

IN THE HIGH COURT OF JUDICATURE AT MADRAS  
RESERVED ON : 19.03.2018  
DELIVERED ON : 21.01.2019

CORAM:  
THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN  
Criminal Appeal No.68 of 2015

Lourdhe

...Appellant/Accused

Vs

State represented by  
The Inspector of Police,  
Kothagiri Police Station.  
(Cr.No.478/2010)

...Respondent/Complainant

Prayer: Criminal Appeal filed under Section 374 of the Criminal Procedure Code, against the judgment dated 10.12.2014 passed in S.C.No.28 of 2012 by the learned Sessions Judge, Fast Track Mahalir Court, Udthagamandalam and prays that this Court may be pleased to set aside the judgment of conviction and sentence passed against him and acquit him.

For Appellant : Mr.S.N.Arunkumar

For Respondent : Mrs.T.P.Savitha  
Government Advocate (Crl.Side)

JUDGMENT

This Criminal Appeal is filed by the appellant against the judgment of conviction and sentence passed in S.C.No.28 of 2012, dated 10.12.14 by the learned Sessions Judge, Fast Track Mahalir Court, Udagamandalam, wherein the learned trial judge sentenced the appellant to undergo rigorous imprisonment of 10 years and imposed fine of Rs.1000/- and compensation of Rs.1,00,000/- in default to undergo simple imprisonment for one year for the offence under section 376 of IPC and imposed fine of Rs.1000/- for the offence under section 506(ii) of IPC in default to undergo 2 months simple imprisonment.

2.Brief case of the prosecution:

The victim girl namely Anitha aged about 14 years was residing with her parents in the Warwic Estate Quarters, Kotagiri and studying 8<sup>th</sup> standard in the St.Antony School. The appellant/accused Lourdhe aged about 52 years was residing nearby with his family. On 26.10.2010 at about 12.00 hours, the victim girl Anitha lodged a complaint before the Inspector of Police, Kotagiri Circle stating that while she was playing in front of her house on 23.10.2010, the appellant/accused Lourdhe

called her saying that he will give some flowers to her and for receiving the flowers, she went inside the house where the appellant/accused closed the door and raped her and the appellant/accused threatened her to kill if she inform the rape incident to anybody and after two days, one Shobana neighbor resident cum mother of her friend ammu, informed her parents about the incident and the parents of anitha enquired her and lodged this complaint. On receipt of the written complaint from the prosecutrix anitha, a case was registered in Cr.No.478 of 2010 under sections 376 and 506(ii) of IPC.

3.PW11 Inspector of Police, inspected the scene of occurrence, the house of the appellant/accused with PW 4 and one Ullian and prepared rough sketch and observation mahazar, Exhibit P4 and P19. PW11 IO went to the house of the PWs1 to 3 and seized the inner wears of the victim girl PW1 Anitha as M.O.1 & 2 under mahazar Exhibit P4. Then PW1 was taken to the Kotagiri Government Hospital through PW 10 Chandra for Medical Examination. PW6 Assistant Doctor examined PW1 and issued accident register Exhibit P8. PW5 Doctor issued her report Exhibit P7 on examining PW1 Anitha. PW 11, Inspector of Police arrested the appellant/accused Lourdhe aged about 54 years on the very same day and remanded him to judicial custody. The confession of the appellant/accused was recorded before PW4 and one Ullaian and the signature of the appellant/accused was obtained as Exhibit P5 and the confession statement is Exhibit P20. The trouser of the appellant/accused was seized in mahazar Exhibit P6 and M.O.3 was sent to the Court through form 91 under the cover mahazar Exhibit P21 and 22. The appellant/accused was sent for medical examination before PW7 Doctor and his report is Exhibit P10. On further investigation the victim girl PW 1 Anitha was examined again by the Doctor PW9 to ascertain her age as per the requisition letter issued by the Judicial Magistrate, Kotagiri through Exhibit P6. PW9 Doctor issued his report Exhibit P15 opining that the victim age would be within 15 to 16 years. After completion of the investigation, PW11 filed the final report under section 376 and 506(ii) of IPC. On committal, the learned Sessions Judge, Fast Track Mahalir Court, Udagamandalam framed two charges under section 376 and 506(ii) of IPC against the appellant/accused. The prosecution examined PWs 1 to 11 and marked Exhibits P1 to P25 and M.Os 1 to 3. The appellant/accused was questioned under section 313 of Cr.P.C. and nobody was examined on his side.

4.After completion of trial, the learned trial judge convicted and sentenced the appellant to undergo rigorous imprisonment of 10 years and imposed fine of Rs.1000/- and compensation of Rs.1,00,000/- in default to undergo simple imprisonment for one year for the offence under section 376 of IPC and imposed fine of Rs.1000/- for the offence under section 506(ii) of IPC in default to undergo 2 months simple imprisonment.

5.Rival Submissions:

The learned counsel for the appellant submits that the Court below had erred in convicting the appellant under sections 376 and 506(ii) of IPC.

6.The learned counsel for the appellant submits that the Court below ought to have seen that PW2 father of the victim girl PW1 had stated that complaint was given on the next day after the occurrence and the first complaint had been suppressed by the prosecution.

7.The learned counsel for the appellant submits that the Court below ought to have seen that there are no injuries on the private part of the victim, according to doctor's evidence.

8.The learned counsel for the appellant submits that the Court below ought to have seen that the evidence of PW2 and 3 are contra to each other as to when they came to know about the rape on PW1. The witness Shobana who is alleged to have informed PW2 and 3 about the occurrence, have not been examined in Court.

9.The learned counsel for the appellant submits that the Court below ought to have held that the oral evidence is contrary to the medical evidence.

10.The learned counsel for the appellant submits that the Court below ought to have seen that the evidence of PW1 is contra to medical evidence. PW7 doctor states that when he examined the accused, the accused was not able to ejaculate and so accused was advised to be sent to neurologist and psychiatrist for opinion regarding potency.

11.The learned counsel for the appellant submits that the Court below ought to have seen that the arrest, confession and recovery from the appellant were not proved by the corroborating witness PW4.

12.The learned counsel for the appellant submits that the Court below ought to have seen that the evidence of PW8 Deputy Director, Forensic Laboratory is that she did not find any sperm in M.O.'s 1 to 3.

13.The learned counsel for the appellant submits that the Court below ought to have seen that the material witnesses, the children who were playing with PW1 at the time of occurrence had not been examined by the prosecution, eventhough their names had been stated in the FIR.

14.The learned counsel for the appellant submits that the Court below ought to have seen that no documentary evidence by way of school record had been exhibited by the prosecution to prove the age of the victim girl PW1 that she is a minor.

15.The learned counsel for the appellant submits that the Court below ought to have seen that sofa cover, the material

object on which the alleged act of rape by the accused on PW1 took place, was not seized.

16.The learned counsel for the respondent objected the contentions raised on behalf of the appellant and supported the conviction and sentence imposed by the trial judge and sought for dismissal of the criminal appeal.

17.I heard Mr.S.N.Arunkumar, learned counsel for the appellant and Mrs.T.P.Savitha, learned Government Advocate (Criminal Side) for the respondent and perused the entire materials available on records.

18.Rape is a dark reality in Indian society like in any other nation. This abnormal conduct is rooted in physical force as well as familiar and other power which the abuser uses to pressure his victim. Nor is abuse by known and unknown persons confined to a single political ideology or to one economic system. It transcends barriers of age, class, language, caste, community, sex and even family. The only commonality is power which triggers and feeds rape. Law is the only measure to curb this barbaric act. It is a sad reflection and we must emphasize that the Courts must deal with rape cases in particular with utmost sensitivity and appreciate the evidence in totality of the background of the entire case and not in isolation.

19.The law is well settled on the point that the prosecutrix complaining of having been a victim of the offence of rape is not accomplice of the crime and there is, no rule of law that testimony cannot be acted without corroboration on material particulars and her testimony has to be appreciated on the principles of probabilities just as the testimony of any other witness and further, if the Court find it difficult to accept the version of the prosecutrix on its face value it may search for evidence direct or circumstantial which would lend assurance to her testimony. The Hon'ble Apex Court in catena of cases observed that the Court should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature to throw out an otherwise reliable prosecution case.

20.To begin with, it must be observed that while dealing with charges of sexual assault on women, particularly the cases like the present one, where the victim is a teenaged helpless poor girl belonging to a weaker section of the society, the Courts have to display a greater sense of responsibility and to be more sensitive. It must also be kept in mind that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process and, therefore, the Courts shoulder a great responsibility while trying an accused on charges of rape and must deal with such cases with utmost sensitivity.

21.The questions arising for consideration in the instant case are:

Whether the prosecution story, as alleged, inspires confidence on the basis of the evidence adduced in Court?

Whether the prosecutrix is a witness worthy of reliance?

22.The learned trial Judge, after considering the evidence and material on record came to a conclusion that the prosecutrix was below 16 years of age at the time when she was subjected to sexual intercourse against and convicted the appellant/accused.

### 23.TESTIMONIES OF THE PROSECUTION WITNESSES

It is necessary to elaborate the testimonies of the witnesses of the prosecution in brief.

24.PW1 in her evidence deposed that she was raped and threatened by the appellant in his house at about 12.00 Noon on 23.10.2010 and she has not disclosed the incident to anybody and also to her friends playing outside eventhough they enquired her. On 25.10.2010 she went to the school and after that her friend ammu's mother Shoba stated the incident to her mother PW3 on 26.10.2010 and then her mother enquired her and lodged the complaint.

25.PW1 in her cross examination deposed that her friend mother Shoba stated the happenings in the house of appellant/accused to her mother in the night on 25.10.2010 and after that her parents PWs-2 and 3 enquired one Babu, who is the son of the appellant/accused. The said Babu again enquired PW1 in her house in front of her parents after PWs 2 and 3 questioned Babu about his father's conduct.

26.PW2, father of PW1, deposed in his chief examination that his wife PW3 was discussing with one Shoba who is residing nearby on the Saturday night hours and also discussing at next morning. When PW1 questioned them about their serious discussions, PW3 stated that the appellant/accused raped their daughter PW1 in his house. The Police came to their house at about 12.00 Noon on 26.10.2010.

27.PW3, mother of PW1, deposed in her chief examination that the incident was happened on Saturday at about 12.00 Noon (23.10.2010) and PW1's friend Ammu mother Shobana informed the incident to her on Tuesday morning dated 26.10.2010.she enquired the same with PW1 and reported the same before the Police Station. PW1 written the complaint Exhibit P1 and she signed in that complaint.

28.PW3 in her cross examination categorically stated that she knew the incident only from Shobana on Tuesday morning dated 26.10.2010 and the same was also reported to PW11, Inspector of Police immediately. After hearing the incident from Shobana, she came to her house and questioned PW1 at about 9.00 AM. Then she

called her husband PW2 through phone and he returned to their house at about 11.00AM. After that they prepared the complaint Exhibit P1. Further she informed the incident to one Ullian and PW2 Raju after Shobana informed the happenings in the house of the appellant/accused. Both Ullian and Raju informed the incident to the police and police visited the house of PW3 and seized the dress of PW1 (M.Os. 1 and 2). The police also arrested the accused at 12.00 noon on the very same day. PW1 to PW3 went in the jeep to the police station and preferred complaint. The police not obtained her signature while seizing the dress of PW1 in their house. She signed in the statement written by her daughter PW1 in the police station.

29.PW4 in his chief examination deposed that one Ullian came to his Estate at about 12.30 noon on 26.10.2010 and informed the rape incident and both took the car and reached the house of PWs 1 to 3. When they were to reach, the police were inspecting the house of PWs 1 to 3 and they were asked to attest in the rough sketch and observation mahazar. M.Os. 1 and 2 were recovered in the house of PW1 and they also signed in the mahazar Exhibit P4. After that they all went for searching the accused and arrested him in the place known as "S. Kaikatti" and signed in the confession statement recorded by the Police Officer which is Exhibit P5. The accused handed over his trouser M.O.3 to the police from his house.

30.PW4 in his cross examination deposed that the police examined him at about 1.00 PM and obtained four signatures from him. At that time PWs 1 to 3 were present in their house and M.Os 1 and 2 were recovered from their house.

31.PW5 Doctor deposed in her evidence that she examined PW1 and issued the report Exhibit P7 stating that there are no external injuries on PW1, vagina admits one finger, hymen ruptured, no discharge through vagina, PW1 has been utilized for sexual act and she confirmed the non presence of sperms in the chemical examiner report issued by the forensic laboratory.

32.PW6 Doctor deposed in her evidence that she examined PW1 and issued the report Exhibit P8 stating that no external injuries scene in the body of PW1 and on vaginal examination hymen is not intact, vagina loosely admits one finger and no vaginal discharge scenes and opined that final opinion could be given by gynaecologist.

33.PW7 Doctor deposed in his evidence that he examined the appellant/accused and issued his report Exhibit P10. In his cross examination, he deposed that since the appellant/accused not able to ejaculate, he was referred to urologist and psychiatric opinion regarding potency and after clinical examination, that there is nothing to suggest that the person is impotent.

34.PW9 Doctor deposed that he examined PW1 and issued his radiological report Exhibit P15 determining the age as above 15 years and below 16 years of age on the date of the examination.

35.PW11 the Inspector of Police cum Investigation Officer deposed in his evidence that he has not examined Shobana, who informed the rape incident to PW3, the mother of prosecutrix PW1. Further he admitted that he has not examined the friends of PW1 who were named in the FIR namely Sathya, Jeeva, Ammu, Dani, Shalini and Barath. The mahazar witness PW 4 Raju was not residing in the line houses situated near the place of occurrence. The Investigating Officer deposed that the occurrence was first known by PW 3 through Shobana at about 12.00 Noon during his investigation. Further he deny the evidence of PW2 stating that Shobana was discussing with his wife PW1 in the night hours of Saturday and 6.00 AM in the Sunday and the same was disclosed to him by PW1.

36.Before appreciating the evidences of the Prosecution, it is necessary to analyse section 375 of IPC.

37.Section 375 of the IPC enumerates six circumstances wherein the sexual intercourse committed amounts to rape which read as under:

First - Against her will.

Secondly - Without her consent.

Thirdly - With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly - With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly - With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly - With or without her consent, when she is under sixteen years of age.

38.MENS REA / MOTIVE:

Regarding the motive of crime, it may be observed that in a case based on circumstantial evidence, the existence of motive assumed significance though the absence of motive does not necessarily discredit the prosecution case, if the case stands otherwise established by other conclusive circumstances and the chain of circumstantial evidence is so complete and is consistent only with the hypothesis of the guilt of the accused

and inconsistent with the hypothesis of his innocence.

39. The motive has to be gathered from the surrounding circumstances and such evidence should flow from one of the links to the chain of circumstantial evidence. The proof of motive would only strengthen the prosecution case and fortify the Court in its ultimate conclusion but in the absence of any connecting evidence or link which would be sufficient in itself from the face of it, the accused cannot be convicted. Motives of men are often subjective, submerged and unnamable to easy proof that Courts have to go without clear evidence thereon if other clinching evidence exists. A motive is indicated to heighten the probability that the offence was committed by the person who was impelled by the motive but if the crime is alleged to have been committed for a particular motive, it is relevant to inquire whether the pattern of the crime fits in which the alleged motive.

40. In the present case there is no evidence on record to show that the accused did have a motive to commit the offence. Except the related and interested witnesses consisting of PWs.1 to 3, no one was examined even to prove the last seen theory.

41. Non-Examination of the material witness:

The law regarding appreciation of the witnesses is well settled and a witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, there can be no sweeping generalization. Each case must be judged on its own facts. These observations are only made to combat what is so often put forward in cases as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts.

42. On applying the aforesaid settled principles of the Hon'ble Apex Court and appreciation of the evidences adduced in this case, I come to the conclusion that the non-examination of the friends of the prosecutrix named in the FIR and ammu's mother shobana, who first, knew the happenings against prosecutrix, destroys the substratum of the case. Further there are serious material contradictions in the evidences of PWs.1 to 3 in reporting the incident to the Police.

#### 43.DELAY IN FIR:

The delay in lodging the first information report raises a considerable doubt regarding the veracity of the evidence of the prosecution and points towards the infirmity in the evidence and renders it unsafe to base any conviction. Delay in lodging of the FIR quite often results in embellishment which is a creature of after thought. It is therefore that the delay in lodging the FIR be satisfactorily explained. The purpose and object of insisting upon prompt lodging of the FIR to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of actual culprits and the part played by them as well the names of eye witnesses present at the scene of occurrence.

44.In the case reported as State of Rajasthan v. Om Prakash, (2002) 5 SCC 745, the Hon'ble Supreme Court has held that in case where delay is explained by the prosecution in registering the case, the same could be condoned moreover when the evidence of the victim is reliable and trustworthy. Similar view was taken in Tulshidas Kanolkar v. The State of Goa, (2003) 8 SCC 590, wherein it was held by the Hon'ble Supreme Court as follows:

"The unusual circumstances satisfactorily explained the delay in lodging of the first information report. In any event, delay per se is not a mitigating circumstances for the accused when accusations of rape are involved. Delay in lodging first information report cannot be used as a ritualistic formula for discarding prosecution case and doubting its authenticity. It only puts the Court on guard to search for and consider if any explanation has been offered for the delay.

45.As per the above settled principles, I marshaled the evidences adduced in this case to search any reasonable circumstances for the delay in reporting the incident to the Police which can be presumed by the act of the parties. But there are serious lacunae in the evidences of PWs.1 to 3 and there is a clear attempt to fix the appellant by PWs 1 to 3, which can be easily presumed on scrutinizing the evidences. The material contradictions in the evidence of these witnesses shake the credibility of their testimony. PW 1 says her mother knew the incident on the next day through shobana, who is not examined but PW3 mother of prosecutrix depose that she heard the incident happened to PW 1 through shobana on 26.10.2010 and reported the same to her husband and PW4.

46.Therefore, upon a complete and careful reading of the evidence of the prosecutrix including the evidences of PWs 2 and 3, it is revealed that the prosecutrix remained silent for the reasons best known to her. Therefore, it can be said that the FIR was lodged after a careful discussion and the delay of two

days was not natural and PWs.2 and 3 carefully planned their executions results in the material discrepancy affecting the credibility of the Prosecutrix and fatal to the prosecution story.

47.It is difficult for this Court to believe PW1's version regarding the alleged rape in the house of the appellant/accused for the simple reason that her friends named by her in the complaint and before the witness box, were not examined by the Prosecution at least to prove the last seen theory. Further this Court presume the conduct of the Prosecutrix, who carefully written the complaint on her own hand writing narrating the details, which cannot be a normal behavior of the girl aged about 15 years. In these circumstances, this Court has no hesitation to conclude that statement of prosecutrix do not inspire confidence, rather story put forth by her appears to be untrustworthy.

48.The learned counsel for the respondent strenuously argued that bare perusal of the impugned judgment of conviction recorded by the Court below, clearly suggest that Court below not only appreciated the evidence in its right perspective, rather dealt with each and every aspect of the matter meticulously and as such, there is no scope left for this Court to interfere with the findings returned by the Court below.

49.In the case at hand, entire story put forth by the prosecution appears to be untrustworthy and full of contradictions. The Hon'ble Apex Court has repeatedly held that since the fundamental aspect of criminal jurisprudence rests upon the well established principle that "no man is guilty until proved so", utmost caution is required to be exercised in dealing with the situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. Most importantly, Hon'ble Apex Court has held that there must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistency in evidence amongst all the witnesses. In nutshell, it can be said that evidence in criminal cases needs to be evaluated on touchstone of consistency. In this regard, reliance is also placed on Judgment passed by the Hon'ble Apex Court in C. Magesh and Ors. v. State of Karnataka reported in (2010) 5 SCC 645, wherein it has been held as under:-

"45. It may be mentioned herein that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency. Needless to emphasise, consistency is the keyword for upholding the conviction of an accused. In this regard it is to be noted that this Court in the case titled Suraj Singh v. State of U.P., 2008 (11) SCR 286 has held:- (SCC p. 704, para 14) "14. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the

account of other witness is held to be creditworthy. The probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."

46. In a criminal trial, evidence of the eye witness requires a careful assessment and must be evaluated for its creditability. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that "no man is guilty until proven so", hence utmost caution is required to be exercised in dealing with situations where there are multiple testimonies and equally large number of witnesses testifying before the Court. There must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistency in evidence amongst all the witnesses."

50. Medical evidences:

To determine the factor whether rape has been committed by appellant/accused on the prosecutrix PW 1 Anitha or not, apart from the oral evidence, medical evidence, which is found in the present case, is also to be seen and discussed.

51. Now this Court would advert to the medical evidence led on record by the prosecution. At this stage, it would be appropriate to take note of medical examination by PW 5 Doctor in her opinion categorically opined that on physical and chemical examination, no external struggle marks or internal injuries found that she had undergone the first intercourse as alleged by the prosecutrix.

52. After having perused analysis, PW 6 Doctor, also opined that keeping in view the aforesaid chemical analysis report and findings of examination of the victim, have not found any struggle marks on the body of the prosecutrix. There were no external and internal injuries on the body of the prosecutrix. No spermatozoa were detected in the vaginal swab and smear of the prosecutrix.

53. PW5 Doctor specifically deposed in her evidence that it is difficult to find out how many times she had intercourse when one finger easily admits in the vagina and the same was also confirmed by PW6 another Doctor who issued the accident register Exhibit P8. PW8 forensic expert deposed that no sperm was detected in the M.O.3 and the same was confirmed through her report Exhibit P14.

54. It is also apparent from the medical evidence, especially, chemical analysis report given by the FSL, nothing else matched with the trouser M.O.3 seized from appellant.

55. Therefore on cumulative reading the evidences of PWs.5 to 8, it is clear that the M.Os.1 to 3 petticoat, inner wear and the underwear allegedly worn by the prosecutrix and appellant had no semen and that by itself is sufficient to treat that the

appellant had no sexual intercourse with the prosecutrix. The opinion of PW 5 would only cause some suspicion on the conduct of the appellant but not sufficient to prove the case, as alleged by the prosecution. Further there is no abrasion or external injuries found and the age of the prosecutrix PW 1 was above 14 years at the time of alleged incidents, therefore, the case of the prosecution that she was forcibly raped by the appellant/accused should not have been accepted as the medical evidence does not corroborate her statement. If the victim is unwilling to yield to sexual intercourse, she is expected to receive injuries on her person. The absence of injuries on the body of the prosecutrix, generally, gives rise to an inference. Where the prosecutrix had received multiple injuries on the various parts of her body it indicated that she offered resistance when she was subjected to sexual intercourse.

56. In my considered opinion, because of the following reasons, the statement of the prosecutrix PW 1 Anitha does not inspire confidence and thus, the findings of the learned trial Judge convicting the accused appellant for the offence under Section 376 of I.P.C. cannot be sustained:-

(i) That the medical evidence so far as the allegation of alleged rape is concerned, is nil and thus, from medical evidence, there is no corroboration to the statement of the prosecutrix PW 1.

(ii) That the fact that the prosecutrix did not receive any injury when accused appellant committed rape with her itself goes to show that she was screening the truth.

(iii) That the fact that she did not tell about the alleged incidents of rape to anybody or even to the wife of the appellant/accused who was also present in the house, further goes to show that she was a unworthy witness.

(iv) That the fact that on incident of alleged rape, she was first undressed and she herself put on the clothes and her friends were playing outside further goes to show that her testimony creates doubt.

(v) That hymen of the prosecutrix PW 1 was found torn and vagina admitted one finger easily and there were no tears present in the vagina and these facts go to show that she may be habitual to sexual intercourse and this aspect also negatives the allegations of rape.

(vi) That the medical evidence, therefore, clearly discloses that the prosecutrix does not appear to have put up any resistance to the alleged onslaught committed on her by the appellant. From this, the only irresistible inference can be that the prosecutrix version cannot be believed.

(vii) That the fact that the prosecutrix did not raise any hue and cry on incident of rape, itself goes to show that she is

screening the real happenings.

(viii) That the fact that the prosecutrix was unmarried girl aged about 14 years at the time of incident and the absence of injuries on the person of the prosecutrix negatives the allegation of rape.

(ix) That the age of the prosecutrix was above 14 to 16 years as per the evidence of PW 9 and thus, she was not just a child who would have surrendered herself to a forced sexual assault without offering any resistance whatsoever and since in this case, there is no evidence that the prosecutrix offered any resistance when the accused appellant committed rape on her and therefore, the allegation of rape cannot be accepted.

(x) That the fact that narration of alleged incidents of rape to anybody in the report Exhibit.P1 itself goes to show that she made improvement when she was being examined in Court on this aspect.

(xi) That the corroborative evidence of clothes stained either with blood or semen is missing in this case and from this point of view also, theory of rape cannot be accepted. Had there been any stains of semen or blood on the clothes, which she was wearing at the time of alleged incident of rape, they would have gone long way to prove the case of the prosecution about commission of rape and in absence of that, negatives the case of the prosecution.

(xii) That no doubt in sexual offence, the prosecutrix is not an accomplice and there is no rule of law that her testimony cannot be acted upon and made basis of conviction unless corroborated in material particulars, but, however, since in the present case, the corroboration to the statement of the prosecutrix is not found in any other evidence as she remained silent over the alleged incident and, therefore, in such circumstances, statement of the prosecutrix PW 1 Anitha cannot be said to be reliable and trustworthy being not corroborated with any other evidence and furthermore, she has made improvement when she was being examined in Court.

#### 57.LAW RELATING TO THE EVIDENCE OF CHILD WITNESS:

For determining accurate age of an individual, especially in early years, the following examination of the body is must:-

1. Teeth
2. Height
3. Weight
4. Ossification of bones
5. Minor sings.

58. On this point, the decision of the Hon'ble Supreme Court in *Jaya Mala v. Home Secretary, Government of Jammu and Kashmir* may be referred to where it has been held that margin of error in age ascertained by the radiological examination is of two years on either side.

59. On the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (herein-after referred to as the 2007 Rules). The afore stated 2007 Rules have been framed under Section 68(1) of the Juvenile Justice (Care and Protection of Children) Rules, 2000. Rule 12 referred to herein-above reads as under:-

"12. Procedure to be followed in determination of Age.?"

(1) In every conflict with law, the Court or the Board or the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The Court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the Court or the Board or, as the case may be, the Committee by seeking evidence by obtaining-

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year;

and, while 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 and either of the evidence specified in any of the clauses (a) (i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the Court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7A, section 64 of the Act and these rules, no further inquiry shall be conducted by the Court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed off cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law."

60. Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix PW1.

61. The manner of determining age conclusively has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the concerned child, is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3),

envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the concerned child, on the basis of medical opinion."

62.The first question for determination is the age of the victim. In the complaint lodged by PW1, she disclosed her age as 14 years and she was studying in the eighth standard in the school. As per the Juvenile Justice (Care and Protection of Children) Rules, 2007, the School certificate is the highest rated option to prove the age of PW1.Unfortunately, the birth certificate or the school transfer certificate was not produced by the Prosecution and the learned trial judge also failed to call for the records of the admission register maintained by the school. Hence as per rule 12 (3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, this Court could not conclusively arrive at the conclusion made by the learned trial judge regarding the age of PW1.

63.Admittedly, ossification test has been conducted in this case to ascertain the age of the prosecutrix despite being so advised by the learned magistrate and PW 9 opined that the prosecutrix would be above 15 to 16 years at the time of occurrence and denied the suggestion made to him that he made statement to the PW 11, Inspector of Police that prosecutrix would be aged below 18 years. This denial has been contradicted to the PW 11 and he admits the statement made to him by the doctor PW 9 that the prosecutrix would be below 18 years of age.

64.In the absence of any material on the basis of date of birth recorded at the time of admission of PW1 in the school and failure of the prosecution to get the school certificate, I am of the view that benefit of doubt in this case must go to the appellant.

65.It is no doubt true that the conviction in a case of rape can be based solely on the testimony of the prosecutrix, but that can be done in a case where the Court is convinced about the truthfulness of the prosecutrix and there exist no circumstances which cast to a shadow of doubt over her veracity. If the evidence of the prosecutrix is of such quality, that may be sufficient to sustain an order of conviction solely on the basis of her testimony. In the instant case, I do not find her

evidence to be of such quality.

66.It must be remembered that a decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it. It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.

67.While parting, as the Court of law, cannot, being obsessed with public sentiments convict the appellant/accused. In my view, this was a case where the learned Judge ought to have been more cautious in scrutinising the materials. Sometimes, mere gravity of the charges leads one to record hasty conclusions. That should be avoided at all costs because the prosecution has to prove its case beyond reasonable doubt. Ultimately, this is a case of liberty of individual and one cannot lose sight of the fact that sometimes people are dragged into false cases unnecessarily. This was a case where the inherent contradictions have not been noticed and rather omitted from consideration. The Trial Court has ignored and brushed aside vital omissions and failed to take into account the admissions in the cross examination.

68.In the case titled "Jose alias Pappachan v. Sub-inspector of Police, Koyilandy and Anr. (2016) 10 SCC 519, the Hon'ble Apex Court, has held as under:-

"56.It is a trite proposition of law, that suspicion however grave, it cannot take the place of proof and that the prosecution in order to succeed on a criminal charge cannot afford to lodge its case in the realm of "may be true" but has to essentially elevate it to the grade of "must be true". In a criminal prosecution, the Court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof and in a situation where a reasonable doubt is entertained in the backdrop of the evidence available, to prevent miscarriage of justice, benefit of doubt is to be extended to the accused. Such a doubt essentially has to be reasonable and not imaginary, fanciful, intangible or non-existent but as entertainable by an impartial, prudent and analytical mind, judged on the touch stone of reason and common sense. It is also a primary postulation in criminal jurisprudence that if two views are possible on the evidence available, one pointing to the guilt of the accused and the other to his innocence, the one favourable to the accused ought to be adopted."

69.If the instant case is considered in the backdrop of aforementioned principles, then, I am afraid that the prosecution has failed to prove the charges either under Sections 376 and 506(ii) of I.P.C.

70.In the result:

(a) this Criminal Appeal is allowed by setting aside the conviction and sentence imposed in S.C.No.28 of 2012, dated 10.12.2014, by the learned Sessions Judge, Fast Track Mahalir Court, Udthagamandalam;

(b) the appellant/accused is acquitted from all the charges;

(c) the bail bond, if any, executed by him stands cancelled and the fine amount, if any paid by the appellant/accused shall be refunded.

Sd/-

Assistant Registrar (IV)

//True Copy//

Sub Assistant Registrar

vs

To

- 1.The Sessions Judge,  
Fast Track Mahalir Court,  
Udthagamandalam.
- 2.The Chief Judicial Magistrate,  
Kothagiri.
- 3.The Superintendent,  
Central Prison, Coimbatore.
- 4.The Inspector of Police,  
Kothagiri Police Station, Nilagiri Dist.
- 5.The Public Prosecutor,  
High Court, Madurai -104.

+1cc to Mr.S.N.Arunkumar, Advocate, S.R.No.4232

Criminal Appeal No.68 of 2015

SJ(CO)

rrs 28/01/2019