



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date : 21.06.2023

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CORAM:

THE HONOURABLE MR.JUSTICE G.K.ILANTHIRAIYAN

Crl.A.(MD)No.228 of 2016

Marichamy

... Appellant/Sole Accused

vs.

State through,
The Inspector of Police,
A.W.P.S,
Madurai Town.
In Crime No.23 of 2013.

... Respondent/Complainant

PRAYER : Criminal Appeal has been filed under Section 374(2) of Cr.P.C., to call for the records from the learned Additional District and Sessions Judge (Mahila), Madurai in S.C.No.2 of 2014, dated 10.05.2016 and set aside the same.

For Appellant : Mr.Thiruppathy Chellasamy

For Respondent : Mr.T.Senthil Kumar
Additional Public Prosecutor



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JUDGMENT

This Criminal Appeal has been preferred as against the Judgment and conviction made in S.C.No.2 of 2014, dated 10.05.2016, on the file of the learned Additional District and Sessions Judge (Mahila), Madurai.

2.The case of the prosecution is that the appellant is running an iron scrap material shop at Bharathiyar Road, Jaihindhpuram, Madurai. The victim and her mother were daily coolie workers working in the appellant's shop. While being so, on 02.09.2013 at about 11.30 a.m, while the victim was working in the accused shop, he intended to sexually assault the victim, he had sent her mother to purchase Tea. When the victim was alone in the shop, the accused forcibly pulled her hands and slapped her face and forcefully dragged her into the inner room of the shop. Thereafter, he forced her to see pornographic scenes shared on his cell phone and after removing her dress, he committed penetrative sexual assault upon the victim. Hence, the complaint.

3.Based on the said complaint, the respondent registered the F.I.R in Crime No.23 of 2013 for the offence under Section 376 of I.P.C and under Sections 3 and 4 of the Protection of



Children from Sexual Offences Act, 2012. After completion of the investigation, the respondent filed a final report and the same has been taken cognizance by the trial Court in S.C.No.2 of 2014 on the file of the learned Additional District and Sessions Judge (Mahila), Madurai.

4.On the side of the prosecution, they had examined P.W.1 to P.W.26 and marked Exs.P.1 to P.13 and the prosecution has also marked M.O.1 to M.O.5 and on the side of the accused, no one was examined and marked Ex.D.1 to Ex.D.3.

5.On perusal of both oral and documentary evidence, the trial Court found the appellant guilty for the offence punishable under Section 376 of I.P.C r/w under Sections 3 and 4 of the Protection of Children from Sexual Offences Act, 2012. He was sentenced to undergo 10 Rigorous Imprisonment and to pay a fine of Rs.5,000/- and in default to undergo two years Simple Imprisonment. The trial Court also directed the Government of Tamil to pay a sum of Rs.2,00,000/- as compensation to the victim within a period of 30 days. Aggrieved by the same, the present Criminal Appeal.



6.The learned counsel appearing for the appellant would submit that the alleged occurrence had taken place on 02.09.2013, whereas the complaint was lodged only on 08.09.2013. The delay in lodgment of the complaint was not explained by the prosecution. There was no such occurrence happened and only due to previous enmity, a false complaint has been foisted as against the appellant. The entire allegations are false one and not supported by any corroborative medical evidence to prove that the victim was subjected to sexual assault. That apart, the prosecution failed to prove the age of the victim girl. She herself admitted that even in the year 2012, she completed her 18 years. The prosecution also failed to produce any document to prove the age of the victim as a minor at the time of the alleged occurrence. The trial Court convicted the appellant solely on the report submitted by the Radiologist, who was examined as P.W.21, which is not conclusive proof to convict any accused. The ossification test in a human being has got a connection with heredity, gene, climate and other various factors of a person. Therefore, the radiology report cannot be conclusive proof to prove the age when there are two views from the evidence adduced by the prosecution, the view which is in favour of the accused must be considered and ought to have acquitted the accused. When the mother of the victim had stolen the iron scrap from the shop of the appellant illegally and it was



questioned by the appellant, a false case has been foisted as against the appellant as if he had committed sexual assault on the victim girl.

7.Per contra, the learned Additional Public Prosecutor appearing for the respondent would submit that in order to prove the charges, the prosecution had examined P.W.1 to P.W.26 and marked Ex.P.1 to Ex.P.13 and the prosecution also produced material objects M.O.1 to M.O.5. The prosecutrix categorically deposed the occurrence and it cannot be disbelieved at any point of time. The evidence of prosecutrix is best in nature and it need not be corroborated by any other evidence. Though the medical evidence is not supported the case of the prosecution, she was subjected for medical examination only after 7 days from the date of occurrence. Therefore, there may not be any possibility for external injury on the body of the victim girl. The victim girl was subjected to medical examination by P.W.20 for the history sexual assault on 08.09.2013. She was admitted as an inpatient and she had given a medical certificate which was marked as Ex.P.6. In the case of sexual assault, the delay is immaterial, since the victim was in mental agony immediately after the occurrence. P.W.21 issued Ex.P.5 with regard to the age of the victim as below 18 years and it was also corroborated by P.W.1 and P.W.2. Therefore, the trial Court



rightly convicted the appellant and the same does not warrant any interference by this Court.

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8.Heard the learned counsel appearing on either side and perused the materials available on record.

9.The victim girl was examined as P.W.1. She deposed that the appellant had shown obscene video and thereafter, he removed her dress. He sexually assaulted her. At that juncture, there was a noise outside the shop and immediately, the appellant went out. The victim's sister-in-law along with her two year old son came to the shop. She used to visit every day while she was bringing lunch to her husband. Since the victim was threatened by the appellant that as do not disclose to anybody, if she discloses to anybody, he will kill her and as such, she did not disclose the sexual assault committed by the appellant. It is not the case of the prosecution that after committing sexual assault on the victim, the victim was threatened by the appellant not to disclose to anybody. There was no charge for the offence punishable under Section 506(ii) of I.P.C. Only after 6 days, she revealed the occurrence to her mother and sister-in-law. Immediately, informed to Jamad and lodged the complaint. Thereafter, she was admitted into the Hospital as an inpatient and she had taken treatment for one week.



Admittedly, the victim and her mother were working under the appellant as daily wages. The appellant was running an iron scrap shop. Her father left them in the lurch and got married with another woman. They were working under the appellant for the past three months till the date of the alleged occurrence. Admittedly, there was no complaint with regard to any misbehaving by the appellant while they were working. She further deposed that she was got admission to Mothersa School at Trichy and she studied for 5 years. Even in the year 2012 itself, she completed 18 years. The alleged place of occurrence is situated in the main bazaar and adjacent to the said shop, there are shops.

10. On perusal of Ex.D.1 and Ex.D.2 revealed that always the said shop was opened and the inner room was also opened in which the old scrap materials were kept. The entire shop was roofed by steel sheets. Her mother was examined as P.W.2. In order to prove the age of the victim, the prosecution marked Ex.P.4 and Ex.P.5 through P.W.20 and P.W.21. The School certificate was also marked as Ex.P.8 through P.W.24. In order to prove the age of the victim, the prosecution had examined P.W.24, the Headmistress of Nethaji Middle School, Jaihindpuram. She deposed that the victim was born on 31.04.1999 and she also issued a record sheet which was marked as Ex.P.8. On perusal of Ex.P.8 revealed that in the



month of April, there is no 31st date. The month of April has only 30 days. That apart, the letters filled in the said certificate also wrote as 1991 instead of 1999. Therefore, it is a fake and forged document. In fact, the trial Court also did not believe the same. However, the trial Court convicted the appellant considering the ossification test as conclusive proof of age which was marked as Ex.P.5 through P.W.21, who conducted the radiology test. P.W.21 had examined the victim and issued an age certificate of the victim which was marked as Ex.P.4.

11.The learned counsel appearing for the appellant vehemently contended that the ossification test cannot be taken as conclusive proof to convict the accused. It is against the guidelines of the Honourable Supreme Court of India and also established theories of Medical Jurisprudence and Toxicology. On perusal of the records revealed that P.W.21 conducted an ossification test to determine the age of the prosecutrix. He further pointed out that the textbook of Medical Jurisprudence and Toxicology was written by Rai Bahadur Jaising P.Modi. All the experts of Forensic Science and analysts of India based on which almost all the FSL reports are given in almost all criminal cases in which the opinion is based on this medical jurisprudence. It has different editions and as per new technics and updates, findings differ year by year. It is relevant to



extract the portion of the 27th Edition which was published on 01.01.2022 in the same book as follows:-

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"Ossification of Bones.- This is an important additional sign for determining the age until ossification is completed, for skiagraphy has now made it possible to determine even in living persons the extent of ossification, and the union of epiphyses in bones. Owing to the variations in climatic, dietetic, hereditary and other factors affecting the people of the different provinces of India it cannot be reasonably expected to formulate a uniform standard for the determination of age of the union of epiphyses for the whole of India. However, from investigations carried out in certain provinces it has been concluded that the age at which the union of epiphyses takes place in Indians is about 2 to 3 years in advance of the age incidence in Europeans and that the epiphysial union occurs in females somewhat earlier than in males.

In ascertaining the age of young persons radiograms of both sides of the body should be taken, and an opinion should be given according to the following table, but it must be remembered that too much reliance should not be placed on this table as it merely indicates an average and is likely to vary in individual cases even of the same province owing to the eccentricities of development."



12.Thus, it is clear that the theories and findings of medical experts can only be considered as an opinion but cannot be considered as an axiom or conclusive proof. The human anatomy is a complex structure. Each and every human is biologically unique and dissimilar to one another. The biological and anatomical structure of humanity, varies from person to person, country to country based on Geography, tradition, characters, culture, genealogy, nutrition, circumstances, climates, water, ethnic differences etc.

13.P.W.21 also clarifies that she has not given the medical opinion in the proper manner as per the guidelines of medical experts. She had given that opinion only based on the joints of leg bones. In order to substantiate his contention, the learned counsel appearing for the appellant also relied upon the Judgment of the Honourable Supreme of Court in ***Vinod Katara Vs. State of Uttar Pradesh*** reported in ***2022 SCC Online SC 1204***, wherein it is held as follows:-

"31. The procedure to be followed for the determination of age provided under Rule 12(3)(b) of the 2007 Rules, which reads as:



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"12. Procedure to be followed in determination of age.-(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining-

(a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of ether (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the Juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or Juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a



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finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the Juvenile in conflict with law."

32.Sub-clause (3) of the aforesaid Rule clearly mandates that while conducting an inquiry about the juvenility of an accused, the Juvenile Justice Board would seek evidence by obtaining the matriculation or equivalent certificates and in the absence whereof the date of birth certificate from the school first attended and in absence whereof the birth certificate given by a corporation or a Municipal authority or a Panchayat. It is made clear by sub-clause (b) that only in the absence of the aforesaid three documents, medical information would be sought from a duly constituted Medical Board which will declare the age of the juvenile or child. Thus, it is only in the absence of the aforesaid documents that the Juvenile Justice Board could have asked for medical information/ossification test.

.....

54. The famous American philosopher Mark Twain once said. "Age is an issue of Mind over matter. If you don't mind, it doesn't matter." But the above is not the case in criminal jurisprudence when it comes to age. Here, age matters because law is mindful to it.

55. The bone ossification test (hereinafter "ossification test is a test that determines age based on the "degree of fusion of bone" by taking the x-ray of a few bones. In simple words, the ossification test or



osteogenesis is the process of the bone formation based on the fusion of joints between the birth and age of twenty-five years in an individual. Bone age is an indicator of the skeletal and biological maturity of an individual which assists in the determination of age. The most common method used for the calculation of the bone age is radiography of the hand and wrist until the age of 18 years beyond which the medial age of clavicle is used for bone calculation till the age of 22 years as the hand and wrist bone radiographs cannot be computed beyond 18 years of age as the elongation of the bone is complete after adolescence. However, it must be noted that the ossification test varies slightly based on individual characteristics, therefore the ossification test though is relevant however it cannot be called solely conclusive.

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58. The bone ossification test is not an exact science that can provide us with the exact age of the person. As discussed above, the individual characteristics such as the growth rate of bones and skeletal structures can affect the accuracy of this method. This Court has observed in Ram Suresh Singh v. Prabhat Singh, (2009) 6 SCC 681: (2010) 2 SCC (Cri) 1194, and Jyoti Prakash, Rai v. State of Bihar, (2008) 15 SCC 223: (2009) 3 SCC (Cri) 796 that the ossification test is not conclusive for age determination because it does not reveal the exact age of the person, but the radiological examination leaves a margin of two years on either side of the age range as prescribed by the test irrespective of whether the ossification test of



multiple joints is conducted. The courts in India have accepted the fact that after the age of thirty years the ossification test cannot be relied upon for age determination. It is trite that the standard of proof for the determination of age is the degree of probability and not proof beyond reasonable doubt."

14.Thus, it is clear that the ossification test cannot be regarded as conclusive when it comes to ascertaining the age of a person. The standard of proof for the determination of age is the degree of probability, and not proof beyond reasonable doubt. Further, the Honourable Supreme Court of India and this Court repeatedly held that the ossification test is not conclusive proof for the age determination because it does not reveal the exact age of the person, but the radiological examination leaves a margin of two years on either side of the age range as prescribed by the test irrespective of whether the ossification test of multiple joints is conducted.

15.In the case on hand, except the ossification test report, no school certificates were produced by the prosecution in order to prove the age of the victim girl. In fact, she categorically admitted that she completed her 18 years even in the year 2012 itself. She also deposed that she had studied in the school and even



then, the prosecution did not take any steps to produce those school certificates to prove her age. Hence, the prosecution failed to prove the age of the victim girl.

16. In so far as the charge under Section 376 of I.P.C is concerned, there is no iota of evidence to prove the charge of 376 of I.P.C as against the appellant. P.W.21 had examined the victim girl and issued a certificate which marked as Ex.P.4, wherein it is stated as follows:-

*"Patient is admitted on 8/9/13 at 4.30
AM RMO & outpolice memo sent.*

O/E

Patient afebrile

Not anaemic

Pr-90/mt BP-120/70 mmHg

*No bite marks, nail marks, (or) Scratch
marks over face, abdomen, thigh, breast, back or
external genetalia*

CVS S1,S2 present RS NADS present

P/A-soft

*UPT-negative L/C-No evidence of
external injury over the external genetalia*

External genetalia appear normal

P/V -Hymen not intact



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Vagina admits 1 finger easily

Cervix uterus anteriorlid normal size

fornices free

Hair Clippup: 2 slides of vaginal smear taken

1.Victim (NC) fit for intercourse

2. Vaginal smear taken, sent for analysis

*3.Uterus is normal size suggested UCG,
USG-NS*

4.No external injuries over genetalia

*5.Age certificate from radiologist to be
obtained*

*6.Blood sample taken -VDRL HIV, Blood
grouping & typing -B+*

7.Hymen not intact.”

17. There is no evidence of bite marks, nail marks or scratch marks over the face, abdomen, thigh, breast, back or external genitalia. Therefore, though the victim was subjected to medical examination after 6 days from the date of the alleged occurrence, there would be some marks on her body when the victim attempted to escape from the alleged sexual assault by the appellant. However, as per the certificate, there is no clue to the effect that the victim girl was subjected to sexual assault. On perusal of all the evidence would revealed that a false case has



been foisted as against the appellant and also the prosecution failed to bring the charges to home by proper evidence. Therefore, the conviction as against the appellant for the offences under Section 376 of I.P.C and under Sections 3 and 4 of the Protection of Children from Sexual Offences Act, 2012 cannot be sustained and it is liable to be set aside.

18. Accordingly, the order made in S.C.No.2 of 2014, dated 10.05.2016, on the file of the learned Additional District and Sessions Judge (Mahila), Madurai, is set aside and the Criminal Appeal is allowed. The appellant/Accused is acquitted. Bail bond if any executed by the appellant/Accused shall stand cancelled and a fine amount if paid is ordered to be refunded to the appellant/Accused forthwith.

21.06.2023

NCC : Yes/No
Index: Yes/No
Internet: Yes
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To

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- 1.The Additional District and Sessions Court (Mahila),
Madurai.
- 2.The Inspector of Police,
A.W.P.S,
Madurai Town.
- 3.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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