



Crl.A(MD)No.346 of 2016

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 08.06.2023

CORAM

THE HON'BLE MR.JUSTICE G.K.ILANTHIRAIYAN

Crl.A(MD)No.346 of 2016

Koorankottai Sakthi @ Kottaiyan

... Appellant

Vs.

The State Rep.by
The Inspector of Police,
Soorangudi Police Station,
Thoothukudi District.
(Cr.No.11 of 2013)

... Respondents

PRAYER : Criminal Appeal filed under Section 374(2) of the Code of Criminal Procedure, to set aside the conviction and sentence passed by the Mahalir Neethimandram (Fast Track Mahila Court), Thoothukudi in S.C.No.22 of 2015 dated 30.08.2016 and acquit the appellant.

For Appellant : Mr.R.Murugan

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



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JUDGMENT

This Criminal Appeal has been filed to set aside the conviction and sentence passed by the Mahalir Neethimandram (Fast Track Mahila Court), Thoothukudi in S.C.No.22 of 2015 dated 30.08.2016 and acquit the appellant.

2.The case of the prosecution is that the victim girl, who was aged about 13 years, was studying 8th standard in St.Peter's Middle School in Pitchaiyapuram village. One Sathi Eswari, who is the sister of the accused, had conducted tuition centre and the victim girl was attending the tuition class. When the victim girl was alone in tuition centre after completion of tuition class, the accused came there and forced her to lie down and committed penetrated sexual assault. He also threatened her that if she discloses the sexual assault, he would kill her. Again on 13.03.2013, he had committed penetrated sexual assault on the victim girl by threatening her. Thereafter, the victim was suffering severe



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stomach ache and as such, she was taken to the private hospital where she found to be pregnant. Hence, the complaint.

3.On receipt of the complaint, the respondent registered FIR in Cr.No.11 of 2013 for the offence under Section 5(i)(ii) r/w 6 of the Protection of Children from Sexual Offences Act, 2012 and Section 506(2) IPC. After completion of investigation, the respondent filed final report and the same has been taken on file in S.C.No.22 of 2015. On the side of the prosecution, they had examined P.W.1 to P.W.15 and marked Ex.P.1 to Ex.P11. On the side of the accused, no one was examined and no document was marked.

4.On perusal of oral and documentary evidence, the trial Court found the accused guilty for the offence under Section 5(i)(ii) r/w 6 of the Protection of Children from Sexual Offences Act, 2012 and Section 506(2) IPC. He was sentenced to undergo ten years rigorous imprisonment and to pay a fine of Rs.1,000/- in default to undergo three months simple imprisonment for the offence punishable under Section 5(i)(ii) r/w 6 of the Protection of Children from Sexual Offences Act,



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2012. He was also sentenced to undergo two years rigorous imprisonment. Aggrieved by the same, the appellant preferred the present appeal.

5.The learned counsel appearing for the appellant would submit that P.W.1 categorically deposed that she had relationship with one van driver namely Kottaiyan. She did not even whisper about physical relationship alleged to have committed by the appellant in her statement recorded under Section 164 Cr.P.C. The foetus of the victim was subjected for DNA test. In fact, DNA test concluded that the appellant is excluded from being the father of the male child. Unfortunately, DNA test report was not marked before the trial Court. Non-marking of DNA test is also fatal to the case of the prosecution, since it was came against the accused and as such, it was wantonly suppressed by the respondent. Material evidence and the self contradictory nature of evidence cannot and do not establish that the appellant has committed the offence. The benefit of doubt goes in favour of the appellant and as such, he ought not to have convicted under the provisions of POCSO Act.



6.He would further submit that DNA report concluded that the appellant is not father and as such, the trial Court ought to have acquitted the appellant. In support of his contention, he relied upon the decision of the Hon'ble Supreme Court of India in a case of ***Kamti Devi (SMT) and another Vs. Poshi Ram*** reported in ***2002 SCC (Cri) 892*** and ***Nandlal Wasudeo Badwalk Vs. Lata Nanlal Badwalk*** and another reported in ***(2014) 2 SCC 576***.

7.Per contra, the learned Additional Public Prosecutor appearing for the respondent would submit that whatever grounds raised by the learned counsel appearing for the appellant, the same had been categorically answered by the trial Court that non-marking of DNA test report is not at all fatal to the case of the prosecution, since the appellant was charged under the provisions of POCSO Act and charge of aggravated penetrated sexual assault. Further, the appellant is none other than the brother of the tuition teacher. He used to come frequently to the tuition centre. After completion of tuition class, that too, when the victim girl was alone, he committed penetrated sexual assault on the victim girl. Further, P.W.1 categorically deposed that the appellant only



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had committed penetrated sexual assault on her. Therefore, the prosecution also proved its case beyond any doubt and the trial Court rightly convicted the accused and it dose not warrant any interference by this Court.

8.Heard both sides and perused the materials available in the record.

9.Admittedly, the victim was aged about 13 years at the time of occurrence. She used to tuition class conducted by one Sakthi Easwari, who is the sister of the appellant herein. When the victim was alone in the tuition centre, the appellant came there and forced her to lie down and committed penetrated sexual assault on her. He also threatened her with dire consequences that if she discloses, he would kill her. On the same threatening, he had also committed penetrated sexual assault on several times. Due to which, she got severe stomach ache. It was informed to her mother and she was taken to the hospital where she was found to be pregnant. However, foetus was not alive and as such, it was terminated.



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10. On perusal of deposition of P.W.1, revealed that the appellant came to the tuition centre, when there was no other students except victim, he threatened her and committed penetrated sexual assault on her. Thereafter, he did the same on several times by threatening her. Due to which, she got pregnant. Therefore, the appellant also purchased two medicines in order to abort the pregnancy. Thereafter, the victim had severe stomach ache and she was immediately taken to the hospital. During cross-examination nothing was elucidated from P.W.1 in order to disprove the case of the prosecution. It is curious to know that the appellant name is Koorankottai Sakthi @ Kottaiyan. During cross-examination, the victim was admitted that she had acquaintance with one Kottaiyan, who is van driver. In fact, he only help her to come to the Court and other places. By utilizing the name similarity, the appellant attempted to escape from the punishment.

11. The Doctor, who had examined the victim, was examined as P.W.3. She also deposed by corroborating with the evidence of P.W.1. Further she deposed that her pregnancy was aborted due to the fact that



the foetus died. Therefore, it is proved that the victim girl got pregnant due to the penetrated sexual assault committed by the appellant.

12.The learned counsel appearing for the appellant vehemently contended that DNA test report is not supported the case of the prosecution, since biological father is not appellant. In support of his contention he relied upon the decision of the Hon'ble Supreme Court of India in a case of Nandlal Wasudeo Badwalk Vs. Lata Nanlal Badwalk and another reported in (2014) 2 SCC 576. The relevant portions extracted hereunder:

“B.Evidence Act, 1872-Ss.4 and 101 to 117-Presumptions-When may not be invoked-Truth or fact known-Held, while the truth or fact is known, there is no need or room for any presumption-The interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue-when there is a conflict between a “conclusive proof” envisaged under law based on a presumption and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former.



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10. Miss Anagha S. Desai appearing on behalf of the appellant submits that this Court twice ordered for DNA test and, hence, the question as to whether this was a fit case in which DNA profiling should or should not have been ordered is academic. We find substance in the submission of Ms. Desai. Fact of the matter is that this Court not only once, but twice gave directions for DNA test. The respondents, in fact, had not opposed the prayer of DNA test when such a prayer was being considered. It is only after the reports of the DNA test had been received, which was adverse to the respondents, that they are challenging it on the ground that such a test ought not to have been directed. We cannot go into the validity of the orders passed by a coordinate Bench of this Court at this stage. It has attained finality. Hence, we do not find any merit in the submission of the learned counsel for the respondents.

11. As regards the decision of this Court in the cases of Goutam Kundu (*supra*), Banarsi Dass (*supra*) and Bhabani Prasad Jena (*supra*), the same have no bearing in the facts and circumstances of the case. In all these cases, the court was considering as to whether facts of those cases justify passing of an order for DNA test. When the order for DNA test has already been passed, at this stage, we are not concerned with this issue and we have to proceed on an assumption that a valid direction for DNA test was given.”



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13. In the same decision, the Hon'ble Supreme Court also held that it is not enough to escape from the conclusiveness of Section 112 of the Evidence Act. If a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. In the case on hand, the parties are not husband and wife and it is a case of penetrated sexual assault. Though defence counsel failed to mark DNA test report, it is only a piece of evidence proving the paternity of the child. Therefore, the judgment cited by the learned counsel appearing for the appellant is not helpful to the case on hand. Further, the victim is categorically identified the appellant and deposed against him. Admittedly, the appellant is none other than the brother of the tuition teacher. Therefore, it cannot be said that the victim had relationship with one Kottaiyan and the appellant had also nick name as Kottaiyan.

14. Hence, the prosecution had proved its case as against the appellant beyond any doubt. Hence, the trial Court rightly convicted the appellant and this Court finds no infirmity or illegality in the order



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passed by the Court below. Accordingly, this criminal appeal is dismissed. The respondent police is directed to secure the appellant to serve remaining period of sentence.

08.06.2023

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

- 1.The Mahalir Neethimandram (Fast Track Mahila Court),
Thoothukudi.
- 2.The Inspector of Police,
Soorangudi Police Station,
Thoothukudi District.
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.



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G.K.ILANTHIRAIYAN,J.

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