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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: 21.03.2019
CORAM:

THE HONOURABLE MR.JUSTICE **P.N.PRAKASH**
AND
THE HONOURABLE MR.JUSTICE **B.PUGALENDHI**

R.T. (MD) No.3 of 2018
and
Cr1.A.(MD) Nos.58 and 59 of 2019

R.T. (MD) No.3 of 2018:

The State represented by
the Inspector of Police
Odaipatti Police Station
Uthamapalayam Taluk
Theni District
(Crime No.143 of 2014)

Complainant

vs.

1 Sundararaj

2 Robin @ Ravi

3 Kumaresan

Accused 1 to 3

Cr1.A. (MD) .No.58 of 2019:

1 Sundararaj
2 Robin @ Ravi

Appellants/Accused 1 & 2
vs.

State represented by
the Inspector of Police
Odaipatti Police Station
Uthamapalayam Circle
Theni District
(Crime No.143 of 2014)

: Respondent/Complainant

Cr1.A. (MD) No.59 of 2019:

Kumaresan

: Appellant/Accused No.3

vs.

State represented by
the Inspector of Police
Uthamapalayam Circle
Odaipatti Police Station
Theni District
(Crime No.143 of 2014)

: Respondent/Complainant



Referred Trial numbered under Section 366 Cr.P.C. to go into the question of confirmation of the death sentence awarded by the Sessions Judge, (Full In charge) Mahila Court (Fast Track Court), Theni in Spl.S.C.No.52 of 2015 on 04.10.2018

Criminal Appeal (MD).No.58 of 2019 filed under Section 374(2) Cr.P.C. to call for the records relating to the judgment dated 04.10.2018 passed in Spl.S.C.No.52 of 2015 on the file of the Sessions Judge (Full In charge) Mahila Court (Fast Track Court), Theni and set aside the same as illegal.

Criminal Appeal (MD).No.59 of 2019 filed under Section 374(2) Cr.P.C. to call for the records relating to the judgment dated 04.10.2018 passed in Spl.S.C.No.52 of 2015 on the file of the Sessions Judge (Full In charge) Mahila Court (Fast Track Court), Theni and set aside the same as illegal.

For State in R.T.(MD) No.3 of 2019 and respondent in CrI.A.(MD) Nos.58 and 59 of 2019	Mr. A. Natarajan Public Prosecutor assisted by Mr. K.K. Ramakrishnan Additional Public Prosecutor and Mr. R Anandharaj Additional Public Prosecutor
For appellants in CrI.A.(MD) No.58 of 2019	Mr. R. Venkateswaran
For appellant in CrI.A.(MD) No.59 of 2019	Mr. Ma.Karunanithi Legal Aid Counsel appointed by Court

COMMON JUDGMENT

P.N. PRAKASH, J.

The Reference, R.T.(MD).No.3 of 2018 has been made by the Sessions Judge (Full In charge) Mahila Court (Fast Track Court), Theni, under Section 366 Cr.P.C. seeking confirmation of the capital punishment imposed upon Sundararaj (A1), Robin @ Ravi (A2) and Kumaresan (A3) by judgment dated 04.10.2018 in Spl.S.C.No.52 of 2015. While Sundararaj (A1) and Robin @ Ravi (A2) have jointly preferred CrI.A.(MD) No.58 of 2019, challenging their conviction and sentence, Kumaresan (A3) has filed CrI.A.(MD) No.59 of 2019, challenging his conviction and sentence. In view of the commonality of issues involved, the decision in the Referred Trial and the Criminal Appeals shall be governed by this Common Judgment.



2. The appellants are the accused in Spl.S.C.No.52 of 2015, on the file of the Sessions Judge (Full In charge) Mahila Court (Fast Track Court), Theni. The Trial Court framed two charges against the accused, as detailed below.

Charge	Accused	Penal Provisions
1	1 to 3	6 of the Protection of Children from Sexual Offences Act 2012 (for short "the POCSO Act")
2	1 to 3	302 IPC

3. By Judgment dated 04.10.2018, the Trial Court convicted the accused and sentenced them, as detailed below:-

Accused	Section of Law	Sentence of imprisonment	Fine amount
1 to 3	6 of the POCSO Act	Imprisonment for life	Rs.5,000/- in default to undergo rigorous imprisonment for two years
1 to 3	302 IPC	Death	--

4. The prosecution story is simple.

4.1 The deceased, in this case, was a minor girl, her date of birth being 22.06.2004 and at the time of her death, she was studying V standard. She is the daughter of one late Kannan and Kaleeshwari [PW-1]. After the death of Kannan, Kaleeshwari [PW-1] married Ganesan [PW-2]. The family was living in Kamatchipurram Village. On 01.12.2014, the victim girl returned from school sometime in the afternoon and told her mother [PW-1] around 05.30 p.m., that she is going to the house of her elder maternal aunt [PW-3], situated in the adjoining hamlet. Thereafter, her whereabouts were not known. Her parents and other villagers searched for her, but in vain.

4.2 Therefore, on 02.12.2014, Kaleeshwari [PW-1] lodged a written complaint [EX-P1], based on which, Gunaseelan [PW-22], Special Sub-Inspector of Police, registered a case in Crime No.143 of 2014, on 02.12.2014, at 13.30 hours and prepared the printed First Information Report, [EX-P13], which reached the jurisdictional Magistrate at 10.00 a.m., on 03.12.2014, as could be seen from the endorsement made therein.

4.3 While the search was on, Ajithkumar [PW-7] noticed the body of a girl floating in the well of one Ponmadasamy [PW-28], on



02.12.2014 around 05.30 p.m, and informed the villagers. On getting information, Kaleeshwari [PW-1] and other villagers went to the said well and the police were also informed. Fire Service personnel came there and retrieved the body from the well. The body was identified by Kaleeshwari [PW-1] as that of her daughter. The body was despatched to the Government Hospital, Theni, through Muthuraj, Head Constable, [PW-31] and it was examined by Dr.Kavignar Kannnan [PW-34], who made necessary entries in the Accident Register, copy of which, has been marked as EX-P22, wherein, it is stated as under:-

"Brought dead, received one girl body at 08.10 p.m. on 02.12.2014. Body sent to Mortuary".

4.4 The investigation of the case was taken over by Rajaraman, Inspector of Police, [PW-35] (for brevity "the I.O.") who came to the mortuary and conducted inquest over the body of the victim girl and the inquest report was marked as EX-P24. He gave a requisition to the hospital authorities for postmortem and accordingly, Dr.Juliana Jayanthi, [PW-26] performed autopsy over the body of the victim girl and issued the postmortem certificate [EX-P19]. In her evidence as well in the postmortem certificate [EX-P19], she has stated as follows:-

"Appearance found at the postmortem: Moderately nourished body of a female aged about 10 years. Finger and toe nails were blue. White coloured Postmortem abrasions of sizes 2 CM X 2 CM, 2 CM X 3 CM, and 3 CM X. 2.5 CM were seen over the back of the right elbow.

The following antemortem injuries were noted over the body:-

1. Bilateral conjunctival haemorrhage was noted in both eyes.

2. Sub conjunctival haemorrhage of sizes 1 CM x 1 CM, 1 CM X 0.5 CM and 1 CM X 1 CM, and 2 CM X 13 CM were seen over the back of the right and left eyes respectively.

3. Red coloured linear abrasion [nail mark] of size 4 CM X 0.25 CM was seen over the left cheek.

4. Red coloured abrasion of size 2 CM X 1 CM was seen over the left cheek.

5. Red coloured abrasion of sizes 1 CM x 1 CM, 1.5 CM X 1 CM and 0.5 CM X 0.5 CM was seen over the lower aspect of the nose.

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

6. Red coloured contusion of size 2 CM X 1 CM was seen over over the left forearm.



7. Red coloured abrasion of size 3 CM X 2 CM was seen over the left heel.

8. Red coloured, semicircular contusion was seen at the vaginal orifice.

9. Hymen was ruptured with the surrounding bruise.

On dissection of pelvic cavity:-

10. Red coloured contusion of sizes 3 CM X 3 CM and 5 CM X 2 CM were seen over the right and left parametrium respectively.

11. Red coloured contusion of sizes 3 CM X 3 CM was seen over the fundus of the uterus.

On dissection of neck:-

12. Red coloured contusion of sizes 4 CM X 3 CM and 3 CM X 4 CM were seen over the right and left side of the neck.

13. On cut section of larynx congestion was seen.

14. On dissection of chest:-

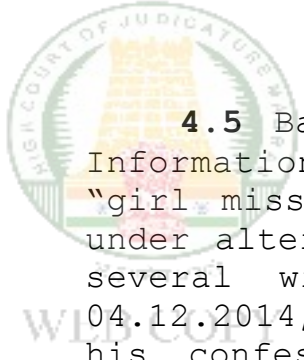
Multiple petechial haemorrhage were seen over the anterior and posterior aspects of heart.

Other findings:-

Peritoneal cavity and pleural cavities - empty, pericardium contains 10 ml of straw coloured fluid - Heart - right side - fluid blood, left side empty, coronaries patent, Lungs, Liver spleen and kidneys - congested. Larynx and trachea - normal; Hyoid bone - intact, stomach - contains 200 gms of cooked rice particles, nil specific smell, mucosa - congested. Small intestine contains 20 ml of bile stained fluid, nil specific smell, mucosa - normal. Bladder - empty; Uterus - described in the injury column normal size, cut section - empty. Brain - surface vessels and cut section congested.

Opinion:-

Reserved pending chemical examination report.



4.5 Based on the postmortem report [EX-P19], the First Information Report, [EX-P13], which was earlier registered for "girl missing", was altered into one under Section 174 Cr.P.C., under alteration report [EX-P23]. On 02.12.2014, the I.O. examined several witnesses, but, did not get any clue. However, on 04.12.2014, he arrested Kumaresan [A-3] at 02.15 p.m. and recorded his confession statement. Pursuant to the disclosure made by Kumaresan [A-3], he recovered the dresses [MO-2 to MO-4] worn by Kumaresan [A-3] and the dresses [MO-5 and MO-6] worn by Robin @ Ravi [A-2] under the cover of mahazar [EX-P6].

4.6 It may be pertinent to refer to MO-4 and MO-6, which are underwears, which were allegedly worn by Robin @ Ravi [A-2] and Kumaresan [A-3] respectively and were found to contain seminal stains. After the arrest of Kumaresan [A-3], the case was altered into one under Section 302 IPC. The I.O. arrested Sundarraaj [A-1] and Robin @ Ravi [A-2] on 04.12.2014 at 06.30 p.m. However, no recovery was effected from them. The vaginal swab and the two underwears with seminal stains were sent to the Tamil Nadu Forensic Science Laboratory for DNA profiling. However, Dr.Thilaka, [PW-23], DNA Expert, has opined that she was not able to extract DNA from the vaginal swab. Thus, there is no scientific evidence in this case to connect the accused with the crime.

4.7 The accused Nos.1 and 2 were produced before Dr.Arunkumar [PW-24], who examined them and gave reports [EX-P15] and [EX-P16] qua Sundararaj [A-1]; EX-P17 and EX-P18 qua Robin @ Ravi [A-2] about their sexual capability and also collected their semen and blood. Dr.Arunkumar [PW-24] noted the following injuries on the body of Sundarraaj [A-1]:-

"1. Reddish brown linear abrasion of size 3 CM X 0.5 CM noted over right forehead.

2. Reddish brown linear abrasion of size 3.2 CM X 0.5 CM noted over left forehead.

3. Reddish brown linear abrasion of size 3 CM x 0.5 CM noted over left cheek.

His secondary sexual characters, scrotum and penis are well developed. Swelling of penis noted".

Dr.Arunkumar [PW-24] also noted the following injuries on the body of Robin @ Ravi [A-2].

"1. Reddish brown linear abrasion of size 3 CM X 0.5 CM noted over right chin.

<https://hcservices.ecourts.gov.in/hcservices/> *2. Reddish brown linear abrasion of size 4 CM X 0.5 CM noted over right chin.*



3. Reddish brown linear abrasion of size 4 CM X 0.5 CM noted over front of right neck in upper part.

4. Reddish brown linear abrasion of size 3 CM X 0.5 CM noted over front of left neck in the middle part.

5. Reddish brown linear abrasion of size 4 CM X 0.5 CM noted over front of right neck in lower part.

6. Reddish brown linear abrasion of size 3 CM X 0.5 CM noted over front of left neck in lower part.

His secondary sexual characters, scrotum and penis are well developed. Swelling of penis noted".

4.8 Similarly, Dr. Juliana Jayanthi [PW-26] examined Kumaresan [A-3] for testing his sexual capability, vide EX-P21. However, no injuries were noted on his body. The report shows that Kumaresan [A-3] is not impotent and is capable of coitus.

4.9 After examining some witnesses, the I.O. filed final report before the Mahila Court, Theni, for the offences under Sections 302 IPC and 6 of the POCSO Act in Special Sessions Case No.52 of 2015. On the appearance of the accused, the provisions of Section 207 of the Code of Criminal Procedure were complied with.

4.10 The Trial Court framed charges against the accused, as detailed in Paragraph No.2, supra. When questioned, the accused pleaded "not guilty". To prove the case, the prosecution examined 35 witnesses, marked 29 exhibits and 14 material objects.

4.11 When the accused were questioned under Section 313 Cr.P.C. about the incriminating circumstances appearing against them, they denied the same. Robin @ Ravi [A-2] has stated that he was taken into illegal custody by the police and his private parts were squeezed to make it appear as if there was swelling. All the accused have stated that they were illegally detained by the police and were beaten while in police custody. Though the arrest card of the accused mentions injuries in the penis, in the remand application, there is absolutely no reference about any injury on the body of the accused and therefore, the remand application was marked as EX-D1 by the defence. No witness was examined on behalf of the accused.

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4.12 The Trial Court, after considering the evidence on record and hearing either side, by Judgment dated 04.10.2018, convicted



the accused, as detailed in Paragraph No.3 supra. Since death sentence has been imposed, the matter is before us for confirmation. As parallel proceedings, Sundararaj [A-1] and Robin @ Ravi [A-2] filed CrI.A.(MD).No.58 of 2019 challenging their conviction and sentence, but, Kumaresan [A-3] did not file any appeal. Therefore, in order to find out as to whether he has engaged any counsel in the referred trial at least, we directed his production before us.

4.13 Kumaresan [A-3] was produced before us on 13.02.2019 and when we enquired him, he stated that he has no means to engage an advocate to defend him either in the Referred Trial or file a separate appeal challenging the Judgment of the Trial Court. Therefore, we appointed Mr.Ma.Karunanithi, [Enrollment No.1346/1995], an advocate of more than 20 years standing at the criminal Bar to defend Kumaresan [A-3]. Thereafter, Mr.Ma.Karunanithi, learned counsel, entered appearance in the Referred Trial for Kumaresan [A-3] and also filed a separate appeal with an application for condoning the delay, which we condoned and the appeal was numbered as "CrI.A.(MD).No.59 of 2019" and is now before us.

5 Heard Mr.A.Natarajan, learned Public Prosecutor for the State, assisted by Mr.K.K.Ramakrishnan and Mr.R.Anandharaj learned Additional Public Prosecutors, Mr.R.Venkateswaran, learned counsel appearing for the accused Nos.1 and 2 and Mr.Ma.Karunanithi, learned counsel appearing for the accused No.3.

6 This case is predicated on circumstantial evidence. As stated above, in this case, we do not have any scientific evidence to connect the accused with the crime. The prosecution has proved beyond cavil that the victim girl was subjected to sexual abuse and was murdered and thereafter, thrown into the well of Ponmadasamy [PW-28].

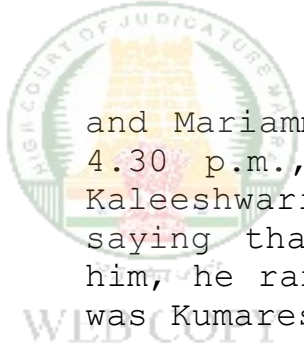
7 The moot question that emerges for consideration of this Court is whether the appellants are the perpetrators of this ghastly crime.

8 The entire case of the prosecution rests on the evidence of Palpandi [PW-6], Karuppan [PW-9] and Aandavar [PW-19], who had allegedly seen the victim in the company of the accused in the evening of 01.12.2014.

9 The second set of evidence is that of Velmurugan [PW-10] and Easwaran [PW-18] who had allegedly seen the accused coming out in a hurry from the farm of Ponmadasamy [PW-28] around 07.00 p.m. on 01.12.2014 and the suspicious conduct of the accused.

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10 The third set of evidence is that of Arumugakani [PW-11]



and Mariammal [PW-12], who have stated that on 02.12.2014, around 4.30 p.m., a boy, aged about 20 years, came to the house of Kaleeshwari [PW-1] and asked for the photograph of the victim girl saying that he needs it for searching her; when they upbraided him, he ran away; thereafter, they learnt that the name of the boy was Kumaresan [A-3].

11 The fourth piece of evidence for fixing the place of occurrence is the evidence of Beula [PW-8], who has stated that she gave a rose flower to the victim girl on 01.12.2014 around 04.30 p.m. and the said rose flower was found near the well after the arrest of the accused on 04.12.2014.

12 The last set of evidence is that of Dr.Arunkumar [PW-24] and Dr.Juliana Jayanthi [PW-26], who had examined the accused and had found injuries on Sundararaj [A-1] and Robin @ Ravi [A-2] and had certified that all the accused are capable of sexual intercourse.

13 While appreciating a case based on circumstantial evidence, we are required to bear in mind the Constitution Bench judgment of the Supreme Court in **Govinda Reddy vs. State of Mysore**¹, the relevant passage of which is extracted below:

"5. The mode of evaluating circumstantial evidence has been stated by this Court in Hanumant Govind Nargundkar v. State of Madhya Pradesh [AIR 1952 SC 343] and it is as follows:

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

14 Bearing in mind the aforesaid passage, we now analyse the evidence of those witnesses, who had allegedly seen the victim

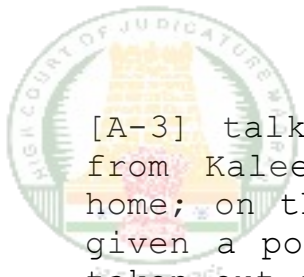


girl with the accused prior to the incident and post the incident. Palpandi [PW-6] has stated that on 01.12.2014, around 05.00 p.m., while he was returning from work along with one Kamaraj [not examined], Karuppan [PW-9] and Aandavar [PW-19], he saw Sundararaj [A-1] and Robin @ Ravi [A-2] standing and speaking to each other in Veppampat Road; he asked them as to why they were standing and talking there, for which they said nothing; a little away from them, he saw Kumaresan [A-3] talking to the victim girl; thereafter, he (PW-6) went to his house and came to know that the victim girl had gone missing; he also learnt that the body of the victim girl was found on the next day, at 06.00 p.m. in the well of Ponmadasamy [PW-28].

15 The statement of Palpandi [PW-6] was recorded on 03.12.2014 and his further statement was recorded on 11.12.2014 and both the statements reached the Court only on 16.10.2015. In the cross-examination, he has admitted that he is from the same village and he is a close relative of Kaleeshwari [PW-1]. He has also admitted that he was aware that the victim girl had gone missing. However, he has stated in the cross-examination that till the police examined him, he did not tell anyone that he saw Kumaresan [A-3] talking to the victim girl on 01.12.2014 around 05.00 p.m.

16 Karuppan [PW-9] has stated that on 01.12.2014, between 04.30 and 05.30 p.m., while he, along with Palpandi [PW-6] and Kamaraj [not examined], was returning home, he saw the victim girl talking to Kumaresan [A-3] near the farm of Ponmadasamy [PW-28]; he also saw Sundararaj [A-1] and Robin @ Ravi [A-2] sitting in a house nearby; in the evening, he learnt from Kaleeshwari [PW-1] that the victim girl had not returned home, after she had gone out to play. In the examination-in-chief, he has further stated that when Kaleeshwari [PW-1] enquired him about the whereabouts of her daughter, he stated that the victim girl will be in the house itself. It is pertinent to note here that even at that time, he did not say that he saw the victim girl talking to Kumaresan [A-3]. He has deposed that the body of the girl was taken out from the well of Ponmadasamy [PW-28] on the next day and he also went and saw it. He was examined by the police on 03.12.2014 and his statement reached the Court on 16.10.2015. In the cross-examination, he has stated that till he was examined by the police, he did not reveal to anyone that he saw the victim girl on 01.12.2014 talking to Kumaresan [A-3]. He has also admitted that Kaleeshwari [PW-1] is his close relative.

17 Now, coming to the evidence of Aandavar [PW-19], he has stated that on 01.12.2014, around 04.00 p.m., while he was returning home along with Palpandi [PW-6], Kamaraj [not examined] and Karuppan [PW-9], he saw Sundararaj [A-1] and Robin @ Ravi [A-2] near the farm of Ponmadasamy [PW-28]; he also saw Kumaresan

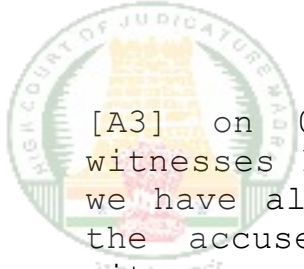


[A-3] talking with the victim girl; on the same day, he learnt from Kaleeshwari [PW-1] that the victim girl has not returned home; on the next day, he came to know that Kaleeshwari [PW-1] had given a police complaint and the dead body of the victim girl was taken out from the well of Ponmadasamy [PW-28].

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18 In the examination-in-chief, Aandavar [PW-19] has clearly stated that even on 01.12.2014, he saw the victim girl in the company of the accused, but, he did not tell anyone about the same. Only after the dead body of the victim girl was taken out from the well, he learnt that she was raped and murdered and he informed the police about what he had seen on 01.12.2014. In the cross-examination, he has admitted that the victim girl was his niece. When we carefully analyse the evidence of Palpandi, [PW-6], Karuppan [PW-9] and Aandavar [PW-19], we find that Palpandi [PW-6] has stated that he saw the victim girl talking to Kumaresan [A-3] around 05.00 p.m. near Veppampat Road, whereas, Karuppan [PW-9] has stated that he saw Kumaresan [A-3] talking to the victim girl between 04.30 p.m. and 05.30 p.m., near the farm of Ponmadasamy [PW-28] and that Sundararaj [A-1] and Robin @ Ravi [A-2] were sitting in a house nearby. Aandavar [PW-19] has stated that he saw Kumaresan [A3] talking to the victim girl around 04.00 p.m. near the farm of Ponmadasamy [PW-28], whereas, the charge against the accused shows that the victim girl had left her house on 01.12.2014 only at 05.30 p.m. to go to her elder maternal aunt's house. We are aware that a rustic witness cannot be expected to give the timings correctly, because, no one would consult his watch on every occasion anticipating that he/she may be required to give evidence later. However, what we are surprised to find is that all these three witnesses viz., Palpandi, [PW-6], Karuppan [PW-9] and Aandavar [PW-19], are relatives of the victim girl and are also known to the accused. They were aware that the victim girl had gone missing in the evening of 01.12.2014. They also joined Kaleeshwari [PW-1] in the search of the victim girl. However, none of them had taken any step to find out from the accused about the whereabouts of the victim girl. It must be remembered that the accused are also from the same village and they are not strangers to the family of the victim girl or to the said witnesses. The accused also did not abscond from the village. In fact, it is the case of the prosecution that Kumaresan [A3] even came to the house of the victim girl on 02.12.2014 in the evening and asked for a photograph of hers for tracing her. From this, it is obvious that Kumaresan [A3] was in the village even after 01.12.2014.

19 It is not the case of the prosecution that after the incident, the accused absconded. Strangely, all these witnesses have not even informed the police only after three days of the occurrence that they saw the victim girl talking to Kumaresan

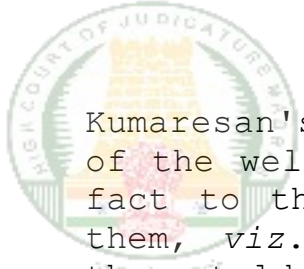


[A3] on 01.12.2014 in the evening. The statements of these witnesses have reached the Court only on 16.10.2015, about which, we have alluded to above. Even there is no material to show that the accused were close friends. The evidence of these three witnesses show that Sundararaj [A1] and Robin @ Ravi [A2] were talking to each other at a particular spot and Kumaresan [A-3] was talking to the victim girl a little away from it. Just because Kumaresan [A-3] was talking to the victim girl in the evening of 01.12.2014, we cannot draw an inference that all the three accused had abducted the victim girl or taken her to the farm of Ponmadasamy [PW-28], sexually abused her, murdered her and dumped her body in the well. Thus, these evidences are insufficient for us to draw such an enormous inference.

20 Coming to the evidence of Velmurugan [PW-10] and Easwaran [PW-18], they have stated that around 07.00 p.m., on 01.12.2014, they saw all the three accused coming out of the farm of Ponmadasamy [PW-28] and on seeing them, the accused took to their heels. In the cross-examination, they have admitted that they are related to the victim girl. They have also stated that they knew that the victim had gone missing on 01.12.2014 and Kaleeshwari [PW-1] was searching for her. They have further stated that they knew that the body of the victim girl was taken out from the well of Ponmadasamy [PW-28] on the next day. However, they have stated that they informed the police as to what they saw on 01.12.2014 only on 04.12.2014, after the arrest of the accused and their statements had reached the Court only on 16.10.2015. The evidences of these two witnesses do not inspire the confidence of this Court to mulct such a huge criminal liability on the accused.

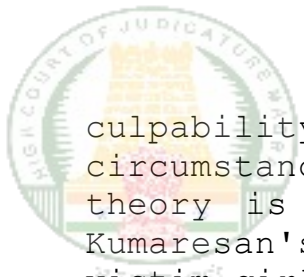
21 To add icing to the cake of the prosecution story, we find that Velmurugan [PW-10], Easwaran [PW-18] and Andavar [PW-19], have been named as the panchayatdars in the inquest report dated 03.12.2014 [EX-P24] and they have also signed in it. While that being so, it is indeed strange that even at the time of the inquest, these witnesses did not tell the police that one of them saw Kumaresan [A-3] talking to the victim girl at 5.00 p.m. on 01.12.2014 and the other two saw the three accused coming out of the farm of Ponmadasamy [PW-28] around 7.00 p.m. on the same day, in a hurry and taking to their heels on seeing them.

22 At the risk of repetition, Palpandi [PW-6], Karuppan [PW-9] and Andavar [PW-19] have stated that they saw Kumaresan [A-3] talking to the victim girl on 01.12.2014 between 4.30 p.m. and 5.30 p.m.; later, they learnt from Kaleeshwari [PW-1] that the victim girl did not return home and so, they joined Kaleeshwari [PW-1] in the search. They are all related to Kaleeshwari [PW-1]. Under such circumstances, the first thing that they all would have done was to go to the house of Kumaresan [A-3] in the same village and enquire. None of them did that. They did not suspect



Kumaresan's [A-3's] involvement even after the body was taken out of the well on the evening of 02.12.2014. They did not tell this fact to the police during the inquest on 03.12.2014 when one of them, viz., Andavar [PW-19] was the panchayatdar himself. But, they told the police only on 04.12.2014 and their statement reached the Court on 16.10.2015. Therefore, we are not able to place any reliance on the testimony of these three witnesses. Same is the case with regard to the evidence of Velmurugan [PW-10] and Easwaran [PW-18] who have stated that they saw all the three accused coming out of the farm of Ponmadasamy [PW-28] around 7.00 p.m. on 01.12.2014 and running away on seeing them. These witnesses were present when the body was taken out of the well located in the farm of Ponmadasamy [PW-28] on 02.12.2014. They did not tell the police even during inquest though Velmurugan [PW-10] and Easwaran [PW-18] were the panchayatdars in the inquest that was held on 03.12.2014. They told this fact to the police only on 04.12.2014 and their statements have reached the Court only on 16.10.2015. It is nobody's case that all the accused were absconding from the village. In fact, it is the specific case of the prosecution that Kumaresan [A-3] even came to the house of Kaleeshwari [PW-1] on 02.12.2014 and asked for the photograph of the victim girl. Under such circumstances, the failure of these five witnesses, or at least the three witnesses who had allegedly seen Kumaresan [A-3] talking to the girl prior to the occurrence, to inform Kaleeshwari [PW-1] or the police about this before 04.12.2014 makes us disbelieve their testimonies.

23 Coming to the third set of evidence referred to in paragraph no.10 above, Arumugakani [PW-11] and Mariammal [PW-12] have stated that they are relatives of the victim girl and on 02.12.2014, they were in the house of Kaleeshwari [PW-1] to join her in the search of the victim girl. They have further stated that around 4.30 p.m., a boy aged about 20 years, came to the house of Kaleeshwari [PW-1] and asked for the photograph of the victim girl saying that he needs it for searching her; when they got angry with him for asking the photograph of the victim girl, he fled; thereafter, they learnt from others that the name of that boy was Kumaresan [A-3]. We are unable to fathom as to how this piece of evidence, even if it is believed by us, would link Kumaresan [A-3] with the crime, much less Sundararaj [A-1] and Robin @ Ravi [A-2]. When according to the prosecution, all the three accused are also from the same village, where is the necessity for Kumaresan [A-3] to ask for the photograph of the victim girl for tracing her? Assuming for a moment that Kumaresan [A-3] had asked for the photograph of the victim girl for the purpose of showing it to others in and around the locality for tracing her, we cannot attribute ulterior motives unless there are circumstances to incriminate him in the offence, in which event, we may draw an inference that after committing the ghastly crime, he wanted to create a smoke screen for hiding his



culpability. However, the evidence to establish the two circumstances, viz., the last seen theory and the post occurrence theory is so weak that we cannot draw an adverse inference on Kumaresan's [A-3's] conduct of asking for the photograph of the victim girl.

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24 Now, turning to the injuries found on the body of Sundararaj [A-1] and Robin @ Ravi [A-2], according to the police, they found injuries on their body at the time of arrest. Had it been so, Sundararaj [A-1] and Robin @ Ravi [A-2] should have been produced before a medical practitioner under Section 53-A Cr.P.C. on 04.12.2014 itself and instead, they were produced before Dr.Arunkumar [PW-24] on 06.12.2014. It is pertinent to note that the injuries found on the body of Sundararaj [A-1] and Robin @ Ravi [A-2] were also not referred to in the remand application [EX-D1]. The accused have given explanation that when they were questioned under Section 313 Cr.P.C, after they were arrested, the police had beaten them and Robin @ Ravi [A-2] has specifically stated that his private part was squeezed to make it appear as if there was a swelling. Assuming for a moment that the accused had suffered swelling in their private parts when they sexually abused the victim girl on 01.12.2014, the swelling would not have been there till 06.12.2014, when they were examined by Dr.Arunkumar [PW-24]. It must be remembered that according to the police, the accused were arrested on 04.12.2014 and produced before the remanding Magistrate on the same day and only on 06.12.2014, the accused were produced from the prison to the hospital for examination by Dr.Arunkumar [PW-24].

25 Dr.Arunkumar [PW-24], in his evidence as well in the medical examination report, has not stated whether the accused had undergone circumcision or about the presence of smegma in their private parts. When he was confronted in the cross-examination, he admitted that he had not specifically noticed about these two aspects. We are at a loss to understand as to how Dr. Arunkumar [PW-24] had failed to note these vital aspects and from the answers given by him, it appears to us that he has conducted the examination in a cavalier manner. However, he has admitted that the swelling in the penis can occur, if a person masturbates violently. Therefore, merely based on the injuries found in the private parts of the accused on 06.12.2014, we are unable to conclude that they had committed rape on the victim girl on 01.12.2014. Three linear abrasions and six linear abrasions have been noted on the body of Sundararaj [A-1] and Robin @ Ravi [A-2] respectively by Dr. Arunkumar [PW-24], based on which, the prosecution wants us to infer that a V standard girl of puny physique would have caused those abrasions on the bodies of Sundararaj [A-1] and Robin @ Ravi [A-2] during her struggle with these two well-built men. This appears to be too large a pill for us to swallow.



26 Though the victim girl and the accused are Dalits, it was the consistent defence of the accused that they belong to a different caste and on account of rivalry between the two castes in the village, this case has been foisted on them by the people of the other caste. We are merely referring to this defence taken by the accused without anything more.

27 Though Section 29 of the POCSO Act casts a reverse burden on the accused, yet, to invoke that, there should be some minimum satisfactory evidence to connect the accused with the crime. The evidence in this case is too fragile even to confirm the conviction, much less to uphold the death sentence.

28 In view of the foregoing discussion, we hold that the prosecution has failed to prove the charges against the accused, though it is apparent that a heinous crime has been committed on a hapless girl.

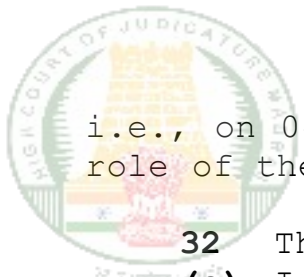
29 In the result, R.T.(MD).No.3 of 2018 is answered as under:-

(i) CrI.A.(MD).Nos.58 and 59 of 2019 filed by the appellants/accused Nos.1 to 3 are allowed and the conviction and sentence slapped on them, vide Judgment dated 04.10.2018 in Special S.C.No.52 of 2015, on the file of the learned Sessions Judge, Mahalir Neethimandram, Theni, are set aside and they are acquitted of the charges framed against them.

(ii) Since the appellants/accused are in jail, they are directed to be set at liberty forthwith, unless their detention is authorized in connection with any other case.

30 Before parting with the matter, we wish to add that we cannot afford to put this case to rest after acquitting the accused, because, while we were casually scanning the original records, we found that the police have recorded the Sec. 161(3) Cr.P.C. statements of some important witnesses on 03.12.2014 and 11.12.2014, but, these statements have reached the Court only on 16.10.2015. Therefore, we smelt a rat and pored over the original records only to unearth a pandora's box, from which, damning facts came to light.

31 We found that the Investigating Officer has recorded by hand, the Sec. 161(3) Cr.P.C. statements of five witnesses, viz., (i)Easwaran, S/o Azhagiri, (ii) Lakshmanan, S/o Baluchamy, (iii)Lalitha, W/o Easwaran, (iv)Ramuthaai, W/o Marimuthu and (v) Arumugakan, W/o Thangapandian, on 04.12.2014 and the statements of these five witnesses have reached the Court on the same day,



i.e., on 04.12.2014 itself, wherein, a different version about the role of the accused has been stated.

32 This can be expatiated as under:

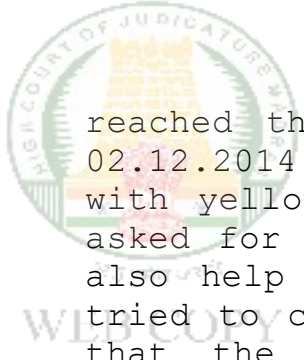
(a) In the hand written statement of Easwaran, S/o Azhagiri, it is stated that on 02.12.2014, at 9 a.m., the said witness saw Robin @ Ravi [A-2] and Kumaresan [A-3] peeping into the well curiously, from where, the body of the victim girl was taken out in the evening. Whereas, in the computer recorded statement dated 03.12.2014, it is stated that the said witness saw Sundararaj [A-1], Robin @ Ravi [A-2] and Kumaresan [A-3] coming out of the farm of Ponmadasamy [PW-28] on 01.12.2014 at 7.00 p.m. and after seeing him, they started running. This computer recorded statement has reached the Court only on 16.10.2015. This witness was examined as P.W.18 and he stuck to the version given by him in the computer recorded statement. It may be recollected that this witness was one of the panchayatdars in the inquest who never said anything to the police then.

(b) In the hand written statement of Lakshmanan, S/o Baluchamy, it is stated that on 02.12.2014, at 9.00 a.m., the witness saw Robin @ Ravi [A-2] and Kumaresan [A-3] peeping into the well curiously, from where, the body of the victim girl was taken out in the evening. This statement has reached the Court on 04.12.2014. But, this witness was not examined in the trial.

(c) In the hand written statement of Lalitha, W/o Easwaran, it is stated that on 03.12.2014, at 10.30 a.m., Kumaresan [A-3] came to the house of Kaleeshwari [PW-1], the mother of the victim girl, for condoling the death and asked for the photograph of the victim girl; riled at that request, when they wanted to catch him, he ran away. This hand written statement has reached the Court on 04.12.2014. But, this witness was not examined in the trial.

(d) In the hand written statement of Ramuthai, W/o Marimuthu, it is stated that on 03.12.2014, at 10.30 a.m., Kumaresan [A-3] came to the house of Kaleeshwari [PW-1], the mother of the victim girl, for condoling the death and asked for the photograph of the victim girl; riled at that request, when they wanted to catch him, he ran away. This hand written statement has reached the Court on 04.12.2014. But, this witness was not examined in the trial.

(e) In the hand written statement of Arumugakani [PW-11], it is stated that on 03.12.2014, at 10.30 a.m., Kumaresan [A-3] came to the house of Kaleeshwari [PW-1], the mother of the victim girl, for condoling the death and asked for the photograph of the victim girl; riled at that request, when they wanted to catch him, he ran away. This hand written statement has reached the Court on 04.12.2014. We found a computer typed statement of Arumugakani [PW-11] which has been recorded on 11.12.2014, but, which has



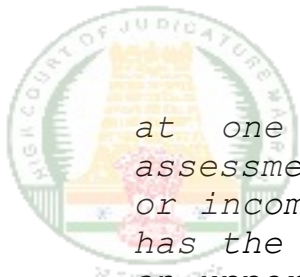
reached the Court on 16.10.2015, wherein, it is stated that on 02.12.2014 around 5.00 p.m., a person wearing a blue colour shirt with yellow stripes, came to the house of Kaleeshwari [PW-1] and asked for the photograph of the victim girl saying that he would also help them in the search; riled at that request, when they tried to catch him, he ran away; from the neighbours, she learnt that the said person was Kumaresan [A-3]. Arumugakani was examined as PW-11 in the trial and she stuck to the version given in the computer typed statement.

33 It is indeed very unfortunate that the Trial Court, the Public Prosecutor and the defence counsel have all miserably failed to plod through the original records of the case. Had, at least, the defence counsel noticed these conflicting versions in the prosecution case, these contradictions could have been proved during the examination of the witnesses and the I.O. The defence could have even taken steps to examine Lakshmanan, Lalitha and Ramuthai to demolish the prosecution story that the accused were seen coming out of the farm of Ponmadasamy [PW-28] on 01.12.2014 at 7.00 p.m.

34 This is a matter of great concern for us and we are afraid that that we are not able to make available quality legal service for the underprivileged accused like the appellants herein who are all Dalits and who would not have had the wherewithal to engage top-notch advocates. That is precisely the reason as to why Kumaresan [A-3] did not even choose to prefer an appeal against the death sentence slapped on him and when we brought him before our Court and questioned him, he simply told us that he is hard pressed for money to defend himself and said stoically that he would rather suffer capital sentence, as if it is his destiny. Therefore, we nominated Mr.Ma. Karunanithi, about which, we have alluded to above. In this country, the rich are able to get the best legal brains and a successful criminal lawyer today is one who is endowed with the ability to suborn witnesses or protract the trial till the witnesses are won over. The poor are left to fend for themselves with poor quality legal service and eventually, justice becomes the biggest casualty in the game of litigation. In the United Kingdom, the Legal Services Board formulated a scheme titled "Quality Assurance Scheme for Advocates" (for brevity "the QASA") after conducting an extensive study on the quality of the advocates in the Criminal Bar. The QASA envisaged periodical appraisal of the competency of the advocates practising on the Criminal Side and an advocate who fails the QASA appraisal will not be permitted to defend prisoners charged with capital offence. The QASA was challenged before the U.K. Supreme Court in **R. v. Legal Services Board** and the challenge was dismissed on 24.06.2015 by observing as under:

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

114. The core feature of the scheme is that every criminal advocate without exception, who wishes to practise



at one of the upper levels, must undertake judicial assessment at the outset. No criminal advocate, competent or incompetent, can slip through that net, and every client has the protection that whoever represents him in a case at an upper level will have been subject to such assessment."

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35 In this case, the defence counsel in the Trial Court did not notice the destructive nature of the Sec.161(3) Cr.P.C. statements of the five witnesses referred to above that were available on record, which is evident from the fact that there has not been any cross-examination of the Investigating Officer on this vital aspect. This is a classic case where the accused, facing a charge of rape and murder, were deprived of quality legal assistance, resulting in the Trial Court believing the prosecution story and sentencing them to death. Alas, what trauma they must have undergone! It is time for the Bar Council of India to bestow its attention on this grey area and take effective steps to address this malady.

36 We have not relied upon these contradictions to set at naught, the verdict of the Trial Court, because, we are aware that these statements are not substantive evidence and can be used only for the purpose of contradiction in the manner laid down in Section 145 of the Evidence Act. However, the power of this Court to go through the case diary under Section 172 Cr.P.C. and read the statements in order to find out the course of investigation cannot be whittled down.

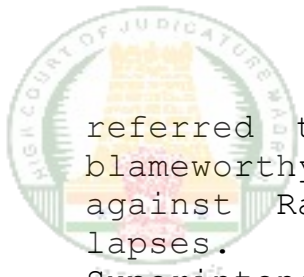
37 In this case, we did not go through the case diary, but, went through only the original records available in the Court, from which itself, we have been able to ferret out a can of worms. Small wonder, we would have noticed a worm pit had we accessed the case diary. We are convinced beyond any speck or shred of doubt that the investigation of this case was not only perfunctory but also blameworthy. In this context, it is apropos to quote the following passages from the judgment of the Supreme Court in **State of Gujarat vs. Kishanbhai and others**²:

"19 Every time there is an acquittal, the consequences are just the same, as have been noticed hereinabove. The purpose of justice has not been achieved. There is also another side to be taken into consideration. We have declared the respondent-accused innocent, by upholding the order of the High Court, giving him the benefit of doubt. He may be truly innocent, or he may have succeeded because of the lapses committed by the investigating/prosecuting teams. If he

It is
hand

In the facts and circumstances of this case, we direct the Superintendent of Police, Theni, to conduct an enquiry on the issues noticed by us and also find out from the case diary as to whether there has been any attempt to shield the real culprit(s).

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referred to in paragraph nos.30 to 33 above are indubitably blameworthy and not innocent. We suggest departmental action against Rajaraman [PW-35], Inspector of Police for the said lapses. The Trial Court shall make available to the Superintendent of Police, Theni, copies of the relevant documents required by him for the enquiry. Further, we direct the State Government to pay a compensation of Rupees Five lakhs to Kaleeshwari [PW-1], mother of the victim girl, within a period of three months from the date of receipt of a copy of this judgment.

Sd/-

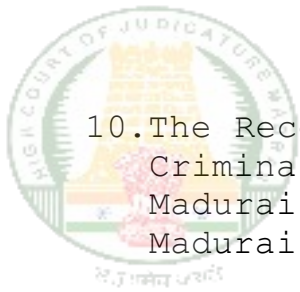
Assistant Registrar (CS-III)

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Sub Assistant Registrar (CS)

To

- 1.The Sessions Judge, (Full In charge) Mahila Court
(Fast Track Court), Theni.
2. The Chief Secretary to Government of Tamil Nadu,
Fort St. George, Chennai 600 009.
- 3.The Director General of Police,
Mylapore, Chennai -4
- 4.The District Collector, Theni
5. The Superintendent of Police, Theni District.
- 6.The Superintendent, Central Prison, Madurai
- 7.The Inspector of Police
Odaipatti Police Station
Uthamapalayam Taluk, Theni District.
8. The Bar Council of India
21, Rouse Avenue, institutional Area
Near Bal Bhawan, Delhi 110 002.
- 9.The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.



10.The Record Keeper, (2 copies)
Criminal Records Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.R.VENKATESWARAN, Advocate (SR-56466[F] dated
25/03/2019)

+1 cc to Mr.M.Karunanithi , Advocate SR.No.55998

nb/cad

**COMMON JUDGMENT MADE IN
R.T. (MD) No.3 of 2018
and
Cr1.A. (MD) Nos.58 and 59 of 2019
21.03.2019**

KM/ (10.04.2019) 21P 14C