

Bail Slip

The Appellant/Accused, namely 1. Guna @ Gunasekaran S/o.Munusamy 2.Raja @ Rajasekar S/o.Manoharan were released on bail as per order vide in CRL MP.NO.1/09 IN CRL A.NO.642/2009 AND CRL MP.NO.1/10 IN CRL A.NO.57/10 dated 09.12.2009 dated 12.04.2010 respectively by this Hon'ble court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated 04.07.2019

CORAM

THE HONOURABLE MR.JUSTICE A.D.JAGADISH CHANDIRA

Crl.A.Nos.642/2009 & 57 / 2010

Guna @ Gunasekaran ... Appellant/A3-

Cr.A.642/2009

Raja @ Rajasekar ... Appellant/A1-

Cr.A.57/2010

Vs

State by Inspector of Police (L&O)
E3 Teynampet Police Station
Chennai Respondent in both Appeals

Prayer:- These Criminal Appeals are filed, against the judgement of conviction and sentence, dated 18.09.2009, made in SC.No.502 of 2006, by the Sessions Judge, Magalir Neethimandram, Chennai.

For Appellants in
both the appeals : Mr.M.Jaikumar

For Respondent in
both the appeals : Mr.K.Prabakar, APP

COMMON JUDGMENT

1.These Criminal Appeals are filed, against the judgement of conviction and sentence, dated 18.09.2009, made in SC.No.502 of 2006, by the Sessions Judge, Magalir Neethimandram, Chennai, (a) convicting and sentencing the Appellant/A3 for the offence under Section 376 read with 109 IPC and to undergo Rigorous Imprisonment for ten years and to pay a fine of Rs.25,000/-, in default to

undergo Simple Imprisonment for one year and for the offence under Section 506 (ii) read with 34 IPC, to undergo one year Rigorous Imprisonment and (b) convicting and sentencing the Appellant/A1 for the offence under Section 376 IPC to undergo Rigorous Imprisonment for ten years and to pay a fine of Rs.25,000/-, in default to undergo Simple Imprisonment for one year and for the offence under Section 506 (ii) read with 34 IPC, to undergo one year Rigorous Imprisonment and ordering the sentences to run concurrently.

2. Three accused persons were convicted in this case. The Appellants are A3 and A1. A2, M.Yesuraja @ Rajasekar has filed a separate appeal, in Cr.A.No.655 of 2009, against the impugned judgement of conviction and sentence. Since it was reported that A2 died on 23.01.2012, by producing the Death Certificate of A2, Cr1.A.655 of 2009 was dismissed as abated, by the judgement of this Court, dated 23.01.2019.
3. The case of the Prosecution has arisen on the basis of the complaint, Ex.P1, given by PW.1, victim girl, Sathya, alleging that on 05.06.2006 at about 23.00 hours, A1 took the victim girl Sathya, aged about 15 years, to the house of A2, at Door No.24/10, Doctor Thomas Road, T.Nagar, Chennai-17, when the family of A2 had gone away to their relatives house and told her that he was in love with her and that if she marries him, he would take her to cinema, beach and he would buy her whatever she wants and with the help of A2, who was already there, laid her in the cot and when she cried for help, A3, who was sleeping in the house, woke up and joined with them and caught hold of the hands and legs of the victim girl, and A1 closed her mouth and A2, showing the knife in his hand, intimidated that if she shouts, he would kill her and that A1 removed the clothes worn by the victim and committed rape on her and A2 showing the knife committed rape on her and A3 facilitated A1 and A2 to commit rape. Hence, the Respondent, after investigation, has filed the final report against accused under Sections 376, 506(ii) read with 34 of IPC and 109 IPC.
4. The case was taken on file in SC.No.502 of 2006, by the Sessions Judge, Magalir Neethimandram, Chennai and necessary charges were framed. The accused had denied the charges and sought for trial. In order to bring home the charges against the accused, the prosecution examined PW.1 to PW.12 and also marked Exs.P1 to P21 and Mos.1 and 12.
5. On completion of the evidence on the side of the prosecution, the accused were questioned under Section 313 Cr.PC as to the incriminating circumstances found in the evidence of the prosecution witnesses and the accused have come with the version of total denial and stated that they have been falsely implicated in this case. On

the side of the defence, Ex.D1, age certificate, dated 13.06.2006 of the victim girl was marked and no witness was examined.

6. The court below, after hearing the arguments advanced on either side and also looking into the materials available on record, found the accused guilty and awarded punishments, as referred to above, which is challenged in these Criminal Appeals, by A3 and A1, respectively.
7. This court heard the submissions of the learned counsel on either side.
8. The learned counsel for the appellants/A-1 and A-3, while assailing the impugned judgment of conviction and sentence passed by the Trial Court, made the following submissions:-
 - 1) At the outset, a case of love affair, elopement and consensual physical relationship between A-1/appellant in CrI.A.No.57/2010 and the victim has been falsely projected as a case of rape and the friends of A-1, who have supported him in the love affair, have been falsely implicated in this case. The testimonies of the witnesses lack credence and do not inspire confidence due to grave exaggerations and contradictions and the Trial Court, on misguided appreciation of facts and law, had wrongly convicted the appellants.
 - 2) The evidence of P.W.1 is not only self-contradictory, but also exaggerated in all aspects. In her complaint under Ex.P.1, she had stated that A-1 induced her and took her to the house belonging to A-2 ; whereas, in her evidence before the Court, she had deposed that it was both A-1 and A-2 who had taken her to A-2's house under threat. In every stage, there is exaggerations and improvements in the version of P.W.1, which cannot be believed in all aspects. However, the Trial Court, believing the version of P.W.1, had convicted the accused.
 - 3) Further, the prosecution has failed to prove by scientific evidence that the accused are responsible for the sexual assault on the victim.
 - 4) The alleged occurrence is stated to have taken place on 05.06.2006, in the house of A-2 in the third Floor of a Slum Clearance Board tenements, which is a thickly populated area, consisting of 12 Blocks and each Block containing 24 houses, which are very closer to each other.
 - 5) The conduct of the victim during the alleged occurrence and her conduct post the occurrence creates grave doubt in the prosecution case and the conduct of P.W.2-Grandmother and P.W.3-Aunty of the victim prior to the occurrence and post the occurrence is highly unnatural and their evidence is suspicious and lacks credibility.

- 6) Further, the victim was stated to have been taken to the hospital by her father and non-examination of the father of the victim, is fatal to the prosecution case.
- 7) Admittedly, it is a case of consensual sexual relationship between the victim and A-1 and coupled with the fact that there being no external injuries belies the case of the prosecution that the victim was subjected to brutal rape by two persons. The evidence of P.W.1/victim is clear that she had affair with A-1 and that she had willfully on consent, gone along with him and that she having not found on the previous day in the house, a complaint had been given to the respondent police by Babu, the maternal uncle of the victim, whereas, strangely the said Babu has not been examined by the prosecution which creates grave doubt in the prosecution case. As stated earlier, being a case of consensual relationship, there is a possibility of the hymen being ruptured, but as per Ex.P.11-Accident Register, excepting an abrasion over the left buttock, no other injuries were noted on any part of the body. If it is a case of rape by violence as projected by P.W.1, there would have been injuries present all over the body.
- 8) The non examination of the residents in the locality, which is a thickly populated and more especially, the other residents/neighbours in the nearby houses [independent witnesses] in the Slum Clearance Board tenements, creates doubt in the prosecution case.
- 9) The attended circumstances surrounding the case would categorically prove that A-1/appellant in CrI.A.No.57/2010 and the victim had consensual relationship and when the facts are being so, the prosecution has failed to prove by letting in legal and conclusive evidence that the victim was less than 16 years at the time of alleged occurrence. Whereas the appellants by way of defence have marked Ex.D.1-Age Certificate, to prove that the age of the victim was more than 17 years but below 19 years. When such being so the Trial Court had erred in believing Ex.P.16-Transfer Certificate marked through P.W.10 to hold that the victim age was less than 16 years. Ex.P.16 is not issued under any Statute and when such being so, Ex.P.16-Transfer Certificate cannot be taken as a relevant document and admissible under Section 35 of the Evidence Act without no proper evidence as to the source of information regarding the date of birth. Further, Ex.P.16 had been brought into this case, three months after the occurrence, creating a doubt with regard to the Date of Birth of the victim/P.W.1.
- 10) Though the sole testimony of the prosecutrix/victim is enough to base conviction, it should inspire

confidence and in this case, the evidence of P.W.1 lacks credibility and thereby, the Trial Court had erred in convicting the appellants based on the evidence of the witnesses, which lacks credence.

- 11) In so far as the appellant in CrI.A.No.642/2009/A-3 is concerned, at the earliest point of time, both in the First Information Report as well as in the 161 statement, P.W.1, the victim had not stated that the Appellant/A3 had touched or threatened her to come to the house and that admittedly, even according to the initial statement of P.W.1, the Appellant/A3 was sleeping in the house and on hearing the noise, he woke up and he has not sexually assaulted or abused her.
 - 12) The prosecution case, when judged on the touchstone of totality of the facts and circumstances, does not generate the qualified satisfaction indispensably required to enter into finding of guilt against the accused. In the case on hand, the prosecution has failed to prove its case beyond all reasonable doubts and the Trial Court without taking into consideration the totality of the facts and circumstances, by wrongly placing reliance on Ex.P.16 and rejecting Ex.D.1, had erred in convicting the appellant/accused.
 - 13) In sum and substance, the learned counsel for the Appellants has ultimately contended that the impugned judgement of conviction and sentence is against law, weight of evidence and probabilities of the case and that the Prosecution has failed to prove its case beyond all reasonable doubts and that the Trial Court is not correct and justified in convicting and sentencing the Appellants and consequently, the Appellants are entitled to benefit of doubt and they are entitled for acquittal.
9. The learned counsel for the appellants, in support of his contentions, placed reliance on the following decisions:-
- (a) 2010 [1] SCC 742 [Sunil Vs. State of Haryana] ;
 - (b) 2006 [5] SCC 384 [Ravinder Singh Gorkhi Vs. State of UP];
 - (c) 1988 Supp. SCC 604 [Birad Mal Singhvi V. Anand Purohit];
 - (d) 2011 [7] SCC 130 [Krishan Kumar Malik Vs. State of Haryana] ;
 - (e) MANU/SC/1287/2016 [Raja and Others V. State of Karnataka] ;
 - (f) 2018 (9) SCC 248 [Rajak Mohammad Vs. State of Himachal Pradesh].

10. Per contra, the learned Additional Public Prosecutor, while refuting the contentions put forward by the learned counsel for the appellants/A-1 and A-3 would submit that

the prosecution has proved its case beyond all reasonable doubts. He put forward the following submissions:-

- a) In the case on hand, a minor girl aged about 15 years was taken by the accused under threat to the house belonging to the 2nd accused when his parents were away and A-1 and A-2, by threatening with her knife, committed rape on her and A-3 abetted the offence of rape.
 - b) The age of the victim/P.W.1 that she was less than 16 years of age on the date of occurrence, has been proved by examining P.W.10-Teacher, through whom Ex.P.16-Transfer Certificate was marked.
 - c) The evidence of P.W.1-victim has been amply corroborated by the evidence of P.Ws.2 and 3 who are respectively the grandmother and aunt of the victim.
 - d) P.W.8-Dr.Tamilselvi, has been examined to prove that the victim/P.W.1 was sexually assaulted and that, she had issued Ex.P.11-Accident Register, wherein she had stated that the hymen was ruptured. Further, through Ex.P.12-Opinion, P.W.8 had stated that the victim/P.W.1 might have been sexually assaulted.
 - e) Much significance cannot be attached to the non-examination of Babu, since the victim, being a minor, was taken to the police station by P.W.3-aunt and her husband Babu. P.W.3 had deposed about having taken the victim/P.W.1 to the police station along with her husband Babu.
 - f) Though it is the case of the defence that the occurrence had taken place in a Slum Clearance Board tenement, where there are number of houses nearby, it is the evidence of P.W.1/victim that she was subjected to threat by the accused resulting in her keeping quiet and going to the house of A-2 without raising any hue and cry.
 - g) Conviction for the commission of the offence of rape can be based on the sole and solitary testimony of the prosecutrix, if the same inspires confidence of the Court and in the case on hand, finding the testimony of the victim/P.W.1 is much clear and trustworthy, the Trial Court had rightly convicted and sentenced the accused.
 - h) Though there are minor and trivial discrepancies in the evidences, the same has not affected the case of the prosecution and would pray that the judgment of conviction and sentence passed by the Trial Court, does not warrant any interference and needs to be confirmed.
- 11.The learned Additional Public Prosecutor, in support of his contentions, placed reliance upon the following decisions:-

[a] 2017 [2] MLJ [Cr1] 14 [N.Rasu and Others Vs. State of Tamil Nadu] ; [b] 2015 [7] SCC 773 [State of

Madhya Pradesh Vs. Anoop Singh] ;

[c] 1996 [2] SCC 384 [State of Punjab Vs. Gurmit Singh and others]; and

[d] 2018 SCC Online SC 2886 [State of Himachal Pradesh Vs. Manga Singh].

12. I have given my careful and anxious consideration to the rival contentions put forward by either side and thoroughly scanned through the entire evidence available on record and also perused the impugned judgement of conviction.

13. Points for consideration:-

(a) Though, in a case of rape, the solitary testimony of the prosecutrix is sufficient to render conviction, taking into consideration the attended circumstances in this case, it is to be seen as to whether the evidence of the prosecutrix/ victim/P.W.1 inspires confidence of this Court and whether her evidence is corroborated by any other evidence brought forth by the prosecution including the medical evidence to base the conviction on the appellants/A-1 and A-3?

(b) Whether the prosecution has succeeded in proving that the prosecutrix was a minor on the date of occurrence and whether the trial court was right in placing reliance on the evidence of PW-10 and EX P 16 /Transfer Certificate to fix the age of the prosecutrix to be less than 16 years on the day of occurrence?

(c) Whether the prosecution has proved the guilt on the part of the appellants/ A-1 and A-3 beyond all reasonable doubts, by adducing cogent, convincing and legally acceptable evidence?

(d) Whether the Trial Court is right and justified in convicting the appellants/A1 and A-3 based on available evidence on record?

14. Taking into consideration all the attended circumstances in this case, this court has to satisfy itself whether the sole testimony of the prosecutrix inspires the confidence and is sufficient to base conviction. In order to satisfy itself, this Court has to firstly analyse the initial complaint given by P.W1, Ex.P.1, her statement recorded under section 161 Cr.P.C., and the evidence deposed by her before the Court below, in consonance with the evidence of P.Ws.2 and 3 who are respectively her grandmother and aunt with great care, caution and circumspection.

15. Now, analysing the evidence with regard to credibility of the witnesses, Pws.1 to 3, P.W.1-victim, in her complaint under Ex.P.1, had stated that she has completed 9th standard and was going to 10th standard and that she knew Raja @ Rajasekar [A-1] who was residing in the same area and that he used to tease her and say that he was in love with her and while so, on 05.06.2006, at around

10.00 p.m., when she had gone to the grocery shop, A-1 had waylaid her and saying that it was raining, had taken her aside and told her that he is in love with her and asked her to come upstairs to discuss about the same. She had further stated that A-1 had told her that he will keep her well and will take her to cinema, beach and that he would buy whatever she asks and thereby induced her and had taken her to A-2's house situated in the 3rd floor of the 24th Block. When she had gone there, she had seen A-3 [Guna @ Gunasekaran] lying in a cot and when A-1 and A-2 had tried to have sexual relationship with her by enticing her and when she had attempted to shout, A-3 had gagged her mouth and A-1 threatened her that they would do away with her life if she shouts. Thereafter, both A-1 and A-2 had, by force, raped her and A-3 told A-1 and A-2 that he will do it later. Subsequently, as P.W.1 felt tired, she slept in the same place and at around 5.00 a.m., on 06.06.2006, the accused had woken her up and saying that she should not speak about the incident to anybody, had sent her out. Thereafter, P.W.1 had gone to her grandmother's [P.W.2] house and informed P.W.2 as to what had happened to her. P.W.2 informed the same to her son Babu (maternal uncle of P.W.1) and thereafter, they preferred a complaint before the respondent police. According to Ex.P.1., the occurrence had taken place at about 11.00 p.m. on 05.06.2006 and she came back to her house at 5.00 a.m., on the next day.

16. In her deposition in chief examination before the Court below, PW.1 had stated that A-1 had taken her to the house of A-2 by inducing her and that, after taking her to the house, the accused had pulled her dresses and had torn the same and pushed her on the bed and when she raised alarm, they had gagged her mouth and threatened her by showing knife and when she attempted to get out of the house, A-3 prevented her. Thereafter, A-1 is stated to have committed sexual assault on her and A-2 had caught hold of her hands and when she had raised alarm, they had slapped her. She had further deposed that after the occurrence, she slept in the same house and after she woke up, she went to her grandmother's house [P.W.2] and that her grandmother was sleeping and P.W.1 went and slept besides her grandmother. After some time, her grandmother [P.W.2] ; aunt [P.W.3] and uncle enquired her as to where she had gone in the previous night and she had told them about the incident. Thereafter, they had taken her to the police station and her statement was reduced into writing by the Inspector and thereafter, she was taken to P.W.2's house, from where she had produced the materials objects [M.Os.1 to 5]. During her cross-examination P.W.1 had admitted that in the 24th Block there are 6 floors and there are 4 tenements in each floors and that the doors of each house is facing

the other. She had further stated that when Raja @ Rajasekar [A-1] had called her, she had gone along with him without raising any objection whereas contradicting her own statement, she had stated that she did not raise any alarm since A-1 had threatened her. Strangely in total contradiction to the complaint, she had stated that A-2 and A-3 dragged her and pulled her and in the later part of the evidence, she had admitted that if she had raised hue and cry, it could be heard by the residents in the other houses since the doors of each houses were close to one another. She had further deposed in the cross-examination that both A-1 and A-2 had caught hold of her and carried her to the third floor and that she did not cry or raise any alarm and that she was taken to the third floor and further admitted that her uncle's house and grandmother's house are in the very same tenement. Further, she had admitted that she had not stated about the accused threatening her or carrying her by force into the house of A2 in Ex.P.1-complaint. In one part of the deposition, she had stated that after the incident, she had not gone to the house of her uncle fearing her uncle.

17.The above versions of P.W.1, rather her statement before the Investigating Officer and her evidence before the Court below, is full of contradictions, exaggerations and improvements and the same cannot be believed at any stage. Though the sole and solitary testimony of the prosecutrix/victim is enough for basing conviction on the accused, it should be probablised and it should inspire confidence of the Court, without any flaws, contradictions, exaggerations / embellishments at any stage. In such circumstances, the Court should also take into consideration the conduct of the victim and the witnesses prior to the occurrence, during the occurrence and after the occurrence.

18.Now, coming to the evidence of P.W.2-grandmother of the victim/P.W.1 and P.W.3-aunt, they were residing in the same locality [Slum Clearance tenements] in different houses, which are very close to each other. P.W.2-Kamala had deposed that her granddaughter / victim [P.W.1] went out of the house around 9.30 p.m. on 05.06.2006 to buy vegetables and that she did not return home and at around 11.00 p.m., it was raining and she went to the house of her son and informed about the missing of P.W.1 and thereafter, her son Babu and his wife - P.W.3 went in search of P.W.1 and later presuming that P.W.1 would have gone to some known person's house, had gone back to their respective houses and on the next day morning, i.e., on 06.06.2006, when P.W.2 had woken up, she had found P.W.1 lying near her and that she had not enquired her granddaughter and left the house to sell idlis and that when she returned home at around 10.00 a.m., she

found P.W.1 sleeping and having seen the chudidhar of her granddaughter torn and she had enquired P.W.1 who had revealed that A-1 and A-2 committed raped on her and that A-3 had threatened her with knife and further the accused had threatened her that if she discloses about the occurrence to anybody, they will do away with the lives of the family members. Thereafter, P.W.2 had informed her son [not examined] and daughter-in-law [P.W.3] and her son had taken P.W.1 to the police station and gave the complaint and that on the same day, the police recovered the clothes worn by the prosecutrix/P.W.1 at the time of occurrence. In her cross-examination, P.W.2 had stated that she was awake till 00.00 hours midnight expecting her granddaughter [P.W.1] to come back and later slept and that she had seen P.W.1 only at 5.00 a.m., on the next day, i.e., 06.06.2006. Further she had stated that the age of her granddaughter would be between 15-16 years.

19.P.W.3-Varalakshmi, the aunt of P.W.1/victim and the daughter-in-law of P.W.2 had deposed about having searched for P.W.1/victim on the date of occurrence, i.e., 05.06.2006, along with her husband, mother-in-law [P.W.2] and not being able to find P.W.1, all of them went back to their respective houses. During her cross examination, she had deposed that P.W.1 had left home to the grocery stores to purchase vegetables saying that her grandmother [P.W.2] had asked her. She had further deposed that the house of P.W.2 was very close to her house, viz., just below her window and that on the next day morning, when P.W.1 had come back home, they have beaten her and enquired her as to what had happened on the previous night and that, P.W.2 and P.W.3 as well as the husband of P.W.3 had beaten P.W.1. P.Ws.2 and 3 had stated that till such time P.W.1 was taken to the police station, she had not taken bath. A suggestion was put to the witnesses, P.Ws.1 to 3 that there had been a love affair between A-1 and the victim girl and the said suggestion had been denied by P.Ws.1 to 3.

20.Now analysing the evidence of the witnesses, PW.1 to PW.3 with regard to the place of occurrence and probability, PW.1 had deposed that the occurrence had taken place in a slum clearance board tenement in the third floor. She had also admitted that there are six floors in a block and each floor consists of four houses and the doors of the four houses are facing each other. PW.4, Raji, is the witness to the observation mahazar as well as to the recovery of the materials from the scene of crime under seizure mahazar Ex.P3 and recovery of materials objects pertaining to the victim under seizure mahazar Ex.P4.

21.As per Ex.P2, there are 24 blocks in the Housing Board Tenement, out of which, 12 blocks are on the Western side

and the other 12 blocks are on the opposite side and that the place of occurrence is on the 24th block and the door of the house was facing North and in the same floor, Door Nos.24/11 and 24/12 are on the Western side and Door No.24/9 was on the Eastern side and that the floor going to the First Floor and the floor going to the III Floor are just opposite to the door of the scene of occurrence. It has also been supported by rough sketch, Ex.P18 marked through PW.11. Admittedly, it is a thickly populated locality and the possibility of the occurrence, in the event of it being a rape under violence without being get noticed by the other residents, could not have been probable. Further, in this case, none of the residents of the nearby houses have been examined by the Prosecution,

22.A perusal of the evidences of the above prosecution witnesses, viz., P.Ws.1 to 3, would disclose that their testimonies are not only self contradictory but also non-corroborative with each other. Admittedly, the houses of P.Ws.2 and 3 are close to each other and both of them, P.Ws.2 and 3, knew that P.W.1 was missing in the night and their conduct in not searching for the girl/P.W.1 who was stated to be aged 15 years in the night and not giving a police complaint, is not only unnatural, but also creates grave doubt. The conduct of P.W.2 and P.W.3 is not natural. If a girl aged about 15 years is found missing in the night, it would not have been the natural conduct of P.Ws.2 and 3, her grandmother and aunt, to go back to their respective houses presuming that she would have gone to somebody's house. Further, it is the evidence of P.W.1 that being frightened of her uncle, she did not go to her uncle's house. It is the evidence of P.Ws.2 and 3 that they along with Babu, the husband of P.W.3, had beaten her questioning her what had happened in the previous night. If P.W.1 had been a victim, P.W.2 and P.W.3 would have searched for her in the night and would not have beaten her in the next morning. This Court is of the opinion that the Trial Court had not properly analysed the evidence in this regard.

23.Coming to reliability of the other corroborating witnesses, PW.4, Raji, as stated above is the witness for the observation mahazar and the seizure mahazar. He is the friend of Babu, maternal uncle of PW.1 and he had specifically stated that he and Babu, maternal uncle of PW.1 are very good friends and that he along with Babu and PW.3 went to the Police Station, lodged the complaint and the complaint was written by some other person. The scribe of the complaint was not examined and thereby, the evidence of PW.4 also creates a doubt as to who had lodged the complaint under Ex.P1.

24.Further, PW.5, Rajendran is the witness for arrest, recovery and confession, relating to Raja and he had also

deposed that he is the friend of Babu. PW.6 is yet another witness for arrest, recovery and confession of the other accused and he had deposed that he is the friend of Babu and that he had gone to the Police Station, since he was known to the Police and that his signatures were obtained in the documents in the Police Station and thereby the evidence of PW.4 to PW.6 is also doubtful.

25. Now coming to the evidence of PW.7, Dr.R.Selvakumar, he had deposed about the test conducted regarding the potency of A1 and A2 and issuance of Certificates under Exs.P.9 and P.10 respectively. PW.8, Dr.Tamilselvi who had examined the victim/P.W.1, had deposed that the hymen of the victim/P.W.1 was ruptured and the vaginal smear taken for examination, did not reveal the presence of semen in it and that she had opined that the victim might have been sexually assaulted. She had further deposed that the victim/ P.W.1 was brought to the hospital by her father one Rajendran and that an entry had been made in the Accident Register to that effect. Further she had deposed that she had not written the age of the injury found on the victim and that she had not mentioned about the other identifications regarding the injuries.

26. P.W.9-Dr.Kamalakshi Krishnamurthy, the scientific officer had deposed that she had analysed M.Os.1 to 10 and that she had detected traces of semen in M.O.6-Bedsheet recovered from the house of A-2 and that semen was not found in M.Os.1 to 4 and 5 to 12 and that she had sent the result for serological test. In her cross examination, she had stated that she had not received the Serological Report. Further, in this case, admittedly, the vaginal smear taken from the victim did not reveal the presence of semen and the semen was not also detected in the clothes recovered from PW.1, viz. MO.1 to MO.4 and no recovery and no test had been done as contemplated under Section 53A of Cr.PC to tally the group of semen found in the MO.6, bed sheet recovered from the house of A2 with that of the accused. Further, there is no evidence on record to show that the Prosecutrix either took bath after the occurrence or that the clothes worn by her viz. MO.1 to MO.4 were washed after the occurrence.

27. P.W.10-Kasthuri, the Headmistress of the school where the victim/P.W.1 had studied, had deposed that the victim was admitted in the School on 12.06.2002 in Class 6 and that the victim studied up to Class 10 and discontinued her studies and the Date of Birth of the victim/P.W.1 was 03.12.1990. P.W.10 also deposed that the victim had left the school on 01.09.2006 and the Transfer Certificate was issued on the request of PW.1 and her mother. The transfer certificate dated 01.09.2006 had been marked as Ex.P.16 to prove the age. In her cross-examination, she

had stated that at the time of admitting the victim/P.W.1 in Class 6, she had brought the records from the School where she had last studied from Standard I to V. However, those documents from the school where she studied Standard I to V, were not produced to prove the age whereas the Transfer Certificate issued much after the date of occurrence was marked as Ex.P16. Neither of the parents have been examined to prove the age of the victim.

28.P.W.11-Saravanan, the Investigating Officer had deposed that after registration of the case, the victim was produced before the Reception Home at Kellys pursuant to her production before the Court concerned and thereafter, she was subjected to medical examination. In the cross-examination, he had deposed that the occurrence had happened in the third floor and that there are 6 to 7 houses nearby. Further, he had stated that P.W.1 had not stated in Ex.P.1 that the accused had torn her clothes and that she had not stated that the accused had taken her to the house of A-2 by force under threat. P.W.11 had further deposed that when he had enquired P.W.1, she had not informed about the accused having gagged her mouth and that P.W.1 had told him that A-1 had proposed to her that he loved her and that the victim/P.W.1 had not told him about having raised hue and cry when she was carried by the accused to the house of A-2 which was in the third floor and that she had raised alarm only when was inside the house.

29.P.W.12-Ramanathan, the Investigating Officer who had conducted further investigation, had deposed that he had attested the Medical Certificate to prove the age of the victim/P.W.1, which was marked as Ex.D.1. He had admitted that as per Ex.D.1, the age of the victim was above 17 years and below 19 years. He had further deposed that during enquiry of P.W.8-Dr.Tamilselvi, she had told him that since no semen was found in the vagina of the victim/P.W.1, there was no possibility of the victim having been subjected to sexual assault. He had further deposed that he had not recovered the Age Certificate of the victim/P.W.1 from the School where the victim was admitted initially.

30.The learned Additional Public Prosecutor has placed reliance upon Manga Singh's case and Gurmit Singh's case [cited supra] to substantiate his argument that conviction can be based on the sole testimony of the prosecutrix, if it inspires confidence and no corroboration is required unless there are compelling reasons which necessitate the Courts to insist for corroboration of her statement.

31.In the judgment reported in 2018 SCC Online 2886 [State of Himachal Pradesh V. Manga Singh], by quoting its earlier decision reported in 1996 [2] SCC 384 [State of

Punjab V. Gurmit Singh], the Apex Court has held in paragraphs No.12 and 13 thus:-

'12 It is well settled by a catena of decisions of the Supreme Court that corroboration is not a sine qua non for conviction in a rape case. If the evidence of the victim does not suffer from any basic infirmity and the 'probabilities factor' does not render it unworthy of credence. As a general rule, there is no reason to insist on corroboration except from medical evidence may not be available. In such cases, solitary testimony of the prosecutrix would be sufficient to base the conviction, if it is inspires the confidence of the Court.

13 In State of Punjab V. Gurmit Singh, [1996] 2 SCC 384, it was held as under:-

'8 The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not over-look. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl of a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion?' [Emphasis supplied]

32. This Court, though agreeable to the argument advanced by the learned Additional Public Prosecutor and the principle of evidence that the sole testimony of the prosecutrix/victim in rape cases is vital and is sufficient to base a conviction, is of the opinion that

the said testimony of the victim/prosecutrix should inspire confidence of the Court and there should be no room to disbelieve or suspect her version.

33. This court deems it fit to refer to the decision of the Hon'ble Apex Court reported in 2011 [7] SCC 130 [Krishan Kumar Malik Vs. State of Haryana], has held thus:-

"'31 No doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of the prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality. But, in the case on hand, the evidence of the prosecutrix, showing several lacunae, which have already been projected hereinabove, would go to show that her evidence does not fall in that category and cannot be relied upon to hold the appellant guilty of the said offences.

32 Indeed, there are several significant variations in material facts in her section 164 statement, section 161 statement [Cr.P.C.], FIR and deposition in Court. Thus, it was necessary to get her evidence corroborated independently, which they could have done either by examination of Ritu, her sister or Bimla Devi, who were present in the house at the time of her alleged abduction. The record shows that Bimla Devi though cited as a witness was not examined and later given up by the public prosecutor on the ground that she has been won over by the appellant.

...

43 With regard to the matching of the semen, we find it from Taylor's Principles and Practice of Medical Jurisprudence, 2nd Edn [1965] as under:-

"'Spermatozoa may retain vitality [or free motion] in the body of a woman for a long period, and movement should always be looked for in wet specimens. The actual time that spermatozoa may retain alive after ejaculation cannot be precisely defined, but is usually a matter of hours. Seymour claimed to have seen movement in a fluid as much as 5 days old. The detection of dead spermatozoa in stains may be made at long periods after emission, when the fluid has been allowed to dry. Sharpe found identifiable spermatozoa often after 12 months and once after a period of 5 years. Non-motile spermatozoa were found in the vagina after a lapse of time which must have been 3 and could have been 4 months.'"

Had such a procedure been adopted by the prosecution, then it would have been a foolproof case for it and against the appellant.

44 Now, after incorporation of section 53-A in the Criminal Procedure Code w.e.f. 23.06.2006, brought to our notice by the learned counsel for the respondent State, it has become necessary for the prosecution to go in for DNA test in such type of cases, facilitating the prosecution to prove its case against the accused. Prior to 2006, even without the aforesaid specific provision in CrPC the prosecution could have still resorted to this procedure of getting the DNA test or analysis and matching of semen of the appellant with that found on the undergarments of the prosecutrix to make it a foolproof case, but they did not do so, thus they must face the consequences.'

34. Now taking into consideration the above decision of the Honourable Supreme Court and the facts and evidence on record, this Court has a duty to scrutinize the evidence of the witnesses.

35. A thorough scrutiny of the evidence of the prosecutrix/P.W.1 in the preceding paragraphs would reveal that there are not only contradictions in her evidence but also exaggerations in her version and that the conduct of the victim at the time of occurrence and the conduct of P.W.2 and P.W.3 before the occurrence and the conduct of P.Ws.1 to 3 post the occurrence, does not seem to be natural and thereby, does not inspire confidence of this Court. It is a case where a young girl was found missing and though houses of P.Ws.2 and 3 are very close-by, no steps had been taken by them either to search for her or to give a complaint to the respondent police station, which was situated nearby. Further, in her evidence, P.W.1 had stated that after the occurrence, she had slept in the house of A-2 and that only on the next day morning she woke up at about 5.00 a.m. and she had gone back to P.W.2's house and slept besides her grandmother without informing anything and that she had informed about the occurrence to P.W.2 only at 12.00 Noon on 06.06.2006. Thereafter, P.W.1 was taken to the Police Station by P.W.2, P.W.3 and her maternal uncle. Strangely, the maternal uncle of the victim has not been examined by the prosecution. Further, the alleged occurrence had taken place in a thickly populated locality, viz., Slum Clearance Board tenement. As per Ex.P.18, there are about 24 blocks and each block consists of 5 floors and in each floor, there are about 4

houses and as per the evidence of P.W.1, the doors of the houses are facing opposite to each of the houses and in one part of the evidence, P.W.1 had stated that she kept quiet since she was threatened whereas in the other part of the evidence, she had stated that she had raised hue and cry and if it is so it is highly strange that nobody else had intervened to save her. Further, none of the occupants in the houses have been examined with regard to the incident and as per the evidence of P.W.8-Dr.Tamilselvi, the victim was brought by her father Rajendran and non-examination of the father of the victim/P.W.1 is also fatal to the case of the prosecution. Further, it is the evidence of PW1 that she was beaten by her uncle and her aunt-P.W.3, and that on the insistence of her uncle, his wife PW3 took her to the Police Station and that she gave the complaint under Ex.P1. P.W.3 has also corroborated the evidence of P.W.1 in this regard. Further, during the perusal of records, it was found that the victim was lodged in the Government/Juvenile Home at Kellys for a brief period by the prosecution and this fact also incites a doubt in the mind of the Court that the victim/P.W.1 would have refused to go along with her relatives fearing harassment by them. This Court is of the considered view that the evidence of P.W.1/victim is full of exaggerations and contradictions and it does not inspire confidence and the possibility of tutoring is also not ruled out.

36. Taking into consideration the evidence on record and the attended circumstances, this Court is of the opinion that a case of consensual sexual relationship has been projected as a case of forceful sexual intercourse under threat.

37. Now having held that the case is not one of forceful sexual intercourse under threat, this Court has to analyse whether the Prosecution has proved that the victim/ Prosecutrix was aged below 16 years on the day of occurrence.

38. Coming to the aspect of determination of age of the victim, the learned counsel for the Appellants submitted that the Prosecution has failed to prove that the Prosecutrix was less than 16 years of age and she was incapable of giving consent by letting in legal evidence. He would submit that the victim was above 17 years and below 19 years of age and that to substantiate that stand, the defence had relied upon Ex.D1, age certificate issued by PW.7, Dr.R.Selvakumar, Institute of Forensic Medicine, Madha Medical College, Chennai. When the evidence in Ex.D1 is clear, the Trial Court erred in believing Ex.P16 transfer certificate marked through the Head Mistress of the School where the victim studied during the time of occurrence. He would further submit that the transfer certificate cannot be construed to be a

valid document relevant under Section 35 of the Evidence Act to fix the age beyond reasonable doubt.

39. Admittedly, as per the evidence of PW.10, the Headmistress had stated that the date of birth as entered into the transfer certificate was based on documents submitted by the victim when she had joined the school, after discontinuing the earlier school where she originally joined. No other supporting documents, like birth certificate or transfer certificate issued by the Primary School, were marked by the Prosecution. Admittedly, the transfer certificate had been obtained three months after the occurrence. No witness has been examined to speak about the date of birth of the prosecutrix and no body had been examined to speak about the entry made in the primary school based on which entries were made in the transfer certificate EX P 16. There is nothing on record to show that the said date of birth was recorded in a register maintained by the school in terms of the requirements of law as contained in Section 35 of the Evidence Act.

40. In support of the contention regarding the failure of the prosecution in proving the age of the prosecutrix to be less than 16 years on the date of occurrence beyond reasonable doubt and the error committed by the trial court in relying on the evidence of PW 10 and EX P 16, the learned counsel for the Appellants has relied on the following decisions:

- a) 1988 Supp.SCC 604 [Birad Mal Singhvi Vs. Anand Purohit]
- b) 2006 [5] SCC 384 (Ravinder Singh Gorkhi Vs. State of UP)
- c) 2010 [1] SCC 742 [Sunil Vs. State of Haryana]
- d) 2018 9 SCC 248 Rajak Mohammad Vs. State of H.P.

41. Per contra, the learned Additional Public Prosecutor would emphasis that the the trial court had rightly fixed the age of the prosecutrix to be less than 16 years based on the evidence of PW10 and EX P16 transfer Certificate since it satisfied the requirement of Section 94 of the Juvenile Justice [Care and Protection of Children] Act, 2015. This Court is unable to accept the above said submissions of the learned Additional Public Prosecutor. In the case on hand the offence is stated to have been committed on 05.06.2006. It is apposite to refer to the decision of the Hon'ble Apex Court reported in 2019 [2] SCC [Cri.] 314 [Gaurav Kumar @ Monu @ State of Haryana], wherein the Apex Court taking into consideration the date of occurrence to be 23.05.2000/24.05/2000, has held that on which date neither the Rules of the Juvenile Justice [Care and Protection of Children] Rules, 2007 nor 2015 could be enforced, has held hereunder:-

'18 The submissions raised by the learned

counsel for appellant based on Rule 12[3] of the 2007 Rules could have been considered by us in detail but we notice that in the present case, there is no applicability of Rule 12 of the 2007 Rules. The date of occurrence in the present case is 23.05.2000/24.05/2000 on which date the 2007 Rules were not enforced. Even on the date when the learned District and Sessions Judge submitted his report 08.05.2003 after holding inquiry, the 2007 Rules were not in force. Rule 100 of the 2007 Rules repealed the earlier Rule of the Juvenile Justice [Care and Protection of Children] Rules, 2001. Rule 100 of the 2007 Rules is as follows:-

'100.Repeal-The Juvenile Justice [Care and Protection of Children] Rules, 2001, notified vide F.No.103/2001-SD dated 22.06.2001 in the Gazette of India, Extraordinary, Part I, section I of the same date is hereby repealed.'

19 Thus, the relevant Rule occupying the field in the present case were the 2001 Rules. Rule 22 of the 2001 Rules dealt with 'procedure to be followed by a board in holding the inquiry in the determination of age.' Rule 22 sub-rule [5] which is relevant for the present case is as follows:-

[i]a birth certificate given by a corporation or a municipal authority;

[ii]a date of birth certificate from the school first attended ; or

[iii]matriculation or equivalent certificates, if available ; and

[iv]in the absence of [i] to [iii] above, the medical opinion by a duly constituted Medical Board, subject to a margin of one year, in deserving cases for the reasons to be recorded by such Medical Board, regarding his age, and, when passing orders in such case shall, after taking into consideration such evidence as may be available or the medical opinion, as the case may be, record a finding in respect of his age.'

42.In this case, on that date of occurrence, Juvenile Justice [Care and Protection of Children] Rules, 2001 was applicable and Rule 22(5) is the relevant Rule which was

applicable for determining the age of the Juvenile/Child in conflict with law. The evidence let in by the prosecution to prove the age of the victim was EX P 16 Transfer Certificate marked through PW 10 the Head Mistress. As stated earlier PW 10 had deposed that the victim was admitted in the School on 12.06.2002 in Class 6 and that the victim studied up to Class 10 and discontinued her studies and the Date of Birth of the victim/P.W.1 was 03.12.1990. P.W.10 also deposed that the victim had left the school on 01.09.2006 and the Transfer Certificate was issued on the request of PW1 and her mother. The transfer certificate dated 01.09.2006 had been marked as Ex.P.16 to prove the age. In her cross-examination, she had stated that at the time of admitting the victim/P.W.1 in Class 6, she had brought the records from the School where she had last studied from Standard I to V. Admittedly in this case the prosecution has not conducted enquiry as contemplated in Rule 22(5) of the Juvenile Justice [Care and Protection of Children] Rules, 2001, whereas has relied on the Transfer Certificate to determine and fix the age.

43. Now while analysing the judgements relied on by the counsel for the appellant regarding determining the age of the prosecutrix/victim, in 2010 [1] SCC 742 [Sunil Vs. State of Haryana], the Apex Court has in para 25 held that:-

''25 The prosecution also failed to produce any admission form of the school which would have been primary evidence regarding the age of the prosecutrix. The School Leaving Certificate produced by the prosecution was also procured on 12.09.1996, six days after the incident and three days after the arrest of the appellant. As per that certificate also, she joined the school in the middle of the session and left the school in the middle of the session. The attendance in the school of 100 days is also not reliable. The prosecutrix was admitted in the school by Ashok Kumar, her brother. The said Ashok Kumar was not examined. The alleged school leaving certificate on the basis of which, the age was entered in the school was not produced.

26 Bishan, PW8, the father of the prosecutrix has also not been able to give correct date of birth of the prosecutrix. In his statement he clearly stated that he is giving an approximate date without any basis or record. In a criminal case, the conviction of the appellant cannot be based on an approximate date which is not supported by any record. It would be quite unsafe to base convicting on an approximate date.''

44. In the case of Ravinder Singh Gorkhi Vs. State of UP reported in 2006 [5] SCC 384, the Hon'ble Apex Court, relying upon its decision reported in 1988 Supp.SCC 604 [Birad Mal Singhvi Vs. Anand Purohit], has held in paragraphs No.17 and 23 as follows:-

'17 The school leaving certificate was said to have been issued in the year 1998. A bare perusal of the said certificate would show that the appellant was said to have been admitted on 1-8-1967 and his name was struck off from the roll of the institution on 6-5-1972. The said school-leaving certificate was not issued in the ordinary course of business of the school. There is nothing on record to show that the said date of birth was recorded in a register maintained by the school in terms of the requirements of law as contained in section 35 of the Evidence Act. No statement has further been made by the said Headmaster that either of the parents of the appellant who accompanied him to the school at the time of his admission therein made any statement or submitted any proof in regard thereto. The entries made in the school-leaving certificate, evidently had been prepared for the purpose of the case. All the necessary columns were filled up including the character of the appellant. It was not the case of the said Headmaster that before he had made entries in the register, age was verified. If any register in regular course of business was maintained in the school, there was no reason as to why the same had not been produced.

...

23 Section 35 of the Evidence Act would be attracted both in civil and criminal proceedings. The Evidence Act does not make any distinction between a civil proceeding and a criminal proceeding. Unless specifically provided for, in terms of section 35 of the Evidence Act, the register maintained in the ordinary course of business by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country, in which, inter alia, such register is kept would be a relevant fact. Section 35, thus, requires the following conditions to be fulfilled before a document is held to be admissible thereunder:- [i] it should be in the nature of the entry in any public or official register ; [ii] it must state a fact in issue or relevant fact ; [iii] entry must be made

either by a public servant in the discharge of his official duty, or by any person in performance of a duty specially enjoined by the law of country ; and [iv] all persons concerned indisputably must have an access thereto.'" [Emphasis Supplied].

45. In the judgment of the Hon'ble Apex Court in *Rajak Mohammad Vs. State of Himachal Pradesh*], reported in (2018) 9 SCC 248, a three Judges Bench of the Hon'ble Apex Court has held as hereunder:-

'5 In this regard, we have considered the evidence and materials on record. The age of the prosecutrix has been sought to be proved by the prosecution by bringing on record the School Admission Form [Exhibit PW5/A] and the certificate [Exhibit PW5/B] issued by one Jasdeep Kaur [PW5], JBT Teacher of Government School Dungi Plate. P.W.5 in her deposition has stated that the writings in the School Admission Form [Exhibit PW5/A] are in her handwriting and the signature affixed is that of the mother of the prosecutrix. In cross-examination, PW5 had stated that the details mentioned in Exhibit PW5/A have been obtained from the School Leaving Certificate issued by the Government Primary School, Tambol. The certificate issued by the Government Primary School, Tambol on the basis of which the details in the Admission Form [Exhibit PW5/A] was filled up by pW5 has not been exhibited by the prosecution. Nothing hinges on the document exhibited by the prosecution as Exhibit PW5/B as that is the consequential certificate issued on the basis of the entries in Exhibit PW5/A. The mother of the prosecutrix who had allegedly signed Exhibit PW5/A has not been examined by the prosecution.

6 On the other hand, we have on record the evidence of Dr. Neelam Gupta [PW8] a Radiologist working in the Civil Hospital, Nalagarh who had given an opinion that the age of the prosecutrix was between 17 to 18 years.

7 While it is correct that the age determined on the basis of a radiological examination may not an accurate determination and sufficient margin either way has to be allowed, yet the totality of the facts stated above read with the report of the radiological examination leaves room for ample doubt with regard to the correct age of the prosecutrix. The benefit of the aforesaid doubt,

naturally, must go in favour of the accused.

8 We will therefore, have to hold that in the present case the prosecution has not succeeded in proving that the prosecutrix was a minor on the date of the alleged occurrence. If that is so, based on the evidence on record, already referred to, we will further have to hold that the possibility of the prosecutrix being a consenting party cannot be altogether ruled out.''

46. In 2011 2 SCC 385 (Alamelu and another Vs. State), the Honourable Supreme Court, following the judgement in Ravinder Singh Gorkhi v. State of UP (2006 5 SCC 584), cited supra, has held as under:-

"45. In fixing the age of the girl as below 18 years, the High Court relied solely on the certificate issued by PW 8 Dr. Gunasekaran. However, the High Court failed to notice that in his evidence before the court, PW 8, the x-ray expert had clearly stated in the cross-examination that on the basis of the medical evidence, generally, the age of an individual could be fixed approximately. He had also stated that it is likely that the age may vary from individual to individual. The doctor had also stated that in view of the possible variations in age, the certificate mentioned the possible age between one specific age to another specific age. On the basis of the above, it would not be possible to give a firm opinion that the girl was definitely below 18 years of age.

46. In addition, the High Court failed to consider the expert evidence given by PW 13 Dr. Manimegalaikumar, who had medically examined the victim. In his cross-examination, he had clearly stated that a medical examination would only point out the age approximately with a variation of two years. He had stated that in this case, the age of the girl could be from 17 to 19 years. This margin of error in age has been judicially recognised by this Court in Jaya Mala v. Govt. of J&K [(1982) 2 SCC 538 : 1982 SCC (Cri) 502] . In the aforesaid judgment, it is observed as follows: (SCC p. 541, para 9)

"9. ... However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side."

47. We are of the opinion, in the facts of this case, the age of the girl could not have been fixed on the basis of the transfer certificate. There was no reliable evidence to vouchsafe the correctness of the date of birth as recorded in the transfer certificate. The expert evidence does not rule out the possibility of the girl being a major. In our opinion, the prosecution has failed to prove that the girl was a minor, at the relevant date."

47. In view of the above discussions and taking into consideration the catena of judgments of the Hon'ble Apex Court [cited supra] and on a careful and thorough scrutiny of the evidence of P.W.1, this Court has come to the indubitable conclusion that the evidence of the prosecutrix/victim/P.W.1 does not inspire the confidence of this Court and that the same is not trustworthy ; tainted and is of not sterling quality. In the case on hand, there are lacuna in the evidence of the prosecution witnesses and thereby, the evidence of the victim as well as the other witnesses do not fall within the category of sterling quality and cannot be relied upon to hold that the appellants/A-1 and A-3 are guilty of the offences and that the Trial Court had failed to take into consideration several significant variations in the material facts in the statement of P.W.1/victim given to the police during investigation and before the Court below. Further, no steps have been taken by the prosecution by invoking section 53-A Cr.P.C., to go for a DNA Test to prove the case. As per the Taylor's Principles and Practice of Medical Jurisprudence, a spermatozoa may retain vitality in the body of a woman for a long period and movements should always be looked in for specimens and in this case, though the victim has been subjected to medical examination and swab test had been done in the vagina of the victim/P.W.1 and no spermatozoa was found. Further, the clothes worn by the victim under MO.1 to MO.4, viz. while colour with violet and light yellow chudidhar top, white chudidhar bottom, white colour dupatta and green colour underwear, which were recovered immediately and subjected to scientific test also, did not disclose the presence of semen. It is pertinent that though as per P.W.9, Scientific Expert, semen was found in M.O.6-bed-sheet recovered at the house of A-2, no scientific test has been done as per Section 53-A Cr.P.C, to confirm that it matched with either of the accused.

48. Further, taking into consideration the principles laid down in the judgements referred to by the learned counsel for the Appellants, regarding determination of age, reliance cannot be placed on the evidence of PW.10, Head

Mistress and Ex.P16, the transfer certificate and thereby, this Court is of the opinion that the Prosecution has failed to prove the age of the Prosecutrix/ victim to be less than 16 years beyond reasonable doubt whereas the Trial Court, erred in relying on the evidence of PW.10 and Ex.P16 and convicting the Appellants. The evidence of PW.1 with regard to abettment by A3 is also not believable.

49. In 2019 4 SCC 522 (Digamber Vaishnav and another Vs. State of Chattisgarh), it was held as under:-

"One of the fundamental principles of criminal jurisprudence is undeniably that the burden of proof squarely rests on the prosecution and that the general burden never shifts. There can be no conviction on the basis of surmises and conjectures or suspicion howsoever grave it may be. Strong suspicion, strong coincidences and grave doubt cannot take the place of legal proof. The onus of the prosecution cannot be discharged by referring to very strong suspicion and existence of highly suspicious factors to inculcate the accused nor falsity of defence could take the place of proof which the prosecution has to establish in order to succeed, though a false plea by the defence at best, be considered as an additional circumstance, if other circumstances unfailingly point to the guilt. "

50. On a careful analysis of the evidence adduced on the side of the prosecution with the aid of the above referred judgments of the Hon'ble Apex Court and on consideration of the totality of the facts and circumstances of the case, this Court is of the opinion that the prosecution has failed to prove the case by letting in evidence, indispensably required to enter a finding of guilt against the appellants and there can be no conviction on the basis of surmises and conjectures or suspicion howsoever grave it may be. Strong suspicion, strong coincidences and grave doubt cannot take the place of legal proof and it would be unsafe to convict the appellants/A-1 and A-3 since there are several infirmities and inconsistencies in the prosecution version. The appellants/A-1 and A-3 are, therefore, entitled to benefit of doubt and they are liable to be acquitted.

51. In the result, the criminal appeals are allowed and the conviction and sentence imposed on the appellants/A-1 and A-3 by the learned Sessions Judge, Magalir Neethimandram, Chennai, vide impugned judgment dated 18.09.2009, made in

SC.No.502 of 2006 are hereby set aside. The appellants are acquitted of all the charges leveled against them. Fine amount, if any paid, shall be refunded to them. Bail bonds executed by the appellants, shall stand discharged.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

AP/Srcm
To

- 1.The Sessions Judge, Mahalir Needhimandram, Chennai.
- 2.Inspector of Police (L&O), E3 Teynampet Police Station, Chennai.
- 3.The Principal District Judge, Chennai.
- 4.The XVIII Metropolitan Magistrate, Saidapet, Chennai.
- 5.The Chief Metropolitan Magistrate, Chennai.
- 6.The Public Prosecutor, High Court, Madras.
- 7.The Director General of Police, Mylapore, Chennai.
- 8.The Superintendent of Prisons, Central Prison, Puzhal, Chennai.

Copy to :

The Section Officer,
criminal Section,
High Court, Madras

+2ccs to Mr.M.Jaikumar , Advocate SR.No. 56248
Crl.A.Nos.642/2009 &
57/2010

A.SK(01/10/2019)