



Crl. A(MD)No.94 of 2020

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated 10.10.2022

CORAM:

THE HONOURABLE Mrs.JUSTICE J.NISHA BANU

AND

THE HONOURABLE Mr. JUSTICE N.ANAND VENKATESH

**Crl. A. (MD)No.94 of 2020
and Crl.M.P.(MD) No.4651 of 2021**

1.Ilavarasan

2.Karthick

.. Appellants

Vs.

State rep by
The Inspector of Police,
All Women Police Station,
Thanjavur District
(Crime No. 6 of 2018)

.. Respondent/Complainant

Appeals filed under Section 374 of Criminal Procedure Code, against the judgment and order dated 30.08.2019 in S.C.No.21 of 2018 on the file of the District and Sessions Judge, Mahila Court (Fast Track Mahila Court), Thanjavur.

For Appellants	: Mr.N.Ananthapadmanaban for Mr.A.Arunprasad
For Respondent	: Mr.A.Thiruvadikumar



Crl. A(MD)No.94 of 2020

WEB COPY

Additional Public Prosecutor
JUDGMENT

J.NISHA BANU
AND
N.ANAND VENKATESH

This criminal appeal has been filed against the order and judgment of the District and Sessions Judge, Mahila Court (Fast Track Mahila Court), Thanjavur made in S.C.No.21 of 2018 dated 30.08.2019, whereby the appellants were convicted and sentenced in the following manner:

Provisions under which convicted	Rank of the accused	Sentence	Fine amount
Section 6 read with 5(u) of the POCSO Act	A1 and A2	To undergo imprisonment for life each	Rs.5,000/- each, in default, to undergo simple imprisonment for one year each.
Section 6 read with 5(g) of the POCSO Act	A1 and A2	To undergo imprisonment for life each.	Rs.5,000/- each, in default, to undergo rigorous imprisonment for one year each. (2 counts)



Crl. A(MD)No.94 of 2020

WEB COPY

2. The case of the prosecution is that the victim girl [P.W.-1] is well known to P.W.2 and both of them used to attend tuition classes together. On 31.03.2018, after completion of the tuition classes, P.W.2 took P.W.1 in his two wheeler and they were talking near Nathampadipatti Bridge at Vettikadu road and at that point of time, A4 seems to have come to that place and questioned the victim girl as to why she is standing there along with P.W.2. Thereafter, A1 and A2 came in a two wheeler and started threatening P.W.2. They asked the parents of P.W.1 to be brought to that place. Immediately P.W.2 left the place and taking advantage of the same, A1 and A2 are said to have committed penetrative sexual assault against the victim girl. They called their friends A3 to A6 and they had also committed sexual assault on the victim girl. Based on the complaint [Exs.P2 and P41] that were reduced to writing and signed by P.W.1, an FIR came to be registered and was marked as Ex.P40. The investigation was taken up by P.W.33 and in the course of investigation, Section 164 Cr.P.C. statement was recorded by the Judicial Magistrate [P.W.31] from P.W.1 and P.W.2, which were marked as Ex.P2 and Ex.P3. On completion of investigation, a final report was filed before the Court below as against 6 accused persons and the



Crl. A(MD)No.94 of 2020

following charges were framed against them:

Charge Nos.	Accused	Charge
1	A4	341 IPC
2	A4	366 IPC
3	A1 and A2	366 IPC
4	A1 and A2	5(u) r/w 6 of the POCSO Act 2012.
5	A1 and A2	5(h) r/w 6 of the POCSO Act 2012.
6	A1 to A6	5(g) r/w 6 of the POCSO Act 2012.

3. The prosecution examined P.W.1 to P.W.33 and marked Ex.P1 to Ex.P58 and identified and marked M.O.1 to M.O.15. The Court below questioned the appellants by putting the incriminating materials that were gathered in the course of trial and the appellants denied the same as false. Taking into consideration the facts and circumstances of the case and on appreciation of evidence, the Court below convicted and sentenced the appellants in the manner indicated above and acquitted A3 to A6 from all charges and aggrieved by the same, the present appeal has been filed before this Court.



Crl. A(MD)No.94 of 2020

WEB COPY

4. The learned counsel for the appellants submitted that all the important witnesses including the victim girl turned hostile and the Court below has convicted the appellants only based on the DNA report/scientific evidence. It was further contended that the only available evidence that was put against the appellants was the evidence of P.W.6, P.W.7, P.W.8, P.W.17 and P.W.19. That apart, the prosecution mainly relied upon Ex.P.9 and Ex.P.32 and based on the opinion of P.W.6 and P.W.19 to the effect that the DNA profiling of the seminal stains of A2 matched with the vaginal smear of the victim girl, both the appellants were convicted and sentenced without any corroborative evidence. The prosecution had relied upon hugger, which was also sent for DNA profiling and this was not even marked in the course of evidence and there is absolutely no evidence for the recovery of the hugger from the accused persons and hence, the report based on the hugger is totally inadmissible. The learned counsel concluded his arguments by submitting that the Court below had convicted the appellants only based on scientific evidence even without considering the fact that the case as projected by the victim girl was not proved in any manner by the prosecution and the Accident Register report, which was marked as Ex.P.23,



Crl. A(MD)No.94 of 2020

clearly showed that the hymen was intact and there was no bleeding and no injuries were found in the vaginal part of the victim girl and hence the case as projected by the prosecution could not have taken place.

5. Per contra, the learned Additional Public Prosecutor appearing on behalf of the prosecution submitted that even though the victim girl [P.W.1] and P.W.2 became hostile witnesses, it is clear from their evidence that a complaint was given on 01.04.2018 at 6.00 a.m., signed by P.W.1 and both of them admitted the signatures found in the 164 Cr.P.C. statements recorded by the learned Magistrate. That apart, the victim girl also admitted she being taken to the hospital and staying at the home for nearly three months. The learned Additional Public Prosecutor also relied upon the evidence of P.W.6, P.W.7 and P.W.19 read along with Ex.P9, which showed that the DNA profile of A2 were found in the vaginal smear taken from the victim girl and since A1 is none other than the brother of A2, the same will apply to A1 also. It was submitted that the appellants were not able give any explanation as against the scientific evidence, which stared at them and hence, the legal presumption under Section 29 of the Protection of Children



Crl. A(MD)No.94 of 2020

from Sexual Offences Act, 2012 (hereinafter referred to as 'the Act') will have to be put against the appellants. Accordingly, the learned Additional Public Prosecutor sought for the dismissal of this criminal appeal.

6. This Court has carefully considered the submissions made on either side and perused the materials available on record.

7. This is a textbook case, which demonstrates the sorry state of affairs in cases involving child molestation and how even the victim girl and the family members are forced to go against the prosecution case and become hostile witnesses, fearing consequences both from the society as well as powerful accused persons.

8. The victim girl, who was examined as P.W.1, had appeared before the learned Judicial Magistrate and given her statement under Section 164 Cr.P.C. and this statement has been marked as Ex.P2. On carefully going through the same, it is seen that the learned Magistrate has ascertained the capability of the victim girl to give statement and thereafter has recorded the



Crl. A(MD)No.94 of 2020

WEB COPY

statement and the same has also been signed by P.W.1. It is true that a statement recorded under Section 164 Cr.P.C. is only in the nature of a former statement and it cannot be treated as a substantive evidence. P.W.1, in the course of evidence, has admitted the signatures found in the complaint, which was marked as Ex.P1. P.W.1 has also admitted the signatures found in the 164 Cr.P.C. statement recorded by the learned Magistrate. Further, P.W.1 has admitted the fact that she was taken to the hospital and after coming back from the hospital, she was staying in a home for nearly three months. All these facts that is deduced from the evidence of P.W.1 can be taken into consideration by this Court.

9. Insofar as P.W.2 is concerned, his statement was also recorded under Section 164 Cr.P.C. and marked as Ex.P3. He has admitted all the signatures found in the statement recorded by the Judicial Magistrate.

10. With the above background, it becomes necessary for this Court to analyze the evidence of the Doctors and Scientific analysts. It is trite law that witnesses may lie but the circumstances will not.



Crl. A(MD)No.94 of 2020

WEB COPY

11. In the present case, the circumstances are by way of medical and scientific evidence. The Doctor, who was examined as P.W.17 was the first person before whom the victim girl was brought for examination on 01.04.2018 at about 11.45 a.m. On examining the victim girl, the Doctor prepared Ex.P23 Accident Register. It is clearly stated in the accident register that the victim girl informed the Doctor that she was ravaged by nearly six unknown persons. The Doctor recorded the following in the Accident Register [Ex.P.23]:

“no injuries over face, cheek, breast, abdomen, thigh.

PA : soft. L/A. Hymen intact admit 1 finger. Abrasion in the fourchette. No bleeding. CX, vagina, palpated with one finger. No injuries. Vaginal swab taken. Vaginal smear taken.”

12. Ex.P24, which is a medical examination report prepared by P.W.17, talks about the tests undertaken on the victim girl and through Ex.P25, a report was submitted before the concerned Court with an opinion that the final impression is consistent with the sexual assault.



Crl. A(MD)No.94 of 2020

WEB COPY

13. P.W.8 was the Doctor, who took the blood samples of A1 to A6 and the victim girl in the FTA card and after drawing the samples, it was handed over to P.W.21, who, in turn, handed over to the Court.

14. The evidence of P.W.6 and P.W.19 becomes very significant in this case, since they are the ones, who gave the DNA report. Their report was marked as Ex.P9. It is seen from their evidence as well as the report that there were two items, for which, the DNA profiling of A2 was matching. Item No.2 pertains to the seminal stains taken from A2 and the vaginal smear of the victim girl and the DNA profile were matching. Likewise, item 9 pertained to a hugger, wherein, the DNA profile of A2 was matching with the smear of the victim girl. Since the DNA profile of A2 was matching, it was automatically applied on A1 also, since he is the brother of A2 and both of them fall within the same family lineage. For proper appreciation, the conclusion that was arrived at in Ex.P9 is extracted hereunder:

“Conclusion: From the DNA typing results of the above



WEB COPY samples, it is found that,

(i) the male DNA profile of the seminal stains on item 2 – smear and item 9 -hugger (of ref 2) belong to one and the same male individual and are that of the alleged accused 2 – Mr.Karthick.

(ii) The female DNA profile of the seminal stains on item 2 – smear is that of the victim Vishalini.

(iii) the seminal stain on item 2 – smear and item 9 - hugger (ref 2) are not that of alleged accused 1 – Mr.Elavarasan, alleged accused 3 – Elasu @ Elavarasan, alleged accused 4 – Soni @ Ravichandran, alleged accused 5 – Mr.Selvam and alleged accused 6 – Natarajan.

(iv) The alleged accused 2 – Mr.Karthick and alleged accused 1 – Elavarasan belongs to a same family lineage.”

15. The learned counsel for the appellants mainly focussed on the hugger, which according to him, was not recovered and was not even exhibited and the so called description of the hugger was completely different from what is found in Ex.P51 compared to what is found in Ex.P32.



Crl. A(MD)No.94 of 2020

WEB COPY

16. In the considered view of this Court, for the sake of arguments, even if the finding on the hugger is kept apart, there was absolutely no explanation from A2 when he was questioned under Section 313 Cr.P.C. as to how the vaginal smear of the victim girl contained the seminal stains, which was clinched by Ex.P9 report. This report along with the evidence of the witnesses was heavily relied upon by the Court below to render a finding against the appellants.

17. The Court below did not express helplessness in this case, when the witnesses turned hostile and it rightly laid its hands on the scientific evidence that was available on record. If really this incident had not taken place, there was absolutely no reason as to why a complaint was given and as to why the Doctors examined the victim girl and also the accused persons and took samples and why they took the effort of giving a report. Fortunately, the scientific evidence has come to the aid of the Court to ensure that the accused persons, who had committed the gruesome crime are not allowed to scot-free.



Crl. A(MD)No.94 of 2020

WEB COPY

18. The legislature was aware of the state of affairs prevailing in the society and the hesitation shown to prosecute sexual offences involving minors and that is the reason why Section 29 of the Act was specifically brought in. This provision makes it clear that a person, who is prosecuted for committing an offence under Section 5 of the Act, shall be presumed to have committed the offence unless the accused is able to prove the contrary. In the present case, the presumption has been properly established by the prosecution through strong scientific evidence. A2 was not able to give any explanation with regard to the finding in Ex.P9 report. If the findings on the DNA profile went against A2, it goes without saying that it will equally apply to A1 also, who is the brother of A2, who belongs to the same family lineage with the same DNA. There was absolutely no reason as to why the seminal stains of A2 was found in the vaginal smear of the victim girl, unless A2 had committed the sexual assault on the victim girl. This strong presumption has not been dislodged by A1 and A2. This evidence read with other admissible portions of the evidence of P.W.1 and P.W.2 clearly justifies the conviction and sentence imposed by the trial Court against the appellants since the appellants were not able to rebut the presumption.



Crl. A(MD)No.94 of 2020

WEB COPY

19. For all these reasons, the conviction and sentence imposed by the trial Court against the appellants does not require any interference of this Court and in view of the same, this criminal appeal stands dismissed. Consequently connected Miscellaneous Petition is closed.

[J.N.B., J.] & [N.A.V., J.]
10.10.2022

Index : Yes
Internet : Yes
RR



Crl. A(MD)No.94 of 2020

WEB COPY

To

1.The District and Sessions Judge,
Mahila Court (Fast Track Mahila Court),
Thanjavur.

2.The Inspector of Police,
All Women Police Station,
Thanjavur District.

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

4.The Record Keeper,
Vernacular Records Section,
Madurai Bench of Madras High Court,
Madurai.



WEB COPY



Crl. A(MD)No.94 of 2020

**J.NISHA BANU, J
AND
N.ANAND VENKATESH, J**

RR

**Judgment made in
Crl. A. (MD)No.94 of 2020**

10.10.2022