



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Judgment Reserved on : 23.11.2021
Judgment Pronounced on : 10.12.2021

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CORAM:

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN
and
THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Crl.A(MD)No.337 of 2020
and
Crl.M.P(MD)No.6039 of 2020
and
Crl.A(MD)No.142 of 2021

Crl.A(MD)No.337 of 2020

State represented by
The Public Prosecutor,
High Court, Madras 104.
(Crime No.170/2019 on the file
of the Vadamadurai P.S.
Dindigul District)

... Appellant/Complainant

Vs.

Kirubanandam

... Respondent/Sole Accused

PRAYER: The Criminal Appeal is filed under Section 378(3) of the Code of Criminal Procedure, to allow the appeal and set aside the judgment of acquittal of the respondent/accused passed by Sessions Court/Fast Track Mahila Court, Dindigul in Spl. S.C.No.29 of 2019, dated 29.09.2020.

For Appellant : Mr.A.Thiruvadikumar
Additional Public Prosecutor
For Respondent : Mr.D.Remeshkumar
for Mrs.S.Prabha

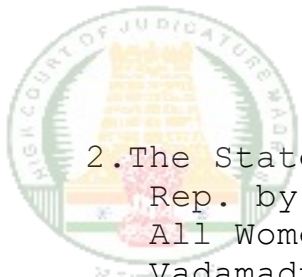
Crl.A(MD)No.142 of 2021

V.Venkadachalam

... Appellant/Defacto Complainant

Vs.

... Respondent-1/Accused



2.The State,
Rep. by the Inspector of Police,
All Women Police Station,
Vadamadurai,
Dindigul.

... Respondent-2/Complainant

PRAYER: The Criminal Appeal is filed under Section 378 of the Code of Criminal Procedure, to call for the records and to allow the above appeal by setting aside the judgment dated 29.09.2020 passed in Spl.S.C.No.29 of 2019, on the file of the Sessions Court/Fast Track Mahila Court, Dindigul.

For Appellant : Mr.T.Arul

For R1 : Mr.D.Remeshkumar
for Mrs.S.Prabha
For R2 : Mr.A.Thiruvadikumar
Additional Public Prosecutor

COMMON JUDGMENT

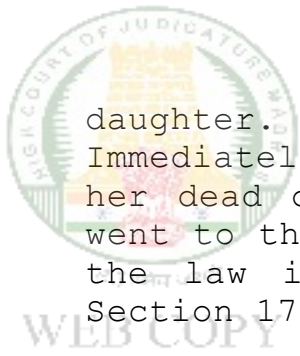
S.VAIDYANATHAN, J.
and
DR.G.JAYACHANDRAN, J.

The sole accused in Spl.S.C.No.29/2019 was acquitted from charges of offence under Section 302 IPC and section 5(m) r/w 6 of POCSO Act by the trial Court vide judgement, dated 29/09/2020. Being aggrieved by the judgment of acquittal, the State, represented by the Public Prosecutor, as well as the father of the victim minor girl are before this court as appellants in Crl.A (MD).No: 337/2020 and Crl.A.(MD)No: 142/2021 respectively.

2. The case of the prosecution unfurls in the following manner:

(i) The victim minor girl aged about 12 years, was at home during the summer vacation after completing her 7th standard. Her father is a laundry worker and mother is an agricultural coolie. On 16/04/2019, To eke out their livelihood, at about 7.00 am, her father left for his shop. Thereafter, her mother left for 100 days work scheme. The victim girl went to the PDS shop along with one Marimuthu and returned home after buying rice. At about 5.00 pm, when the mother returned home from work, she found her daughter in the bedroom lying with bleeding injuries over her body. Her dress was irregular, shimmies missing. A live electrical wire inserted into her nose and mouth. Blood stains and coins were

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daughter. Then she realised that her daughter is dead. Immediately, she called her husband. Her husband came home and saw her dead daughter lying in the bedroom as narrated above. So he went to the Vadamadurai Police Station, lodged a complaint and set the law into motion. Initially, the case was registered under Section 174 Cr.P.C as suspicious death.

(ii) Subsequently, the police during investigation found that the perpetrator of the crime is a lad, aged few months less than 18 years, living next to the victim's house. Accordingly, the charges were altered into Section 302 IPC and Section 5(m) r/w 6 (1) of POCSO Act. The accused was secured on 26/04/2019, being a juvenile conflict in law, he was produced before the Juvenile Justice Board at Dindigul. The accused was sent to observation Home.

(iii) On completion of investigation, final report was filed before the Fast Track Mahila Court, Dindigul against the accused and same was taken on file in Spl.S.C.No.29/2019. Charge u/s 449 IPC, 302 IPC , 5(m) r/w 6 of POCSO Act framed. To prove the charges, prosecution examined 35 witnesses and marked 26 exhibits, 9 material objects. The trial court on appreciation of evidence held the charges not proved beyond doubt and acquitted the accused.

3. The appeals against acquittal by the State and the father of the victim girl are on the ground that the trial court failed to consider the overwhelming evidence against the accused placed before it by the prosecution.

4. The evidence of Deepalakshmi (PW-10) who saw the accused coming out of the deceased house and noted his conduct while she was attending her nature call, erroneously disbelieved by the trial court on the ground that a lady will not come out to relieve herself in open during daytime, when there is a toilet in her house.

5. The extra judicial confession of the accused to the District Child Welfare Officer (PW-25) admitting his guilt was totally overlooked by the trial court for the reason that PW-25 is not trustworthy witness as she had not produced the notes taken down by her while counselling the accused. The trial court, ignoring the statutory presumption under section 29 of POCSO Act, inspite of the DNA matching of the blood stain found in the trouser (MO.5) of the accused and the victim blood, acquitted the accused for reasons not legally tenable.

6. The accused, after committing the crime of penetrative sexual assault on the minor victim girl, fearing that she will



disclose it to others strangled her to ensure the death of the victim girl and inserted live wire into her mouth and nose. PW-19 the mother of the victim and others when saw the victim, wire inserted into mouth and nose initially thought she died due to electrocution.

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7. The trial court erred in holding that the death of the victim was due to asphyxia as per the opinion of the post mortem doctor and not by electrocution as mentioned in the charge sheet filed by the Investigating Officer before the court on 23/07/2019, therefore the prosecution fails. In fact, the accused was charged for offence under section 302 IPC. In the charge read to him narrates the acts committed by the accused which has lead to the death of the victim girl. The opinion of the doctor for the cause of death is "died of asphyxia due to compression of air passage by ligature material on the external aspect of neck". The trial court failed to note the external injuries of charred wounds over the left side of lower and upper lip which was caused due to electrocution is mentioned in the post mortem report Ex P-14.

8. Defending the trial court judgment, the learned counsel for the respondent/accused submitted that it is a case of circumstantial evidence. The presence of PW-10 at the time of occurrence rightly disbelieved by the trial court because, she did not disclose immediately about her witnessing the accused coming out of the victim house. She is a planted witness by the prosecution to falsely fix the accused. She is not the resident of the street. When her house has a toilet, she need not come to a distant place to relieve in open.

9. According to the prosecution, the complaint in this case was received from Venkatachalam, the father of the victim girl on 16.04.2019 at 20.00 hours. Based on the complaint, it is alleged that the FIR Ex.P15 was registered on the same day, however, FIR along with the complaint were forwarded to the learned Judicial Magistrate No.I, Dindigul only on 23.04.2019 and received by the Magistrate in the open Court at 03.00 p.m. The delay of 8 days in forwarding the FIR to the Magistrate in respect of case registered under Section 174 Cr.P.C., renders the prosecution case highly doubtful.

10. It is pointed out by the learned counsel for the respondents/accused that the Observation Mahazar (Ex.P2) and Inquest Report (Ex.P18) alleged to have been prepared on 16.04.2019 and 17.04.2019 did not disclose anything regarding P.W.10 Deepalakshmi seeing the accused coming out from the victims house on the date of incident. The arrest of the accused on 26.04.2019 and the alleged recovery of Material Objects 4 to 6 from the residence of the accused is highly doubtful. Further



more, the presence of blood in M.O.4, had not been found in the recovery mahazar. Surprisingly, DNA report (Ex.P.23) discloses the presence of blood in the trouser M.O.5 and the blood matches with the blood of the victim.

11. The trial Court has rightly taken note of the fact that the possibility of blood stain after lapse of more than 10 days without disintegration is not possible. Therefore, the learned counsel for the respondent/accused submitted that when two reasonable views are possible, the view in favour of the accused has to be accepted. Following the said principles, the trial Court has acquitted the accused, who was fixed in this case to avoid the __murmur of villagers. It was submitted that the respondent/accused has ensued with double benefit namely the benefit of doubt and the judgment of acquittal by the trial Court. Therefore, the order of acquittal may be confirmed.

12. Heard the submission made by the learned Additional Public Prosecutor for the State, the learned counsel for the private appellants and the learned counsel for the respondent/accused.

13. This is a case based on circumstantial evidence. The evidence which incriminate the accused are:-

i) PW-12, is a close relative of the accused and a resident of the Vadasandur Kurumbapatti Village near the house of the accused and the deceased. In her testimony she had deposed that on 16/04/2019 at about 7.30 am, the accused and her brother went to Dindigul to deliver colostrum (rPk;ghy;) at her uncle house. Her brother returned home at about 10.00 am., when she enquired about the accused, her brother told, the accused got down at his house. Later in the day, at about 2.30 pm, the accused came to her house. She requested the accused to drop her at Ayyalur bus stop. He agreed and went to his home. At about 3.30 pm, she called the accused over phone, and at about 5.00 pm the accused and her brother took her to Ayyalur bus stop and boarded her to Dindigul. The mother of the victim girl used to complaint to her about the accused, that the accused and his friends take liquor near to her house. The activities of the accused cause fear. She is afraid of her daughter's safety.

ii) PW-10, is the star witness to the prosecution. She in her deposition had stated that, on 16/04/2019, after attending her 100 days scheme job, she returned home at about 3.00 pm. On that day, she was suffering from dysentery, so to attend the nature's call she went to the bush behind the deceased house and was relieving. At about 3.30 pm, she saw the accused coming out from the deceased house. He looked around all the four directions and moved. At about 5.30 pm, she heard a huge noise near the deceased house. She



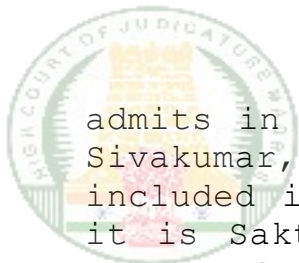
went to 'X' house and saw her dead. She saw blood stains on the floor of the room. In the mouth and nose of 'X', wire was found inserted. Her nose was bleeding. Her skirt raised and her under garment soaked with blood.

iii) PW-15, VAO of the neighbouring village, has signed as witness in the confession statement of the accused recorded on 26/04/2019. In the seizure mahazar for the recovery of the T-shirt, trouser (M.O.5) and kerchief produced by the accused from his house, he has signed as witness. He has deposed about the confession of the accused and the discovery of fact based on the confession.

iv) P.W.25, the District Child Welfare Officer testimony that on 27/06/2019 at the request of the Judicial Magistrate presiding over the Juvenile Justice Board counselled the accused. To her, he confessed about his guilt of committing the crime and same was recorded by her. The report of PW-25 which is marked as Ex P-11, narrates the disclosure of fact by the accused.

v) P.W-24, Scientific Officer's deposition and his serology report Ex.P-10 which has detected blood in the red colour underwear (M.O.5) of the accused and the deposition of PW-34, the Assistant Director of Forensic Laboratory at Chennai, regarding the DNA mapping test conducted on the blood samples collected from the accused underwear M.O.5. The DNA report Ex P-22 matches the DNA of the blood found in M.O.5 with the DNA mapping of the biological parents of the deceased. The blood found in M.O.5 belongs to a female and it is the blood of the deceased since it tallies with the DNA of her biological parents.

14. When all the circumstantial evidences were duly proved beyond doubt, thereby pointing out the needle of guilt towards the accused alone the Court need not be hesitant to hold him guilty. In the instant case, PW-10, PW-12 are the witnesses who have deposed about seeing the accused on the date of incident, the place and the time they saw him. Two witnesses namely the father (PW-1) and mother (PW-19) of the victim girl had deposed that on the date of incident, the deceased went to Ration Shop to buy rice and returned home. According to PW-19, her daughter went to ration shop along with Marimuthu (PW-2) to buy rice and returned home. According to PW-1, from the PDS shop, Sivakumar s/o Sakthivel brought his daughter and dropped her at home. According to PW-2, he and the deceased went to Ration Shop together. After purchasing rice, he gave it to the deceased and asked her to go home. The deceased carried the rice and left home in her bicycle. In this regard, the Investigating Officers PW-32 and PW-33 were cross-examined. PW-32, the Inspector of Police who investigated the case first and PW-33, who continued the investigation subsequently both



admits in the cross-examination that they enquired Sakthivel S/o Sivakumar, but they did not record his statement. His name was not included in the list of witnesses. There is a confusion whether it is Sakthivel S/o Sivakumar **or** Sivakumar s/o Sakthivel is the person who brought the victim girl to the home from Ration Shop. However, the fact remains that the said person has not been testified before the court to vouchsafe the case of the prosecution. The omission to record the statement of that person by the prosecution gains significance in view of the deposition of PW-2 Marimuthu, who has not whispered about Sivakumar or Sakthivel. In fact, the prosecution has examined one Sakthivel S/o.Vadamalai aged about 55 years as PW-9. He is the witness for the recovery of M.O.1 to M.O.3 from the house of the deceased. In his evidence, he has deposed that he went to the deceased house on 16/04/2019 at about 8.30 to 9.00 pm. He signed the recovery mahazaar and identified his signatures in the mahazar. The testimony of PW-10 is disbelieved by the trial court for different reasons. This court holds that even if her testimony is relied, it does not clear the test of section 106 presumption, under the Evidence Act. It is the case of the prosecution that the accused house is opposite to the deceased house. No explanation required for his presence at that place, since he is not a stranger to that place.

15. Now, while examining the evidence regarding recovery of M.O.4, M.O.5 and M.O.6, we find from Ex.P-19 (second sheet) ie Form-91 that they were recovered from the house of the accused kept in the Almirah. M.O.5 is described as 'red colour trouser'.

16. Section 6 of the Indian Evidence Act deals about the relevancy of facts forming part of same transaction.

17. The learned Additional Public Prosecutor appearing for the State submitted that the conduct of the accused as noticed by P.W.10 immediately after the accused coming out of the house of the deceased is a relevant fact and admissible in evidence.

18. Proximity of time, nearness of the place, continuity of action and community of purpose and design for the offence are the factors that one should have in mind to determine whether the facts form part of the same transaction. The reliability of such witness is more, if the said incriminating conduct is disclosed at the earliest point of time without an opportunity to get tutored.

19. Further, the rule of "res gestae" is an exception to the general rule that hearsay evidence is not admissible. In this case, the conduct of the accused looking around and leaving the place whether form part of same transaction, is doubtful.

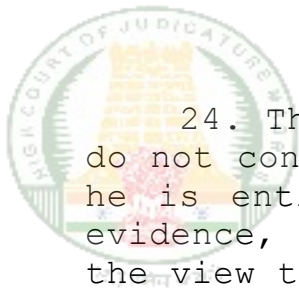


20. Back to Section 106 of Indian Evidence Act which deals about the burden of proof regarding exclusive knowledge of a given fact and the blood stain present in M.O.5 which tallies with the DNA of the biological parents of the deceased, it is to be noted that the very recovery of M.O.5 from the Almirah in the house of accused itself is doubtful, for the reason that Form-91 (Ex.P19) which was alleged to have been prepared on 26.04.2019 was forwarded to the Juvenile Justice Board only on 02.05.2019.

21. This M.O.5 along with M.Os.4 & 6 were alleged to have been recovered based on the confession statement given by the accused on 26.04.2019 at 06.00 a.m., in the presence of Santhanakrishnan P.W.15 and one Valliammal (Not examined). Examining the evidence of P.W.15-The Village Administrative Officer, we find that he has not mentioned from where M.Os.4 to 6 were taken by the accused and produced. He has generally stated that it was produced by the accused from his house. His evidence is not specific. Further, this Court is also disturbed by the fact that while Form-91 and Material Objects were sent to the Juvenile Justice Board belatedly, the description of M.O.5 as found in Form-91 does not correlate with the description of material objects mentioned in Ex.P10.

22. As per Ex.P10 and the evidence of P.W.24 item-2 is described as "red colour underwear". The report of the Forensic Science Lab, Madurai, dated 27.05.2019 in MDU/BIOL/119/2019 as spoken by P.W.24 a red colour underwear with dark brown stains was subjected to serology test and they detected blood on it. The blood stain detected in the red colour underwear was forwarded to DNA Division. On receipt of the blood sample, DNA division has tested the sample and given a report, dated 21.10.2019 under reference MDU/DNA/58/2019 stating that the comprehensive analysis of the test results of the above item (blood stain collected from the red colour underwear) with that of Mr.Venkatachalam, the admitted father of the deceased, the deceased 'X' and Mrs.Lakshmi, the admitted mother of the 'X' and the interpretations there of are given in the office report cited in MDU/DNA/112/2019. The Office report of MDU/DNA/112/2019 is marked as Ex.P23. The conclusion of report is (i) the bloodstains on item-2 -underwear belongs to a female individual (ii) the person to whom the bloodstains on item-2 underwear belongs was the biological daughter of Mr.Venkatachalam and Mrs.Lakshmi.

23. From these the documentary evidence it is doubtful whether the red colour trouser alleged to have been recovered from Almirah in the accused house was sent for serology test and DNA mapping. The contradictions in the description of the material object M.O.5 and red colour trouser in Form-91 and as red colour underwear in the serology test and DNA map reports renders the prosecution case highly doubtful.



24. The trial Court has rightly found that these discrepancies do not conclusively prove the guilty of the accused and therefore, he is entitled for benefit of doubt. On reappreciation of the evidence, this Court has no other reasonable alternate view than the view taken by the trial Court.

25. To add, the delay in forwarding the FIR to the Judicial Magistrate and non examination of the witness who alleged to have dropped the deceased at her home from PDS shop gives room to extend the benefit of doubt.

26. Hence, Both appeals are dismissed and the judgment and order of acquittal passed in Spl.S.C.No.29 of 2019, dated 29.09.2020 by the learned Fast Track Mahila Court, Dindigul stands confirmed. Consequently, connected miscellaneous petition is closed. No cost.

27. The order passed by this Court, dated 17.11.2021 and 23.11.2021 stands recalled.

Sd/-

Assistant Registrar (CS-III)

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Sub Assistant Registrar(CS)

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To

1.The Sessions Judge,
Fast Track Mahila Court, Dindigul.

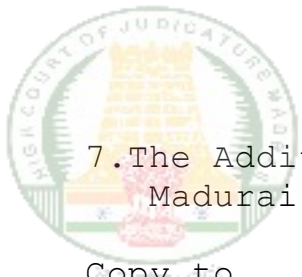
2.The Superintendent of Police,
Dindigul District.

3.The Inspector of Police,
Vadamadurai Police Station, Dindigul.

4.The Superintendent, Central Prison,
Madurai.

5.The Inspector of Police, North Town Police station,
Trippur.

6.The Inspector of Police,
All Women Police Station,
Vadamadurai, Dindigul.



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

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The Record Keeper, Criminal Section,
Madurai Bench of Madras High Court, Madurai.

+2 CC to M/s.S.PRABHA, Advocate (SR-38181[F] dated 10/12/2021)

+1 CC to M/s.T.ARUL, Advocate (SR-38470[F] dated 13/12/2021)

Crl.A(MD)Nos.337 of 2020 and 142 of 2021

10.12.2021

RK(17/12/2021) 10P 13C