Madras

+1cc to Mr.G.Prabhakaran, Advocate SR.No. 64512

CrI.A.No.620/2009

VSN II

A.SK(29/08/2019)