
(2014) 07 MAD CK 0199

In the Madras High Court

Case No : H.C.P. No. 801 of 2014 and M.P. No. 1 of 2014

Sushil Mandal

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 23-07-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 174
Evidence Act, 1872 — Section 112

Citation : (2015) 1 LW(Cri) 62 : (2014) 3 MLJ(Cri) 448

Hon'ble Judges : S. Rajendran, J;P.N. Prakash, J

Bench : Division Bench

Judgement

P.N. Prakash, J.—Sushil Mandal, a distraught father, is knocking on the doors of this "Temple of Justice", seeking production of his 17 year old son Sandesh, a student of Class XI of Maharishi Vidya Mandir, Hosur, whom he firmly believes to be still alive and is in the illegal custody of one Rajkumar, the second respondent herein. This case has a chequered history and the factual matrix is as under:

(a) Sandesh and Monisha (the daughter of Rajkumar, the second respondent), being in the cusp of adolescence, developed mutual infatuation, which came to the knowledge of the teachers in the School, and sometime in July 2011, the parents of both were called to the School and were give advice by the school authorities to keep their children in check.

(b) While so, on 15.10.2011, around 8.00 p.m. Sandesh went out of his house and did not return. Frantic search made for him proved futile and Sushil Mandal lodged a complaint with the SIPCOT police, who registered a case of "boy missing" in Cr.No. 368/2011 on 18.10.2011. On 24.10.2011, an unidentified body of a person was fished out from a lake in Arasanatti area in Hosur and based on the report lodged by the Village Administrative Officer, a case in Cr.No. 374/2011 under Section 174 Cr.P.C. was registered by the SIPCOT police. The Inspector of Police, SIPCOT Police Station conducted inquest over that body, in which he has noted the age as 40 years. The apparel on the body was noted as:

? Green colour full hand shirt

? Thick blue colour pant

? White sleeveless banian

? Dark blue colour underwear

(c) The body was found to be bloated, as it appears to have been in water for quite some time. After conducting the inquest, the body was sent by the police for post-mortem to Government Hospital, Hosur, where Dr. Karthik Pandian, M.D. performed autopsy on 24.10.2011 around 12.15 hrs. In the post-mortem report, the age has been noted as 40 years, which is of course based on the information provided by the police and not on any scientific basis.

(d) With regard to identification and caste marks, in the post-mortem report it is noted "not able to make out (body fully decomposed)". Certain relevant features noted in the post-mortem report may be worth extracting:

"Hyoid bone in tact;

Neck specimen shows underlying contusion"

Sternum was preserved and diatom was not detected in it.

(e) The final opinion in the Post-mortem Certificate states as follows:

"No definite opinion could be given. However, death due to compression of the neck cannot be ruled out."

It is opined in the Post-mortem Report that the deceased would appear to have died about 5 to 7 days prior to autopsy. The following viscera were preserved:

? Kidney

? Portion of liver

? Stomach and its contents

? A loop of small intestine and its contents

? Preservative used NaCl

? Hyoid bone in formalin

? Neck tissues in formalin

? Skull in formalin

(f) Thereafter, the police posted the details of this unidentified body in their official website. Sushil Mandal sent representations to several authorities complaining about the lackadaisical manner in which the case relating to his missing son was being handled and he was pointing accusing finger at Rajkumar/ the second respondent herein. Ultimately he filed HCP No. 1908/2011 for the

issuance of a writ of Habeas Corpus to produce his son.

(g) On notice to the police, the police were filing several status reports before this Court explaining about the efforts taken by them to trace Sandesh. In April 2012, this Court directed the Superintendent of Police, Krishnagiri to monitor this probe and take effective steps for producing Sandesh when the Court reopens after summer vacation. In May 2012, the police collected some photographs of Sandesh from Sushil Mandal for conducting superimposition test with the skull of the unidentified person in Cr.No. 374/2011. On the request of the Executive Magistrate-cum-Tahsildar, Hosur, the skull was forwarded on 06.06.2012 by the Medical Officer, Government Hospital, Hosur to the Tamil Nadu Forensic Sciences Department, where experts conducted Superimposition Test and by Report dated 29.06.2012 came to the conclusion that the "skull could very well have belonged to the male individual seen in the photographs". The Report dated 29.06.2012 together with the reasons and annexures showing the Superimposition of the skull with the head portion in the photograph of Sandesh is before us and we also perused it. The skull was forwarded to the Professor of Forensic Medicines, Government Mohan Kumaramangalam Hospital, Salem for age determination and in the report dated 01.07.2012, the age was determined as above 17 years and below 22 years.

(h) A status report was filed before this Court in HCP 1908/2011, with which, Sushil Mandal was not happy. Sushil Mandal took a stand that he went to the lake on 24.10.2011 and told the police that it was not his son's body. This is the bone of contention now. The police strongly deny this and say that Sushil Mandal never knew about this fact as claimed by him now. We also note that even at the earliest point of time, namely in the affidavit filed by Sushil Mandal in support of HCP No. 1908/2011, he had not whispered about this fact.

(i) While so, on 07.07.2012, this Court transferred the investigation from the file of SIPCOT police to Crime Branch CID for investigation. While CB CID was seized of the matter, one Naveen kumar @ Naveen, a student of an Engineering College surrendered before the Village Administrative Officer of Mukundapalli, Hosur on 22.09.2012 confessing that he had pushed Sandesh into the lake in the evening on 15.10.2011. He was arrested and released on bail.

(j) On the request made by the CB CID, the Judicial Magistrate No. 2, Hosur, in whose jurisdiction the case in Cr.No. 374/2011 is pending, sent the skull and the blood samples of Sushil Mandal and his wife to the Tamil Nadu Forensic Sciences Department for extraction of DNA profile and comparison. A report dated 27.11.2012, was received from the Tamil Nadu Forensic Sciences Department, the conclusion portion of which is as under:

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

i) the skull with mandible belongs to a human male individual.

ii) the child to whom the skull with mandible belongs was the biological son of Mr.

Sushil Mandal and Mrs. Prema Mandal."

(k) With regard to the conclusion arrived at by the CB CID that the body recovered on 24.10.2011 was that of Sandesh, Sushil Mandal seriously disputed this and prayed for a CBI enquiry. This Court by order dated 01.04.2013 in HCP 1908/2011, transferred the investigation of the case from CB CID to CBI and closed the Habeas Corpus Petition.

(l) After the CBI took up the case in mid-May 2013, steps were taken to send the skull to the Centre for DNA Fingerprinting and Diagnostics, (in short "CDFD"), Hyderabad, through the office of the Chief Judicial Magistrate, Coimbatore for extraction of DNA. This Centre in Hyderabad is undoubtedly a premier institution in the country and has the State of the art facilities for scientific examinations.

(m) In the presence of Mr. T.V. Hemanandakumar, the Chief Judicial Magistrate, Coimbatore (in-charge), on 16.09.2013, the blood samples of Sushil Mandal and his wife Prema Mandal were taken in the Coimbatore Medical College and Hospital and under the supervision of the Chief Judicial Magistrate, it was despatched to CDFD, Hyderabad. DNA profiling was done by the CDFD, Hyderabad and the report dated 30.09.2013, clearly states as follows:

"The DNA test performed on the exhibits provided is sufficient to conclude that the source of exhibit A (skull) is from the biological son of the sources of exhibit B (Smt. Prema Mandal) and exhibit C (Shri. Sushil Mandal)"

(n) Not satisfied with this, Sushil Mandal has filed the present HCP No. 801/2014 for producing his son Sandesh and for direction to the CBI, New Delhi, to constitute a new team of Investigating Officers, preferably drawn from North India and investigate this case.

(o) Notice was ordered on the CBI and a detailed counter has been filed on behalf of the CBI. Even in this Habeas Corpus Petition, Mr. Rajkumar has been arrayed as second respondent and he has also filed a counter refuting the allegations made by Sushil Mandal.

2. Heard Mr. R. Sankara Subbu, learned counsel for Sushil Mandal, Mr. L. Baskaran, the learned counsel appearing for Rajkumar and Mr. N. Chandrasekaran, the learned Special Public Prosecutor for CBI cases.

3. Mr. Sankarasbhu, learned counsel for the petitioner, contended as follows:

? That the unidentified body that was fished out of the lake on 24.10.2011 is that of a person who is 40 years old, but whereas, Sandesh was only 17 years old.

? That Sushil Mandal went to the lake on 24.10.2011 and even on that day he had told the police that the body is not that of his son.

? The Post-mortem report also shows the age as 40 years.

? The police website also shows the description of the unidentified person as a 40 year old male.

4. Heavy reliance was placed on the opinions expressed in various treatises on Forensic Medicine to emphasise the point that, if a skull is subjected to superimposition test, it will not be useful for DNA analysis. The literature submitted are:

(1) J.B. Mukherjee's Forensic Medicine and Toxicology (the Skull and Molar teeth subjected to superimposition test will not be useful for DNA analysis).

(2) Molecular biology, 4th edition by Burton E. Tropp. (DNA Damage by Radiation).

(3) Fundamentals of Molecular Biology by Veer Bala Rastogi (Mistakes in DNA, Radiation - an agent causing Damage).

(4) Report by Radiation effects Research foundation a co-operative Japan - Us Research Organisation (Characteristics of DNA Damage by radiation Exposure).

(5) Forensic Medicine by B. Umadethan (Problem concerning DNA Analysis).

(6) Radiation affect on life (What happens when nucleus of DNA molecule gets broken down by Radiation).

(7) Text book of Forensic Medicine and Toxicology, 4th edition by Krishnan Vij (Collection and preservation of biological material for DNA profiling).

5. The learned counsel for the petitioner, Mr. Sankarasubbu, also relied upon the following two judgments of the Supreme Court, viz.,

? Dinubhai Boghabhai Solanki Vs. State of Gujarat and Others,

? Alsia Pardhi Vs. State of M.P. and Others,

wherein, the Supreme Court had transferred the investigation from State Police to CBI.

6. To sum up, his contention is that Sandesh is still alive and that the report dated 30.09.2013 of CDFD, Hyderabad should be rejected and Rajkumar should be implicated.

7. The learned counsel for Mr. Rajkumar filed a counter affidavit, in which he conceded that Rajkumar's daughter had an affair with Sandesh on account of their age and infatuation; that during the course of investigation by the local police and the CB CID, all the members of his family including his daughter Monisha was interrogated thoroughly and the adverse publicity that this case has generated in the media, has affected the life of his daughter, who finds it difficult to even attend College.

8. Mr. N. Chandrasekaran, the learned Spl. P.P. for CBI cases, took us through various scientific reports and explained the steps that have been taken by the CBI to unearth the truth. He submitted that after the CBI had taken over the investigation, they had taken steps through the Court of the Chief Judicial

Magistrate to have the skull and the blood samples of Sushil Mandal and his wife sent to the CDFD, Hyderabad, which is a premier institution in the country. He submitted that no further investigation with regard to identity of Sandesh needs to be entertained after the conclusion arrived at by the experts in CDFD, Hyderabad that the skull is that of Sandesh. The CBI was not able to make any further progress in the investigation because, Sushil Mandal has been agitating on this very fundamental aspect itself and has been responsible for delaying the investigation. He relied upon the judgment of the Supreme Court in the Inspector of Police, Tamil Nadu Vs. John David, to emphasis the efficacy and accuracy of DNA test.

9. We gave our anxious consideration to the submissions made across the Bar.

10. It is true that the SIPCOT police have stated in the Inquest Report that the age of the unidentified body is 40 years. Both the Inquest Report and the Post-mortem Report show that the body was fully decomposed. That is why, even the doctors were not able to give any identification marks in the post-mortem report. We were shown the photograph of the body that was taken by the SIPCOT Police and we were able to see that it is a bloated body with a disfigured face, as it had been in water for quite a long time. Only the garments over the body are identifiable. Therefore, at the time of inquest, the SIPCOT Police have arrived at a subjective satisfaction about the age and have noted the age as 40 in the Inquest Report. It is normal practice for the Post-mortem Doctors to accept the age given by the Police unless a special request is made by the police for age determination. This is clear from the fact that no Ossification Test was done at the time of post mortem. The Ossification Test was done only subsequently on 01.07.2012 when the Superintendent of Police, Krishnagiri was entrusted with the task of monitoring the investigation of the SIPCOT police.

11. Coming to the assertion of Sushil Mandal that on 24.10.2011 he went to the Arasanatti lake when an unidentified body was fished out and that he told the SIPCOT police that it is not that of Sandesh, sounds little improbable to us. His name does not even figure in the inquest proceedings that was conducted by SIPCOT police over the unidentified body on 24.10.2011. Further, even at the earliest point of time when he came before this Court in HCP No. 1908/2011, he had not made any averment to the effect that he had gone to the lake on 24.10.2011 and had disowned the body. We are of the opinion that he would not have been aware about this at all.

12. The first affidavit in HCP 1908/2011 was sworn to by Sushil Mandal on 15.12.2011 and if he had gone to the lake on 24.10.2011, he would surely have mentioned about this fact in that affidavit. A subsequent affidavit in HCP 1908/2011 contains the said assertion, but that affidavit has been filed only in the year 2013, which only shows that Sushil Mandal has been improving upon the case in his anxiety to repudiate the police investigation. Even if we exclude the Ossification Test and the DNA Test that were conducted by the Tamil Nadu Forensic Sciences Laboratory (though we do not have sufficient grounds to reject

them), still the DNA test that was conducted by the Hyderabad Laboratory cannot be simply brushed aside just because it does not suit the pre-determined beliefs and conclusions of Sushil Mandal.

13. We find that the skull of the unidentified body was preserved in formalin after the post-mortem, by the Doctors of Government Hospital, Hosur. On the orders of the Chief Judicial Magistrate, the skull was sent to the Hyderabad Laboratory. The Chief Judicial Magistrate himself was present when the blood samples were drawn from Sushil Mandal and his wife Prema Mandal on 16.09.2013 in the Coimbatore Medical College Hospital and it was the Chief Judicial Magistrate who has despatched them to the Hyderabad Laboratory. We have no reasons to smell doubt at every stage of the investigation as we are barred from adopting a Doubting Thomas approach. In fact, under illustration 114(e) of the Evidence Act, the Court may presume that judicial and official acts have been regularly preformed. In fact, the Supreme Court in Jameel Ahmed and Another Vs. State of Rajasthan, , has reiterated the following principle which was enunciated in Aher Raja Khima Vs. The State of Saurashtra, :

"The presumption that a person acts honestly applies as much in favour of a police officer as of other persons, and it is not a judicial approach to distrust and suspect him without good grounds therefor. Such an attitude can do neither credit to the magistracy nor good to the public. It can only run down the prestige of the police administration."

14. Now advertng to the arguments of Mr. Sankarasubbu, based on various treatises referred to above that, when once Superimposition Test is done, the skull will be of no use for DNA extraction, we find that this argument has been built up on the hypothesis that, X-ray was used for conducting the Superimposition Test by the Tamil Nadu Forensic Sciences Laboratory (in short "TNFSCL"). Unfortunately, it is not so. There are basically two methods of Superimposition Test. If the X-ray of the skull of the subject that was taken when the subject was alive is available, and if that had to be compared with the disputed skull, then the X-ray of the disputed skull will be taken and that will be superimposed over the former (X-ray of the skull that was taken when subject was alive).It is nobody's case here that Sushil Mandal gave the X-ray of Sandesh's skull that was taken when Sandesh was alive. What was given was only the photograph of Sandesh. For conducting such Superimposition Test, the subject skull will not be subjected to X-ray. The technique that is used is "skull-photograph-superimposition technique" which was standardised way back in the year 1976. In this test, the subject skull and the face photograph of the person will be placed besides each other and two cameras will capture the photographs individually and feed them into the computer, where the expert will superimpose the images of the skull over the photograph and give his opinion. The experts from TNFSCL have demonstrated this process even to our Judicial Officers during training in the Tamil Nadu Judicial Academy. Therefore, the fundamental hypothesis on which Mr. Sankarasubbu's argument has been built, falls like a

pack of cards. This is the scientific answer for Mr. Sankarasubbu's submission made, based on the treatises referred to above.

15. Now we propose to approach the issue from common sense point of view also. It is a fact that Superimposition Test was first performed and only thereafter, the subject skull was sent to the TNFSCL, Chennai and to the Hyderabad laboratory for DNA profiling. If the experts in both the laboratories were not able to extract DNA, they would have definitely stated so in their report. The fact that they were able to extract DNA from the skull shows that, the Superimposition Test has not hindered or annihilated the cells in the skull so as to make it impossible for the Scientists to do DNA extraction there from.

16. Let us assume an extreme proposition. Assuming for a moment that X-ray of the skull was taken despite which if the experts were able to extract DNA from the skull, it will be a textbook case of nature embarrassing science and having the last laugh. No allegation or mala fide or ill motive has been attributed by Sushil Mandal against the Scientific experts of TNFSCL, Chennai and CDFD, Hyderabad. What personal axe to grind they have in this affair? We cannot permit doubts and suspicions to mar the opinion of acclaimed scientific experts. We take judicial notice of the fact that DNA profiling begets 99.99% accurate results which has prompted the Supreme Court also to say that it will even dislodge the presumption under Section 112 of the Evidence Act (See: Nandlal Wasudeo Badwaik Vs. Lata Nandlal Badwaik and Another, . We cannot allow the anxieties of Sushil Mandal to dislodge the scientific opinion arrived at by the TNFSCL, Chennai and CDFD, Hyderabad merely on the basis of opinions expressed in some treatises.

17. Before concluding we wish to share a piece of our mind with Sushil Mandal. We find from the records that Sushil Mandal has been writing to all the authorities in the Country alleging that Rajkumar and his wife Hemalatha have kidnapped Sandesh, and praying for action against them. He has also complained to the Commissioner of Central Excise, Chennai to take departmental action against Rajkumar, who is working as Inspector in the Central Excise Department. The Assistant Commissioner of Central Excise has sent a reply dated 03.09.2012 to Sushil Mandal which reads as under:

"Please refer to your complaint letter dated 8/6/2012 on Shri I.R. Rajkumar, Inspector working in Hosur of this Commissionerate.

On receipt of the above, a copy of the complaint against Shri I.R. Rajkumar was sent to the Assistant Commissioner of Hosur - I Division, seeking a factual report. The Assistant Commissioner, Hosur - I Division after verification has submitted that the name of Shri I.R. Rajkumar, Inspector, does not figure in the FIR concerned with the complaint made at the Hosur SIPCOT Police Station in relation to you SON missing since 15/10/2011. Further your allegation that Shri I.R. Rajkumar caused you to lose you job with M/s. Aankit Granites Limited, it is informed that as M/s. Aankit Granites Limited vide their letter dated 27/06/2012

have submitted that they have not terminated your service. In the absence of a police report to the Magistrate, prima facie indicating that the alleged crime has been committed by a Government Servant, and subsequent imprisonment "upto 48 hours", the Department cannot initiate any action in this regard."

18. We do sympathise with Sushil Mandal, but we do not approve of such witch hunting by him. Future of Monisha, whom Sushil Mandal should view as his daughter and not as an enemy, should not be jeopardised. After all she is a victim of adolescence. "An eye for an eye, only ends up making the whole world blind", said Mahatma Gandhi. It is also true that, had Sushil Mandal not filed HCP No. 908/2011, the SIPCOT police would have conveniently and comfortably closed the case as "undetected". We are not hereby giving any clean chit to anyone including Rajkumar and we are leaving it open to the CBI to investigate from all angles, including the role of SIPCOT Police.

19. Adverting to the prayer for constituting a new team of Officers drawn from North India, we feel that this cannot be countenanced. India is divided into North, South, East and West only for geographical reasons to measure monsoon and drought and nothing more. The bureaucracy which is the steel frame of India is one single organic entity and we will be sowing seeds of balkanisation of this Country if we accede to such requests. Mahakavi Subramani Bharathi said:

Hence, we reject this request in limine.

In fine, we are putting a lid on this controversy and setting it at rest by upholding the DNA test results of TNFSCL, Chennai and CDFD, Hyderabad. We direct the CBI to continue with the investigation and to find out the mystery in this case. The CBI should also look into the fact whether the SIPCOT police had in any manner tried to shield the guilty and create a red herring to deflect the course of investigation in this case. We find no justifiable reasons to reconstitute the investigation team as sought for by the learned counsel for the petitioner.

In the light of the aforesaid discussions, nothing further remains to be done in this case and with the above directions this Habeas Corpus Petition is closed. Consequently, the other miscellaneous petition is closed.