

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON	11.02.2021
DELIVERED ON	18.03.2021

CORAM:

THE HON'BLE MR. JUSTICE P.N. PRAKASH
and
THE HON'BLE MR. JUSTICE V. SIVAGNAM

R.T. No.1 of 2019 & CrI.A. No.31 of 2021

R.T. No.1 of 2019:

Ashok Kumar

Accused

vs.

State
represented by the Inspector of Police
Thiruporur Police Station
Kanchipuram District
(Cr.No.394 of 2017)

Complainant

CrI.A. No.31 of 2021:

Ashok Kumar

Appellant

vs.

State
represented by the Inspector of Police
Thiruporur Police Station
Kanchipuram District
(Cr.No.394 of 2017)

Respondent

R.T. No.1 of 2019:

Referred Trial under Section 366 Cr.P.C. on the judgment and order dated 15.02.2019 passed in Special Case No.13 of 2018 on the file of the Mahila Court, Chengalpattu.

Crl. A. No.31 of 2021:

Criminal Appeal filed under Section 374(2) Cr.P.C. seeking to set aside the judgment of conviction and sentence dated 15.02.2019 passed in Special Case No.13 of 2018 on the file of the Mahila Court, Chengalpattu.

For appellatant
in Crl.Appeal

Mr. John Sathyan

For respondent/
State in Crl.Appeal

Mr. K. Prabakar

Addl. Public Prosecutor

COMMON JUDGMENT

P.N. PRAKASH, J.

For the sake of anonymity, the deceased in this case, who is a minor girl, is referred to as "X".

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2 Shorn off unnecessary frills, the germane facts leading to the institution of the referred trial and criminal appeal run thus:

2.1 “X” was 13 years old when her life ebbed out. She was the daughter of Malar (P.W.1) and Munusamy. Apart from “X”, Malar (P.W.1) has a daughter, Divya (P.W.2) and a son Arul Kumar (P.W.3) and both were elder to “X”. Divya (P.W.2) got married to one Velmurugan, through whom, she has a child named Koteeswari, who was around three years old at the time of the incident. All of them were living together under one roof, viz., Door No.2/316, Lenin Nagar 1st Street, Alathur Village, Kancheepuram.

2.2 “X” was studying in IX standard in the Government Higher Secondary School, Payyanur and according to the school records (Ex.P.22), her date of birth is 11.11.2003 [See the evidence of Kamakshi (P.W.23), Headmistress of the school].

2.3 The appellant herein also hails from the same village, but, is a resident of Gangai Amman Koil Street nearby and was well-known to the family of “X”.

2.4 The incident in this case took place on 23.07.2017 (Sunday). Malar (P.W.1) was working in Chettinad Hospitals and on 23.07.2017, she went for

work, but, decided to return home early as she was unwell. Divya (P.W.2), along with her child Koteeswari, went with her brother Arul Kumar (P.W.3) in the latter's motorcycle, to consult an astrologer in the evening of 23.07.2017. After consultation, they received information that Malar (P.W.1) was waiting in the Thiruporur bus stand and so, they picked her up in the motorcycle and the threesome returned home around 7.30 p.m.

2.5 It is the assertion of the trio that while they were nearing their house, they saw the appellant hurriedly running in a suspicious manner through a pathway that runs adjacent to their house; when they went inside their house, they were shocked to find "X" lying dead on the floor in a pool of blood with her dress dishevelled; they raised a hue and cry which drew the attention of the neighbours.

2.6 On a complaint (Ex.P.1) given by Malar (P.W.1) which was written by Sasi (P.W.9), Ramesh (P.W.24), Inspector of Police, Thiruporur Police Station, registered a case in Cr.No.394 of 2017 on 23.07.2017 at 8.30 p.m. for the offences under Section 6 of the POCSO Act, 2012 and Section 302 IPC against the appellant and prepared the printed FIR (Ex.P.23).

2.7 The complaint (Ex.P.1) and the printed FIR (Ex.P.23) reached the jurisdictional Court at 2.30 p.m. on 24.07.2017, as could be seen from the endorsement of the judicial officer thereon.

2.8 The Investigating Officer (P.W.24) took up the investigation of the case and went to the place of occurrence. On his directions, Saravanakumar (P.W.17) took photographs at the place of occurrence which were marked as Ex.P.15 and the compact disc containing 12 photographs was marked as M.O.14.

2.9 The Investigating Officer (P.W.24) requisitioned the services of the mobile unit of the Tamil Nadu Forensic Sciences Department (for short “the TNFSD”) and accordingly, Vijayalakshmi (P.W.15), Assistant Director, TNFSD, reached the place of occurrence at 10 p.m. on 23.07.2017.

2.10 The Investigating Officer (P.W.24) prepared the observation mahazar (Ex.P.3) and rough sketch (Ex.P.24) in the presence of Murugesan (P.W.6) and Dhanasekar (P.W.10) at 9.30 p.m.

2.11 From the place of occurrence, the Investigating Officer (P.W.24) seized the following items under the cover of a mahazar (Ex.P.4) on 23.07.2017 at 12 midnight in the presence of Murugesan (P.W.6) and Dhanasekar (P.W.10):

S.No.	Description of items seized
1	A pair of slippers with the inscription "Step lite" (M.O.1);
2	A blood-stained knife measuring 15 cms. long with a wooden handle measuring 11 cms. (M.O.2);
3	A brown colour panties (M.O.6);
4	A white and brown colour pillow with cover with bloodstains (M.O.7);
5	A blood-stained floor tile (M.O.8);
6	Blood taken from the floor near the private part of "X" in a cotton swab; &
7	A floor tile without bloodstain (M.O.9).

2.12 Apart from the above items, with the help of Vijayalakshmi (P.W.15), the Investigating Officer (P.W.24) also took sample blood found on the floor near the private part of "X" in a swab, which, for the sake of convenience, hereinafter, would be referred to as "item no.5" in this judgment, though it has been shown as "item no.6" in the mahazar (Ex.P.4).

2.13 Shankar (P.W.22), Deputy Superintendent of Police, Finger Print Bureau, came to the place of occurrence at 10.00 p.m. on 23.07.2017 and lifted two finger prints found on a plastic Limca bottle (M.O.10) that was found near the body of "X". However, strangely, he did not take custody of it immediately.

2.14 However, the Investigating Officer (P.W.24) seized the Limca bottle (M.O.10) under the cover of mahazar (Ex.P.5) at 00.45 a.m. on 24.07.2017 in the presence of witnesses Murugesan (P.W.6) and Dhanasekar (P.W.10).

2.15 The Investigating Officer (P.W.24) sent the body of "X" through Gunasekaran (P.W.11), Head Constable, to the Government Hospital, Chengalpattu, for post-mortem even before conducting inquest at the place of occurrence. After the body reached the Government Hospital, Chengalpattu, inquest was conducted by the Investigating Officer (P.W.24) on 24.07.2017 between 6.30 a.m. and 8.30 a.m. The inquest report is Ex.P.25.

2.16 In the Government Hospital, Chegalpattu, Dr. Karthikeyan (P.W.16) performed autopsy on the body of "X" on 24.07.2017 and noted the following injuries in the post-mortem certificate (Ex.P.11) and also gave his opinion as to the cause of death in the post-mortem certificate (Ex.P.11):

“Injuries:

1. Oblique cut injury of size 15 x 4 cms. bone deep seen over the front and outer aspect of middle third of right side neck.
On dissection: The underlying soft tissues, middle third of right side sternocleidomastoid muscle found cut along the plane of injury with surrounding dark red soft tissue bruising.
On further dissection: The underlying nerves, superficial blood vessels, external jugular vein, lower part of thyroid cartilage on right side and right

side common carotid artery found cut along the plane of injury with extravasation dark red blood into the surrounding soft tissues.

On further dissection: Cut fracture of 1 cm. long seen over the right side of body of fifth cervical vertebrae.

2. Reddish brown abrasions of size 11 x 1 cm. seen over the front and outer aspect of upper third of right side neck 1 cm. above and parallel to the injury no.1 and 3 x 2 cm. seen over the front of upper third of left side chest.
3. **On dissection of external genitalia:** Dark red contusion of size 1.5 cm. x 1 cm. x 1 cm. seen over the upper third of left side labia majora muscle. Dark red contusion of size 1 cm. x 1 cm. x 0.5 cm. seen over the upper third of right side labia majora muscle. Dark red bruising seen over the upper and middle thirds of both sides of labia minora muscle.

On further dissection: Hymen found torn irregularly at 4 o' clock to 7 o' clock position and torn margins shows dark red colour bruising.

On dissection of head:

Scalp/skull bones/membranes: Intact

Brain: Normal in size

C/s: Pale

Base of Skull: Intact

On dissection of neck:

Hyoid bone: Intact

Thyroid cartilage: Refer injury no.1

Cricoid cartilage: NAD

Trachea: NAD

On dissection of chest:

Heart: Normal in size

C/s: Chambers were empty

Valves: NAD

Coronaries: NAD

Great vessels: NAD

Lungs: Normal in size

C/s: Pale

On dissection of abdomen:

Stomach: Contains 160 gms. of partly digested food particles, no specific smell felt.

Mucosa: Pale

Intestines: Brown chime present.

Liver, spleen & both kidneys: Normal in size

C/s: Pale

Bladder: Empty

Uterus: Normal in size

C/s: Empty

Pelvis: Intact

Spinal column: Refer Injury no.1
Viscera, vaginal swab and smear sent for analysis.

Opinion as to cause of death:

- (a) Reserved pending report of
- (b) The deceased would appear to have died of shock and hemorrhage due to cut injury of neck with evidence suggestive of recent forceful vaginal penetration.”

2.17 During post-mortem, Dr. Karthikeyan (P.W.16) collected the blood of “X” and sent it, along with the samples of her visceral organs, to the TNFSD for analysis. Viscera report (Ex.P.12) shows that poison was not detected in any of the visceral organs. Strangely, the blood grouping of “X” was not done and instead, the blood of “X” was tested only for the presence of poison.

2.18 We propose to stop here for a moment and state that Dr.Karthikeyan (P.W.16) has sent vaginal smears and swabs twice and so, there are two reports from the TNFSD, viz., Exs.P.14 and Ex.P.13. We feel it is essential to extract the relevant portions from both the reports and only then, can Dr.Karthikeyan’s (P.W.16’s) error or failure will stand highlighted.

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2.18(a) The report relating to the examination of the vaginal swab and vaginal smear dated 20.09.2017 (Ex.P.14) reads as follows:

“A sealed cover marked PM No.705/2017 dt. 24.07.2017 CR.No.394/2017 of Tiruporur P.S.....” and containing the following items was received here on 25.07.2017 through Head Constable No.196 Thiru.E.Gunasekaran under unbroken seals which corresponded with the sample sent, viz.,

- Item 1 : Two test tubes each containing a cotton swab
Item 2 : Two microscope slides each with a whitish smear

Report:

Did not detect semen on item 1
Did not detect spermatozoa or gonococci on the smears of the slides in item 2.”
(emphasis supplied)

2.18(b) The report relating to the examination of the vaginal swab and vaginal smear dated 20.09.2017 (Ex.P.13) reads as follows:

“A sealed cover marked PM No.705/2017 dt. 24.07.2017 CR.No.394/2017 of Tiruporur P.S..... swab and smear and containing the following items was received here on 01.08.2017 through Grade I Police Constable No.1685 Thiru. T. Thirunavukkarasu under unbroken seals which corresponded with the sample sent, viz.,

- Item 1 : A test tube containing a cotton swab
Item 2 : Two microscope slides each with a brownish smear

Report:

Did not detect semen on item 1
Did not detect spermatozoa or gonococci on the smears of the slides in item 2.”
(emphasis supplied)

2.19 Thus, a perusal of the said two reports, viz., Exs.P.14 and P.13, would show that Dr.Karthikeyan (P.W.16) has sent vaginal swabs and smear which are whitish, through Gunasekaran (P.W.11), Head Constable No.196, which has

reached the TNFSD on 25.07.2017 (Ex.P.14) and again, he has sent vaginal swabs and smear which are brownish, through Thirunavukkarasu (P.W.14), Police Constable No.1685, which has reached the TNFSD only on 01.08.2017 (Ex.P.13).

2.20 After the post-mortem, the apparel worn by "X", viz., a checked shirt with red, blue and white colours with bloodstains (M.O.3), a blue colour skirt with bloodstains (M.O.4) and a brown colour dupatta (shawl) with bloodstains (M.O.5) were handed over to the police for further action.

2.21 According to the Investigating Officer (P.W.24), he spotted the appellant on 24.07.2017 around 5.30 p.m. and on seeing the police party, when the appellant started fleeing, he fell down and sustained injuries and thereafter, he was arrested and his confession statement was recorded; based on the disclosure made by the appellant, he seized a black colour T-shirt with bloodstains (M.O.11) under the cover of mahazar (Ex.P.8) in the presence of witnesses Dharmaseelan (P.W.8) and Sasi (P.W.9) from the house of one Sampath (D.W.1), a cousin of the appellant, in Lenin Nagar, Alathur Village at 8.15 p.m. on 24.07.2017; thereafter, on further disclosure made by the appellant, he (P.W.24) is said to have seized a blue colour jeans pant (M.O.12) and brown colour Poomex underwear (M.O.13) in the presence of the same witnesses under the cover of mahazar (Ex.P.9) at 8.45

p.m. on 24.07.2017 from the appellant's house; then, he took the finger prints of the appellant and sent them to the Deputy Superintendent of Police, Finger Print Bureau, for comparison.

2.22 The appellant was produced before the jurisdictional Court for remand along with a remand application which explained away the injuries that were found on him by stating that he fell down when he attempted to flee from the police. Be it noted that the appellant was not subjected to medical examination either under Section 53-A or 54 Cr.P.C. for reasons best known only to the police.

2.23 After the appellant was remanded in judicial custody, on the request of the Investigating Officer (P.W.24), he was examined by Dr. Sathish (P.W.20) on 03.08.2017 and the examination report has been marked as Ex.P.18, which reads as under:

“External injuries:

Healed linear and static scratch abrasions with hypopigmented scar of sizes:

1. 6 x 0.4 cm. vertically oblique on the back of right hand
2. 0.5 x 0.5 cm crescentic on the back of right hand
3. 5 x 0.5 cm vertically oblique on the outer aspect of middle third of right forearm.
4. 8 x 0.2 cm horizontally oblique on the back of lower third of right arm
5. 1 x 0.2 cm and 0.2 x 0.2 cm on the right side of face

6. 0.2 x 0.2 cm on the left side of face
7. 0.5 x 0.2 cm, 3 in numbers, on the left side of chest 4 cm outer to, above and inner to left nipple.
8. 2 x 0.2 cm, 2 in numbers, on the right side of neck
9. 1 x 0.5 cm on the front of neck 6 cm above the suprasternal notch
10. 1 x 0.5 cm below the right ear
11. 3 x 0.2 cm on the middle third of right side of neck 4 cm from the midline
12. 5 x 0.5 cm vertically oblique on the outer aspect of lower third of left forearm
13. 0.5 x 0.2 cm and 2 x 0.2 cm on the outer aspect of left elbow

Local examination:

No injuries, scars, sinuses, ulcer or swelling in and around genital organs. Glans penis and prepuce healthy and normal. Pubic hair 8 cm. black in colour not matted. Smegma absent. Prepuce not circumcised. Both scrotums intact. Both testes intact and one on either side of sac. Testicular sensations present on both sides. Penis length 10 cm when flaccid and 15 cm on erection. Cremastic reflexes, abdominal, knee and plantar reflexes present.

Systemic examination: C.N.S., C.V.S. and R.S. – No abnormality detected.

Collection of trace evidence:

1. Blood for grouping and DNA typing
2. Swab and slide from the glans penis for vaginal epithelial cells

Time of completion of examination 12.10 p.m. on 03.08.2017

Pending report of chemical analysis of trace evidence.

OPINION: Nothing to suggest that the above examined male individual is impotent. There is evidence of general bodily injuries.”

2.24 Dr. Sathish (P.W.20) also performed radiological examination of the appellant and issued the age certificate (Ex.P.19) wherein he has opined as follows:

“I am of opinion that the individual is aged about 20-25 (Twenty to twenty five) years.”

2.25 It may be pertinent to state here that Dr. Sathish (P.W.20) has drawn the appellant's blood by adopting EDTA method. EDTA means Ethylenediaminetetraacetic Acid. This method ensures that the blood does not clot. In this method, EDTA is first put in a test tube into which the blood drawn from a person is injected with a syringe. The test tube is neatly sealed and sent for serological examination. DNA can also be extracted from this blood. However, in this case, DNA was not extracted from the blood of the appellant that was sent by Dr. Sathish (P.W.20) to the TNFSD, though Dr. Sathish (P.W.20) has clearly stated in his report (Ex.P.18) that the blood is required for both “grouping and DNA typing”. Only serological examination was done and the serology report dated 30.08.2017 (Ex.P.17) reads as follows:

“REPORT:

We examined the above item for grouping and found that it belongs to the blood group “A”.

2.26 At the request of the Investigating Officer (P.W.24), the Judicial Magistrate No.II, Chengalpattu, recorded the Section 164 Cr.P.C. statement of Sampath (D.W.1) and the same was marked through the Investigating Officer (P.W.24) as Ex.P.29.

2.27 Shankar (P.W.22), Deputy Superintendent of Police, Finger Print Bureau, compared the chance finger prints which he lifted from the Limca bottle (M.O.10) with the finger print that was allegedly obtained by the Investigating Officer (P.W.24) from the appellant and gave his report (Ex.P.21) and the opinion of Shankar (P.W.22) is as under:

“OPINION:

The disputed chance print developed on the Limca 600 ml empty pet bottle and marked as “S1” of Thiruporur P.S. Cr.No.394/17 u/s 6 of POCSO Act and 302 IPC dated 23.07.2017 received from Sessions Judge, Mahila Court, Chengalpattu Dis.No.1120/17 dated 28.08.2017 is identical with the accused finger prints of Ashok Kumar, S/o Lakshmanan on his finger print slip received from Sessions Judge, Mahila Court, Chengalpattu dated 28.08.2017 whose right middle impression is marked as “Q1”.”

2.28 The Investigating Officer (P.W.24) sent the seized items through the Court to the TNFSD for examination and report. Accordingly, the following items were subjected to biological examination *vide* report dated 20.09.2017 (Ex.P.20):

Item 1	Two pieces of broken tile with brown designs on which were dark brown stains.
Item 2	Pieces of broken tile with brown designs
Item 3	A pillow with pillow cover with black/red/orange/white designs on which were dark brown stains
Item 4	A rusty metal knife with a riveted wooden handle and measuring about 27 cm. in length on which were dark brown stains
*Item 5	Cotton swab on which were dark brown specks

Item 6	A torn brown jatti
Item 7	A ragged silken shirt with blue/red/white cross stripes on which were profuse dark brown stains.
Item 8	A torn blue half skirt on which were profuse dark brown stains
Item 9	A silken brown cloth on which were profuse dark brown stains
Item 10	A black “T” shirt with red/white/blue designs on which were dark brown specks
Item 11	A faded blue jeans trousers on which were dark brown specks
Item 12	A brown jatti

The items were numbered in this laboratory.

Report:

Detected blood on each of items 1,3,4,5 and 7 to 11 (both inclusive) but not on any of items 2,6 or 12.

Did not detect semen on any of the above twelve items.

Note:

1. The serology and DNA reports will be sent separately
2. Item 5 - ‘cotton swab’ described above was used up during examination
3. The unexpended portions of the remaining eleven items have been marked/labeled as “BIOL 344/2017” for identification.”
(*emphasis supplied)

2.29 Thereafter, serological examination of the nine items, in which, blood was detected by the Biology Department, was conducted by the Serology Department and the serology report is dated 08.11.2017 (Ex.P.16). A perusal of the serology report shows that blood group “A” was detected in the apparel worn

by “X”, viz., shirt (M.O.3), skirt (M.O.4) and dupatta (shawl) (M.O.5). The T-shirt (M.O.11) was found with human blood “A” and in the jeans trousers (M.O.12), blood grouping could not be done as the stains were found to be disintegrated.

2.30 The Investigating Officer (P.W.24), after examining witnesses, including the experts, and after collecting various reports, completed the investigation and filed a final report in the Special Court for POCSO Act Cases, Chengalpattu, which was taken on file as Special Case No.13 of 2018.

2.31 On appearance of the appellant, the provisions of Section 207 Cr.P.C. were complied with and charges under Section 6 of the POCSO Act and Section 302 IPC were framed against the appellant on 11.06.2018.

2.32 When questioned, the appellant pleaded “not guilty”.

2.33 To prove the case, the prosecution examined 24 witnesses and marked 35 exhibits and 14 material objects.

2.34 When the appellant was questioned under Section 313 Cr.P.C. on the incriminating circumstances appearing against him, he denied the suggestions that were put to him.

2.35 From the side of the appellant, Sampath, cousin of the appellant, was examined as D.W.1 and Marimuthu, Malar's (P.W.1's) neighbour, was examined as D.W.2.

2.36 On 14.02.2019, the trial Judge framed an alternative charge against the appellant under Section 376A IPC and when questioned, the appellant denied the same. On the next day, i.e., on 15.02.2019, the trial Judge questioned the appellant as to whether he wants to adduce any evidence with regard to the amended charge, for which, the appellant has answered in the negative. Immediately on the same day, the trial Court has convicted and sentenced the appellant as follows:

S.No.	Provisions under which convicted	Sentence
1	Section 6 of the POCSO Act	Life imprisonment and fine of Rs.25,000/-, in default, six months simple imprisonment
2	Section 302 IPC @ 376A IPC	Death sentence

2.37 Since the trial Court had awarded death penalty, the case was referred to this Court for confirmation under Section 366 Cr.P.C. The appellant also has filed an appeal in CrI.A. No.31 of 2021 challenging his conviction and sentence.

3 Heard Mr. John Sathyan, learned counsel for the appellant and Mr.K.Prabakar, learned Additional Public Prosecutor appearing for the State.

4 This is a case of circumstantial evidence and it may be apposite to refer to the following words of the Supreme Court in the Constitution Bench judgment in **Hanumant vs. State of Madhya Pradesh**¹:

“10. In dealing with circumstantial evidence the rules specially applicable to such evidence must be borne in mind. In such cases there is always the danger that conjecture or suspicion may take the place of legal proof and therefore it is right to recall the warning addressed by Baron Alderson to the jury in *Reg v. Hodge* [(1838) 2 Lew 227] where he said:

“The mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete.”

It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so

¹ AIR 1952 SC 343

established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused. In spite of the forceful arguments addressed to us by the learned Advocate-General on behalf of the State we have not been able to discover any such evidence either intrinsic within Exhibit P-3-A or outside and we are constrained to observe that the courts below have just fallen into the error against which warning was uttered by Baron Alderson in the above mentioned case.”

5 The prosecution case rests on the following circumstances:

- Anjalai (P.W.4) had seen the appellant with “X” around 5.30 p.m. on 23.07.2017 near her house which is next to the house of “X”.
- Senthil (P.W.7) had seen the appellant going from Lenin Nagar towards his house in Gangai Amman Koil Street hurriedly around 6.30 p.m.
- Malar (P.W.1), Divya (P.W.2) and Arul Kumar (P.W.3) had seen the appellant around 7.30 p.m. running away hurriedly through the pathway adjacent to their house.
- On going to their house, the trio saw the chappals (M.O.1) of the appellant outside.
- The presence of the finger print of the appellant in the Limca bottle (M.O.10).
- T-shirt (M.O.11) that was worn by the appellant was found to contain the blood group “A”.
- There were injuries on the appellant’s body when he was examined by Dr.Sathish (P.W.20) on 03.08.2017.

6 Mr. John Sathyan attacked each of the aforesaid circumstances and submitted that the prosecution had failed to prove them even satisfactorily for this Court to join the dots and conclude that it was the appellant who had perpetrated the offence.

7 During the course of arguments, this Court posed a general question as to whether any DNA profiling was done in this case, for which, Mr. Prabakar, learned Additional Public Prosecutor fairly and voluntarily stated that, to the best of his knowledge, DNA profiling has been done and that he would peruse the case diary and get back to this Court. True to his words, he placed before this Court the photocopies of two DNA reports that were available with the police in the case diary, but were not marked during trial. This prompted this Court to call for the entire records, both material and immaterial, from the trial Court and pore over them. We ferreted out the originals of the two DNA reports in the trial Court records which have not been marked as exhibits. A perusal of the DNA report DNA/335/2017 dated 19.03.2008 (Ex.C.2) damns the prosecution case. We are only extracting the conclusion of the said report:

“Conclusion:

From the DNA typing results of the above samples, it is found that:

- i. The blood stains on item 5 – cotton swab (of ref 2) belongs to a male individual
- ii. The blood stains on item 5 cotton swab (of ref 2) is not that of the alleged accused Mr. Ashok Kumar.” (emphasis supplied)

8 Therefore, in exercise of the powers under Section 391 read with Section 367 Cr.P.C., we marked the two DNA reports, both dated 19.03.2018 as Exhibits C.1 and C.2. after serving photocopy of the same on both sides. These two DNA reports have been issued under the hand and seal of the Assistant Chemical Examiner and Deputy Director, TNFSD and is, therefore, permissible to mark them and rely upon them under Section 293 Cr.P.C. without the expert being examined as a witness.

9 These two DNA reports have been received by the trial Court on 26.03.2018 as could be seen from the Court seal affixed thereon and the police were also aware of it, as could be seen from the fact that they were having photocopies of these reports in their case diary. The DNA profiling has been done by Dr.N.Mahalakshmi, M.Sc., Ph.D., Assistant Chemical Examiner to Government and Deputy Director and G. Yuvarani, M.Sc., M.Phil, Scientific Officer and the two reports dated 19.03.2018 (Exs.C.1 & C.2) have been issued.

10 As stated above, these reports reached the trial Court on 26.03.2018. The Investigating Officer (P.W.24) has recorded the statement of Yuvarani on 27.03.2018, wherein, she has stated that the DNA extracted from item no.5 does not tally with the DNA of the appellant, but, it tallies with the DNA of some other male. Of course, this is from the Section 161(3) Cr.P.C. statement of Yuvarani as she was not examined by the prosecution, strangely, during trial. We are not relying upon this statement of Yuvarani as a piece of substantive evidence, because, it is common knowledge that the police statement of a witness has no legal validity. But, we are forced to refer to the same in order to highlight the fact that an important piece of evidence which exonerates the appellant lock, stock and barrel, has been concealed by the prosecution.

11 For a moment, we wanted to keep aside these two DNA reports and see whether if we can sustain the conviction of the appellant on the facts proved by the prosecution. The prosecution has, no doubt, proved the following facts:

- “X” was the daughter of Malar (P.W.1) and younger sister of Divya (P.W.2) and Arul Kumar (P.W.3).
- “X” was studying in IX standard and was 13 years of age as on the date of the incident and she was living with her family.
- “X” was brutally murdered on 23.07.2017 in her house.
- The appellant is also from the same village and is known to the family of “X”.

12 Now, the question is whether the prosecution has proved the incriminating circumstances alluded to in para 5 above, by satisfactory evidence.

13 According to Malar (P.W.1) and Divya (P.W.2), they saw the appellant around 7.30 p.m. running away through the pathway adjacent to their house. According to Arul Kumar (P.W.3), he saw the appellant running away from his house around 7.30 p.m. In the complaint given by Malar (P.W.1) itself, it is stated that one Anjalai (P.W.4) was also available near the place when the appellant ran away. Whereas, Anjalai (P.W.4), in her evidence, has stated that she saw the appellant around 5.30 p.m. talking to "X" near the house of "X". She has not stated that she saw the appellant running away around 7.30 p.m. hurriedly from the house of "X". Further, Senthil (P.W.7), in his evidence, has stated that he saw the appellant running towards his house hurriedly around 6.30 p.m. Even if we give a percentage of discount with regard to timing given by various witnesses, yet, we are unable to find truthfulness in the case of the prosecution, because, the FIR in this case itself has reached the Court only on 24.07.2017 at 2.30 p.m.

14 We unearthed the two DNA reports, viz., DNA 236/2017 (Ex.C.1) and DNA 335/2017 (Ex.C.2), both dated 19.03.2018, from the trial Court records and we have extracted above, the conclusion portion from DNA 335/2017 (Ex.C.2) in paragraph 7 above, which exonerates the appellant. However, the findings in DNA 236/2017 (Ex.C.1) that the DNA extracted from the T-shirt (M.O.11) and jeans trousers (M.O.12) is that of a female individual and it tallies with the DNA extracted from the other bloodstained items found in the place of occurrence, including the apparel of "X", incriminate the appellant.

15 Mr. John Sathyan attacked DNA 236/2017 (Ex.C.1) by contending that had the prosecution proved the seizure of the T-shirt (M.O.11) and the jeans trousers (M.O.12) satisfactorily, then, the DNA report (Ex.C.1) could be pressed into service. He submitted that according to the Investigating Officer (P.W.24), the appellant was arrested on 24.07.2017 at 5.30 p.m. and on the disclosure statement of the appellant, the T-shirt (M.O.11) was seized from the terrace of the house of Sampath (D.W.1) at 8.15 p.m. on 24.07.2017. The case of the Investigating Officer (P.W.24) that he arrested the appellant on 24.07.2017 has been falsified by the evidence of his own Head Constable Gunasekaran (P.W.11), who has, in his cross-examination, stated that after he delivered the dead body in the hospital and returned to the police station on 23.07.2017 at 11.30 p.m., he

found that the appellant was found arrested and kept in the police station. This Court cannot ignore this clinching piece of evidence, because, it is not from the mouth of a layman but from the mouth of a policeman who was assisting the Investigating Officer in this case. That apart, the evidence of the Investigating Officer (P.W.24) that the appellant sustained injuries when he attempted to flee, coupled with the fact that the appellant was not subjected to medical examination as required under Section 53-A and 54 Cr.P.C., makes the date and time of the arrest suspect.

16 Mr. John Sathyan pointed out to this Court that according to the prosecution, immediately after the occurrence, the appellant went towards Sampath's (D.W.1's) house which is opposite the house of "X", removed his black T-shirt, threw it on the terrace of Sampath's (D.W.1's) house and wore a T-shirt of one Vignesh and went away. Mr. John Sathyan contended that in the Section 164(3) Cr.P.C. statement of Sampath (D.W.1), Sampath has stated all these facts and has also stated that in the same evening, the police came and took away the T-shirt from his house. He further contended that the prosecution deliberately failed to examine Sampath (D.W.1) because it went against their case that the T-shirt was recovered only on the next day after the arrest of the appellant, whereas, the

Section 164(3) Cr.P.C. statement of Sampath (D.W.1) shows otherwise. Though a statement of a person recorded under Section 164 Cr.P.C. is not a substantive piece of evidence, yet, this Court cannot turn a Nelson's eye to the fact that the prosecution has not examined Sampath (D.W.1) though his statement under Section 164 Cr.P.C. was recorded and marked as a prosecution exhibit (Ex.P.29) through the Investigating Officer (P.W.24). The appellant was produced before Dr. Sathish (P.W.20) for medical examination only on 03.08.2017. Therefore, there is sufficient force in the submission of Mr. John Sathyan that the time and date of arrest of the appellant and seizure of the T-shirt (M.O.11) and jeans trousers (M.O.12) is clouded. That apart, no witness has identified the T-shirt (M.O.11) and jeans trousers (M.O.12) saying that the appellant was wearing them. This Court is not disputing the DNA findings in Ex.C.1, but, when the seizure of the T-shirt (M.O.11) and the jeans trousers (M.O.12) is under cloud, it is unsafe to sustain the conviction, just because, the DNA report (Ex.C.1) shows that the bloodstains on the T-shirt (M.O.11) and jeans trousers (M.O.12) are those of a female. On the one hand, we have the DNA report (Ex.C.1) which implicates the appellant and on the other, we have the DNA report (Ex.C.2) which completely exonerates the appellant. It may be recapitulated that Vijayalakshmi (P.W.15) had gone to the place of occurrence and taken the blood that was found on the

floor next to the private part of “X” in a cotton swab (item no.5) which has been sent to the TNFSD for DNA profiling. The DNA report (Ex.C.2) of the blood in item no.5 says that it is that of a different male and not that of the appellant. This establishes the presence of the blood of a male other than the appellant. Between Ex.C.1 and Ex.C.2, we have to perforce choose Ex.C.2 and ignore Ex.C.1 though both were burked by the prosecution during trial.

17 The next alarming feature in this case is the evidence of Dr.Karthikeyan (P.W.16). The facts and circumstances show that “X” was lying in a pool of blood. Blood was spilled on the floor beside her private part. Dr.Karthikeyan (P.W.16), in his evidence, has stated that he took smears and swabs from “X”’s vagina and sent the same to the TNFSD for examination. He has marked biology reports (Exs.P.13 and P.14). But, he has not stated as to how two reports were given by the TNFSD. This Court perused the two reports carefully.

18 Though we have extracted Exs.P.14 and P.13 in paragraph 2.18(a) and 2.18 (b) above, yet, for the sake of continuity, we once again extract the said two reports.

18.1 The report in BIOL 331/2017 dated 20.09.2017 (Ex.P.14) states as follows:

“A sealed cover marked PM No.705/2017 dt. 24.07.2017 CR.No.394/2017 of Tiruporur P.S.....” and containing the following items was received here on 25.07.2017 through Head Constable No.196 Thiru.E.Gunasekaran under unbroken seals which corresponded with the sample sent, viz.,

- Item 1 : Two test tubes each containing a cotton swab
- Item 2 : Two microscope slides each with a whitish smear

Report:

Did not detect semen on item 1
Did not detect spermatozoa or gonococci on the smears of the slides in item 2.”

18.2 The report in BIOL 342/2017 dated 20.09.2017 (Ex.P.13) reads as follows:

“A sealed cover marked PM No.705/2017 dt. 24.07.2017 CR.No.394/2017 of Tiruporur P.S..... swab and smear and containing the following items was received here on 01.08.2017 through Grade I Police Constable No.1685 Thiru. T. Thirunavukkarasu under unbroken seals which corresponded with the sample sent, viz.,

- Item 1 : A test tube containing a cotton swab
- Item 2 : Two microscope slides each with a brownish smear

Report:

Did not detect semen on item 1

Did not detect spermatozoa or gonococci on the smears of the slides in item 2.”

19 Of course, in both these reports, spermatozoa was not detected. A perusal of the above shows that on 25.07.2017, Dr. Karthikeyan (P.W.16) has sent a whitish smear through Gunasekaran (P.W.11), Head Constable, to the TNFSD. Again, he has sent a brownish smear through Thirunavukkarasu (P.W.14), Grade I Police Constable, on 01.08.2017. Basic knowledge of forensic science would reveal that in the light of the injuries noted in the external genitalia of “X” during post-mortem and the presence of blood on the floor around the private part of “X”, the doctor could not have taken the whitish smear and sent the same to the TNFSD. The smear would have performed been brownish. According to the reports, both the smears were taken on 24.07.2017 in P.M. No.705 of 2017 in Cr.No.394 of 2017, but, the whitish smear has been sent to the TNFSD on 25.07.2017 and the brownish smear has been sent to the TNFSD on 01.08.2017. Perhaps, Dr. Karthikeyan (P.W.16) realized the mistake that he had sent a wrong smear on 25.07.2017 and therefore, he had sent the brownish smear on 01.08.2017. Of course, this is only our surmise and conjecture. In the absence of any explanation either by the prosecution or by Dr. Karthikeyan (P.W.16) in this regard, this Court cannot substitute its imagination to certain facts.

20 Coming to the report of the finger print expert, according to Shankar (P.W.22), he came to the place of occurrence at 10 p.m. on 23.07.2017 and lifted two finger prints from the Limca bottle (M.O.10). Concededly, Shankar (P.W.22) does not belong to the TNFSD, but, to the Finger Print Bureau attached to the Police Department. Of course, that, by itself, cannot be a reason to suspect his evidence. Had he lifted the finger prints at 10 p.m. on 23.07.2017 from the Limca bottle (M.O.10), the Investigating Officer (P.W.24) would have seized the Limca bottle (M.O.10) then and there. Instead, the Investigating Officer (P.W.24) first seized 7 items under the cover of mahazar (Ex.P.4) at 12 o' clock midnight on 23.07.2017, in which, the Limca bottle (M.O.10) is not there. The Limca bottle (M.O.10) appears only in the second mahazar (Ex.P.5) that was prepared at 00.45 a.m. on 24.07.2017. Shankar (P.W.22), finger print expert, has not signed in the seizure mahazar (Ex.P.5). The fact that the finger prints were lifted from the Limca bottle (M.O.10) in the place of occurrence was not even reported to the jurisdictional Court. Even in the photographs of the scene of occurrence, there is no photo showing the body and the Limca bottle (M.O.10) together. The Limca bottle (M.O.10) has been photographed separately. Limca bottle (M.O.10) is a movable property unlike a door frame, *etc.* Shankar (P.W.22) could have easily seized and taken the Limca bottle (M.O.10) with him when he saw it at 10.00 p.m.

on 23.07.2017. Strangely, the Investigating Officer (P.W.24) has seized the Limca bottle (M.O.10) at 00.45 hrs. on 24.07.2017 and has sent it to the Court on 01.08.2017 in the trial Court P.I.No.10 of 2017, as could be seen from Ex.P.28, without protecting its integrity. It must be borne in mind that the appellant was already arrested on 24.07.2017 and the Limca bottle (M.O.10) was with the police at the time of his arrest and it was sent to the Court, as stated above, on 01.08.2017. Once again, at the request of the Investigating Officer (P.W.28), the Limca bottle (M.O.10) has been sent by the Court to Shankar (P.W.22) on 28.08.2017. We do not understand as to why the Limca bottle (M.O.10) was sent once again to Shankar (P.W.22) on 28.08.2017, when, according to Shankar (P.W.22), he has lifted chance finger prints from the Limca bottle (M.O.10) as early as on 23.07.2017. Strangely, Vijayalakshmi (P.W.15), Assistant Director, mobile unit of the TNFSD, who had gone to the place of occurrence to assist the Investigating Officer in collecting clue materials, has not spoken a word about the Limca bottle (M.O.10).

21 Mr. John Sathyan submitted that even assuming for a moment that two finger prints were lifted from the Limca bottle (M.O.10), there is no satisfactory evidence as to who had taken the finger prints of the appellant, when and how. For this, he took this Court through the report of the finger print expert

(Ex.P.21) and drew the attention of this Court to the finger print slip. A perusal of the finger print slip does not disclose who had taken the finger print of the appellant or when it was taken. Therefore, this Court is unable to hold this circumstance in favour of the prosecution.

22 Lastly, recovery of the chappals (M.O.1) in the entrance to the house of “X”, even if accepted, cannot, by itself, lead to the inference that the appellant was the perpetrator of the ghastly offence, inasmuch as, the appellant was found talking with “X” at 5.30 p.m. in broad day light by Anjalai (P.W.4). Therefore, the appellant could have even left the chappals then, as villagers are used to walking barefoot without being finicky on such aspects.

23 In view of the above discussion, this Court is unable to confirm the conviction of the appellant of the offence under Section 6 of the POCSO Act and Section 302 @ 376A IPC and consequently, the sentences therefor. Further, this Court is saddened to note that the investigation of the case of the murder of a young girl has been done very shabbily.

24 Therefore, we direct the State Government to conduct an enquiry with regard to the lapses in the investigation of the case and take suitable action against those who are responsible for the lapses. We further direct the Government to pay a compensation of Rs.5 lakhs to the family of “X” as reparation not only for the failure to protect “X” but also for failing to bring the perpetrator to guilt.

25 In the result, the reference made by the Mahila Judge, Chengalpattu, is answered accordingly and the criminal appeal preferred by the appellant stands allowed. As a sequitur, the appellant is directed to be set at liberty forthwith, unless his presence is required in connection with any other case.

Before parting with this case, we are constrained to refer to the following passage of the Supreme Court judgment in **Shiv Kumar vs. Hukam Chand and another**² in order to remind the trial Court Prosecutors that their role is not to, somehow or the other, get conviction, but to foster justice:

“13. From the scheme of the Code the legislative intention is manifestly clear that prosecution in a Sessions Court cannot be conducted by anyone other than the Public Prosecutor. The legislature reminds the State that the policy must strictly conform to fairness in the trial of an accused in a Sessions Court. A Public Prosecutor is not expected to show a thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts involved in the case. The expected attitude of the Public Prosecutor while conducting prosecution must be

² (1999) 7 SCC 467

couched in fairness not only to the court and to the investigating agencies but to the accused as well. If an accused is entitled to any legitimate benefit during trial the Public Prosecutor should not scuttle/conceal it. On the contrary, it is the duty of the Public Prosecutor to winch it to the fore and make it available to the accused. Even if the defence counsel overlooked it, the Public Prosecutor has the added responsibility to bring it to the notice of the court if it comes to his knowledge...” (emphasis supplied)

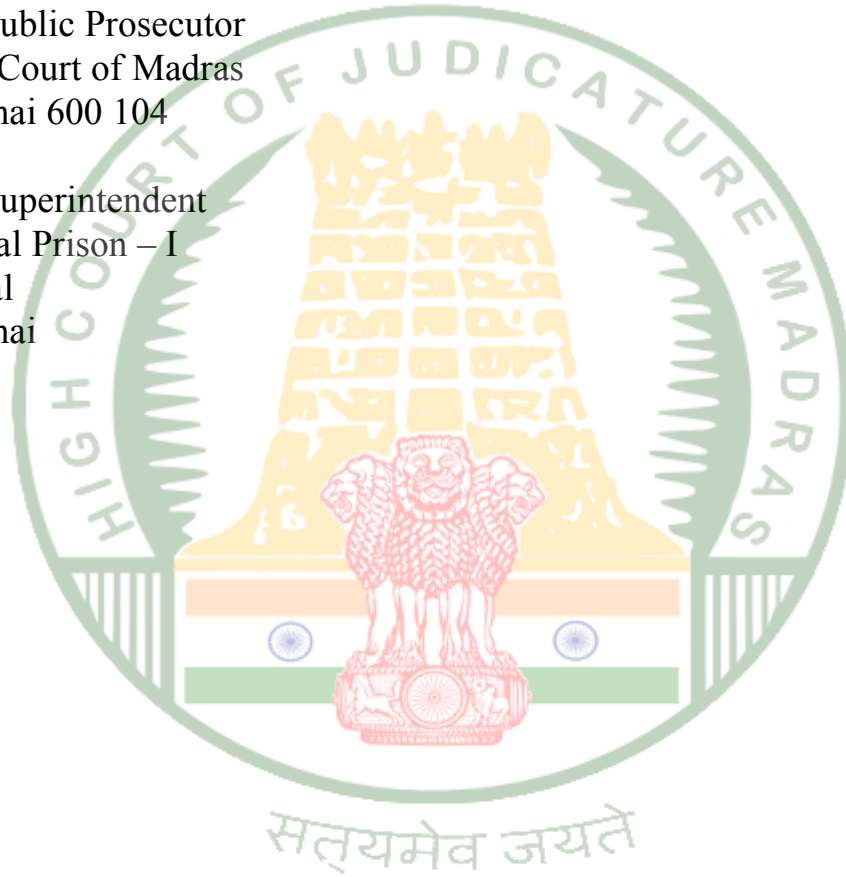
It is equally sad that the defence counsel in the trial Court failed to peruse the Court records and thereby provided a good opportunity for the prosecution to hide the two DNA reports. In contrast, Mr. K. Prabakar, learned Additional Public Prosecutor, High Court, has acted as a true Prosecutor, and not as a persecutor, by candidly placing the two DNA reports that changed the tide in this case. We place on record our sincere appreciation for his extraordinary hard work and fairness.

(P.N.P., J.) (V.S.G., J.)
18.03.2021

cad
To

- 1 The Mahila Judge
Chengalpattu
- 2 The Chief Secretary
Government of Tamil Nadu
Fort St. George, Chennai 600 009
- 3 The Secretary
Home Department
Government of Tamil Nadu
Fort St. George, Chennai 600 009

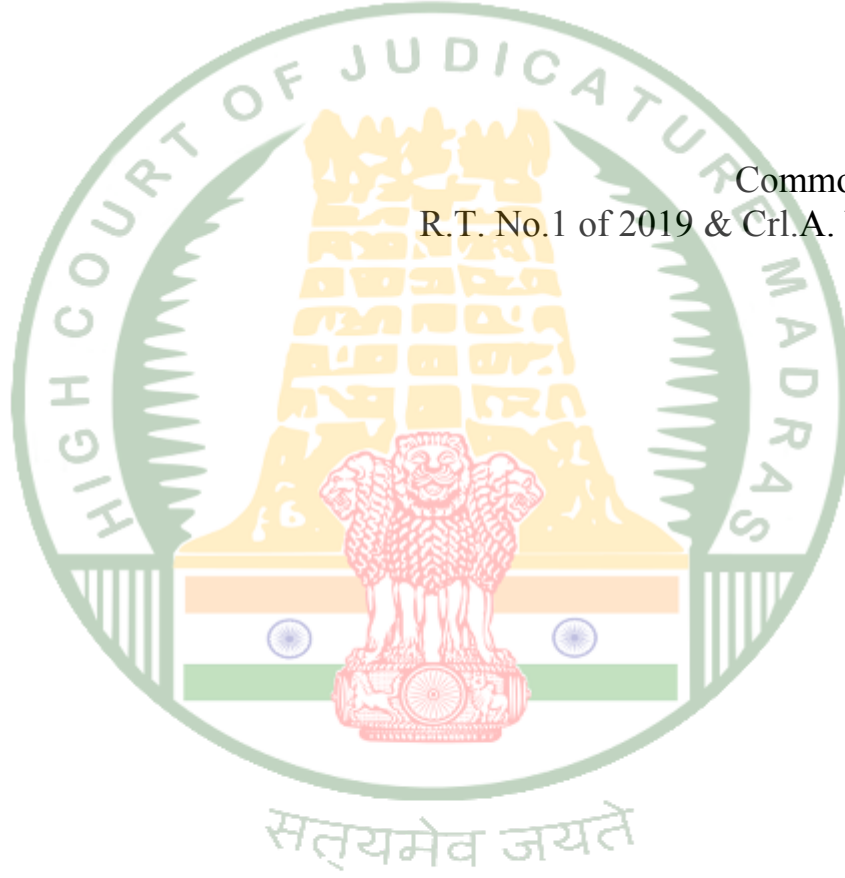
- 4 The Secretary
Finance Department
Government of Tamil Nadu
Fort St. George, Chennai 600 009
- 5 The Inspector of Police
Thiruporur Police Station
Kanchipuram District
- 6 The Public Prosecutor
High Court of Madras
Chennai 600 104
- 7 The Superintendent
Central Prison – I
Puzhal
Chennai



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P.N. PRAKASH, J.
and
V. SIVAGNAM, J.

cad



Common judgment in
R.T. No.1 of 2019 & Crl.A. No.31 of 2021

18.03.2021

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