



*Crl.M.P.No.17101 of 2023
in Crl.A.No. 994 of 2023*

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.10.2024

CORAM:

THE HON'BLE MR.JUSTICE **M. NIRMAL KUMAR**

Crl.M.P.No.17101 of 2023

in

Crl.A.No. 994 of 2023

S.Baskar

... Petitioner

Vs.

The State Represented by,
The Inspector of Police,
Town Police Station,
Mannargudi.
(Crime No.472 of 2014)

... Respondent

Prayer: Criminal Miscellaneous Petition filed under Section 389(1) of Cr.P.C., to suspend the sentence and conviction imposed on the petitioner by the Sessions Judge, Fast Track Mahila Court, Tiruvarur in Spl.S.C.No.15 of 2017 by judgment dated 07.11.2020 and enlarge the petitioner on bail pending disposal of the above criminal appeal.

For Petitioner : Mr.A.Mohamed Ismail

For Respondent : Mr.R.Vinothraja
Government Advocate (Crl. Side)



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ORDER

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The petitioner was convicted by the learned Sessions Judge, Fast Track Mahila Court, Tiruvarur *vide* Judgment, dated 07.11.2020 in Special S.C.No.15 of 2017 and sentenced to undergo ten years Rigorous Imprisonment and to pay a fine of Rs.10,000/- in default to undergo five months Rigorous Imprisonment for offence under Section 5(j)(ii)(l) of the Protection of Children from the Sexual Offence Act, 2012. Challenging the same, the present criminal appeal and suspension of sentence is filed.

2.The learned counsel for the petitioner submitted that during trial, on the side of the prosecution, twelve witnesses examined as PW1 to PW12 and twelve documents marked as Exs.P1 to P12. PW1, PW2 and PW3 are the victim girl, her mother and her father. All the three witnesses not supported case of the prosecution. PW4 is the Headmistress who examined for age of the victim girl. PW5, PW6 and PW7 are the Doctors who examined victim girl and petitioner. PW8 is the Village Administrative Officer for the arrest and recovery. The other witnesses are the Sub Inspector/PW10 and Investigating Officers/PW11 & PW12. In this case, the prosecution proceeded on the premise that the petitioner/A1 and acquitted accused/A6 both committed penetrative sexual assault on the victim girl, that is the



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statement under Section 164 Cr.P.C (Ex.P1) of the victim girl. He further submitted that DNA samples were taken from A1 and from the acquitted accused/A6. Since in the DNA report (Ex.P11) there is no conclusive reference against the acquitted accused/A6, he was acquitted from the case. In this case, the DNA report (Ex.P11) marked through the Investigating Officer and not through the Forensic Doctor who studied, examined and submitted the report. In this case, there is no evidence to show when the STR card obtained from the hospital, how it was carried, how the samples taken, packed, sealed not giving room for any contamination and produced before the Court and thereafter to the forensic lab. No witness examined for these aspects but straight away DNA report (Ex.P11) marked through the Investigating Officer, which is not proper. On the sole basis of DNA report, the conviction cannot be sustainable. In support of his submissions, the learned counsel for the petitioner relied on the decision of the Hon'ble Apex Court in the case of “*Rahul vs. State of Delhi*” reported in *AIR 2022 SC 5661*.”

3.The learned Government Advocate (Crl. Side) appearing for the respondent Police opposed the contention of the learned counsel for the petitioner stating that the petitioner not objected for marking DNA report



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(Ex.P11) through the Investigating Officer and not put any question with regard to taking of DNA sample in STR and producing the same before the Court and to the forensic lab. Now, for the first time such plea made. In this case, the victim girl hails from the poor family, that is the reason the victim girl and her parents purchased not speaking the truth. The birth of the child is not disputed. The DNA report confirmed that the petitioner and victim girl are father and mother of the baby. The statement under Section 164 Cr.P.C (Ex.P11) confirmed the penetrative sexual assault committed by the petitioner. Hence, he strongly opposed for suspension of sentence.

4. The petitioner relied upon the decision of the Apex Court in the case of ***Rahul vs. State of Delhi*** reported in ***AIR 2022 SC 5661*** and submitted that in this case, collection and preservation of evidence and chain of proceeding have not been followed. Further, DNA profile methodology have not been detailed. Further, in the case of ***Suresh Vs. State of Maharashtra***, the Bombay High Court Bench of Aunrangabad in **Crl.A.No.306 of 2016** had held that DNA test report / medical report alone, there cannot be any conviction when they colour evidence is supporting. He further referred to the judgment of the Chattisgarh High Court in ***Kishan Lal @ Champa***



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Yadav V. State of Chattisgarh wherein, after referring to the Apex Court judgment in the case of **Rahul Vs. State of Delhi**, it observed as follows:-

"(18) In view of aforesaid legal position qua DNA profiling report and its probative value, the prosecution is duty bound to prove the guilt of the accused beyond reasonable doubt and burden is always upon the prosecution to lead evidence by taking all the precautions for proving DNA evidence. It is necessary for the prosecution as the entire process of collecting the blood samples for DNA profiling is controlled and done by the human agencies i.e. doctors and the investigating officers. Every step to preserve the sample from manipulation/contamination has to be proved, as absence of those steps may cause prejudice to the accused. The prosecution is required to put all the positive evidence regarding the fact that all the precautions have been taken by the doctors as well as by the police officials regarding the preservation of the DNA samples. As held in the matter of Pattu Rajan (supra) DNA report is "an opinion" and its probative value varies from case to case. The science of DNA is at a developing stage, as such, it will be risky to solely rely upon the DNA report in absence of any substantive piece of evidence."

5. Further, the petitioner relied upon the Apex Court judgment in the case of **Prakash Nishad Vs. State of Maharashtra** reported in **AIR 2023 SC**



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2398 wherein, a specific question was framed whether DNA evidence can form the solitary basis in determine the guilt of the appellant and it had held that the delay in samples is unexplained and therefore, the possibility of contamination and the concomitant prospect of diminishment in value cannot be reasonable ruled out and on the need for expedition in ensuring that samples when collected are sent to the concerned laboratory as soon as possible and also referred to the guidelines for collection, storage and transportation of Crime Scene DNA samples for Investigating Officers to be without any delay. Further, the Ministry of Home had also laid emphasis on the chain of custody to be maintained. In this case, no such evidence is available. In fact, Forensic Expert have not been examined.

6. In this case, the DNA profiling methodology not proved in the manner known to law. In the DNA Test, the collection and preservation of evidence is an important factor which ought to be properly documented. If DNA evidence is not properly documented, collected, packaged, and preserved, it will not meet the legal and scientific requirements for admissibility in a court of law. Added to it, when the ocular evidence was not supporting, conviction ought not to have been based only on the DNA

Test report *i.e.*, medical report.



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7. It is also seen that the Forensic Expert who conducted the DNA Test not examined. The DNA Report (Ex.P11) marked through the Investigating Officer. In such circumstances, it cannot be stated Ex.P11 proved in the manner known to law and Exs.P11 cannot be a sole basis for convicting the petitioner. Hence, the conviction of the petitioner needs reconsideration.

8. In view of the same, this Court finds that the conviction of the petitioner needs reconsideration. Accordingly, the relief of suspension of sentence and bail are granted on the following conditions till the disposal of the above Criminal revision:

(a) The petitioner/accused is ordered to be enlarged on bail, on condition that he shall execute a bond for a sum of Rs.10,000/- (Rupees Ten thousand only) with two sureties, each for a like sum to the satisfaction of the Fast Track Mahila Court, Tiruvarur.

(b) The petitioner/accused and the sureties shall affix their photographs and Left Thumb Impressions in the surety bonds and the learned Magistrate may obtain a copy of their Aadhaar Cards or Bank Pass Books to ensure their identities.



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(c) The petitioner shall appear before the Trial Court on the first working day of every English Calendar once in three months at 10.30 a.m., until the disposal of the appeal and if he is not able to appear before the Trial Court on that day, he shall make arrangements to file an application under Section 317 Cr.P.C. and shall appear before the Trial Court on any other day in lieu of the date of his absence as directed by the Trial Court.

9. Accordingly, this Criminal Miscellaneous Petition is ordered.

03.10.2024

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Index : Yes/No

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To

1. The Sessions Judge,
Fast Track Mahila Court,
Tiruvarur.
2. The Inspector of Police,
Town Police Station,
Mannargudi.
3. The Superintendent,
Central Prison, Trichy.
4. The Public Prosecutor,
High Court, Madras.



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M. NIRMAL KUMAR, J.

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