**BAIL SLIP**

1.Dharmarajan S/o.Veeraiyan, 2.Kalaimaran S/o.Panneerselvam, 3.Manikandan @ Mani @ Pookadai Mani S/o.Munusamy, 4.Sivakumar S/o.Panneerselvam, were released on bail vide order of this court, dated 06.02.2018 made in CRL MP(MD).665 of 2018 in CRL A(MD).277 of 2017 and SathishKumar @ Kattappu, S/o.Gnanasekar was released on bail vide order of this Court dated 26.04.2018 made in CRL MP(MD).2150 of 2018 in CRL A(MD).132 of 2018.

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 04.07.2019

CORAM

THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN**AND****THE HONOURABLE MR.JUSTICE B.PUGALENDHI****Criminal Appeal (MD)Nos.277/2017 and 132 of 2018****Crl.A. (MD)No.277 of 2017**

1.Dharmarajan
2.Kalaimaran
3.Manikandan @ Mani @ Pookadai Mani
4.Sivakumar, ... Appellants/Accused Nos.1, 2, 3 and 5

Vs.

The State,
represented by
The Inspector of Police,
Ammapettai Police Station,
Thanjavur District.
[Cr.No.66 of 2014]

... Respondent/Complainant

Prayer : Appeal filed under Section 374(2) of the Code of Criminal Procedure, against the conviction and sentence in judgment dated 31.05.2017 in S.S.C.No.14 of 2014, by the Sessions Judge, Mahilar Neethimandram (Fast Track Mahila Court), Thanjavur.

For Appellants : Mr.Karunanithi
for Mr.S.Rajaprabu

For Respondent : Mr.S.Chandrasekar
Additional Public Prosecutor

Crl.A. (MD)No.132 of 2018

Satishkumar @ Kattappu ... Appellant

Vs.

The State,
represented by
The Inspector of Police,
Ammapettai Police Station,
Thanjavur District.
[Cr.No.66 of 2014]

... Respondent



Prayer : Appeal filed under Section 374(2) of the Code of Criminal Procedure, against the conviction and sentence in judgment dated 31.05.2017 in S.S.C.No.14 of 2014, by the Sessions Judge, Mahilar Neethimandram (Fast Track Mahila Court), Thanjavur.

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For Appellant : Mr.V.Malaiyendran
Amicus curiae

For Respondent : Mr.S.Chandrasekar
Additional Public Prosecutor

COMMON JUDGMENT

(Judgment of the Court was delivered by **M. SATHYANARAYANAN, J.**)

The appellants in CrI.A.(MD)No.277 of 2017 are A.1, A.2, A.3 and A.5 in S.S.C.No.14 of 2014, on the file of the Mahila Court (Fast Track Court), Thanjavur and the appellant in CrI.A.(MD)No.132 of 2018 is arrayed as A.4 in the said sessions case. There were two juvenile accused viz., Manikandan @ Juice Kadai Manikandai and Ayyakutty @ Thiruvenkadam and since they were juveniles, their cases tried separately. A.1 to A.5 stood charged, tried and convicted as follows, vide impugned judgment dated 31.05.2017 in S.S.C.No.14 of 2014:

Accused	Conviction	Sentence
A.1 to A.3	341 I.P.C.	Each to undergo simple imprisonment for one month and to pay a fine of Rs.500/- each, in default each to undergo simple imprisonment for one week.
	342 I.P.C.	Each to undergo simple imprisonment for one year and to pay a fine of Rs.1000/- each, in default each to undergo simple imprisonment for 3 months.
	365 I.P.C.	Each to undergo simple imprisonment for seven years and to pay a fine of Rs.1000/- each, in default each to undergo simple imprisonment for 1 year.
	Section 6 of the Protection of Child from Sexual Offences Act, 2012	Each to undergo life imprisonment and to pay a fine of Rs.1000/- each, in default each to undergo rigorous imprisonment for 1 year.



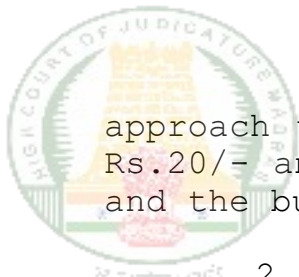
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A.4 and A.5	341 I.P.C.	Each to undergo simple imprisonment for one month and to pay a fine of Rs.500/- each, in default each to undergo simple imprisonment for one week.
	342 I.P.C.	Each to undergo simple imprisonment for one year and to pay a fine of Rs.1000/- each, in default each to undergo simple imprisonment for 3 months.
	365 I.P.C.	Each to undergo simple imprisonment for seven years and to pay a fine of Rs.1000/- each, in default each to undergo simple imprisonment for 1 year.
	Section 6 of the Protection of Child from Sexual Offences Act, 2012 r/w 34 I.P.C.	Each to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.1000/- each, in default each to undergo rigorous imprisonment for 1 year.
	Section 8 of the Protection of Child from Sexual Offences Act, 2012.	Each to undergo rigorous imprisonment for a period of 5 years and to pay a fine of Rs.1000/- each, in default each to undergo rigorous imprisonment for six months.

The sentences of imprisonment were ordered to be run concurrently. The trial Court has also granted set-off under Section- 428 Cr.P.C. and challenging the conviction and sentence awarded by the trial Court, the Accused Nos.1 to 3 and 5 had filed Crl.A.(MD)No.277 of 2019 and the Accused No.4 had preferred Crl.A.(MD)No.132 of 2018.

2. The facts leading to the present appeal, relevant for the purpose of disposal, briefly narrated, are as follows:

2.1. P.W.1 is the lover of the victim girl viz., P.W.2. P.W.1 had acquaintance with P.W.2 and he arranged to get her employment during February 2013 at Ayyankar Bakery, Ammapettai and every day evening, he used to take P.W.2 and accompany her upto her house. P.W.1 and P.W.2 decided to marry and for that purpose, they went from Salimangalam to Tripur on 16.02.2014 and both of them stayed together in the house of friend of P.W.1 and since they ran short of money, they returned back to Salimangalam and reached the place at about 03.00 a.m., on 19.02.2014. P.W.1 did not possess money to buy bus ticket and when it was demanded, he requested the conductor of the bus to wait for some time, so that, he can



approach the tea stall owner, who is known to him to get a sum of Rs.20/- and in the meanwhile, the conductor of the bus scolded him and the bus went out.

2.2. Thereafter, P.W.1 and P.W.2 proceeded to the house of the brother of P.W.1 viz., P.W.3 and the sister-in-law of P.W.1 viz., P.W.4 has execrated him, as to how he can bring P.W.2 at the odd hours to her house and asked him to take P.W.2 and leave her in her house. Accordingly, P.W.1 and P.W.2 were proceeding and when they were nearing Kottakulam Medu, the accused came in two wheelers and assaulted P.W.1 and in a bike, A.4 and A.2 put P.W.2 in between them and started the bike and rest of the accused tied clothe on eyes of P.W.1 and took him to a field and he was forcibly hold by four persons and A.1, A.2 and A.3 had forcible physical relationship with P.W.2 against her consent and unable to bear the pain, P.W.2 also shouted. The rest of the accused had outraged the modesty of P.W.2 and thereafter the accused took P.W.1 and P.W.2 in their bike and left them in the place, where they were abducted. P.W.1 and P.W.2 once again proceeded to the house of P.W.3 and narrated the incident. Since P.W.2 developed fever, P.Ws 3 and 4 took her to the hospital.

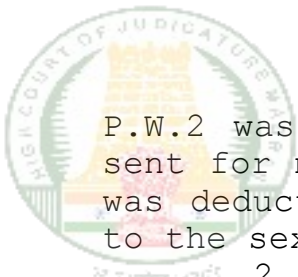
2.3. P.W.1 proceeded to Ammapettai Police Station and lodged a complaint under Ex.P.1 to P.W.14 - the Sub-Inspector of Police and upon receipt of the same, he registered a case in Cr.No.66 of 2014 for the commission of offences under Sections 341, 323, 354, 342 and 376(2)(g) I.P.C.

2.4. P.W.14 forwarded the original of Ex.P.1 - the First Information Report and other documents to the jurisdictional Magistrate Court and also sent copies to the official superiors.

2.5. P.W.15 - the Station House Officer attached to Ammapettai Police Station, upon receipt of the First Information Report, commenced the investigation and proceeded to the scene of crime and in the presence of P.W.7 and another, prepared observation mahazar - Ex.P.27 and rough sketch - Ex.P.28 and thereafter examined witnesses viz., Ayyappan, Muthian, Chinnaraja and Sambasivam and recorded their statements under Section 161(3) Cr.P.C., and also seized the clothes worn by P.W.2 under the cover of Mahazar - Ex.P.29 and the clothes worn by P.W.2 were marked as M.Os. 1 to 4.

2.6. P.W.15 proceeded to the vacant space in front of locked house at Kottakulam Medu and prepared observation mahazar Ex.P.30 and Ex.P.31 respectively and in the same place, had examined P.Ws.1, 2, 3, 5 and 7 and recorded their statements on 20.02.2014. P.W.15, on 20.02.2014, sent the victim girl - P.W.2 for medical examination in the company of police constable.

2.7. P.W.9 was the Assistant Professor of Gynaecology department in Thanjavur Medical College and the victim girl - P.W.2 was produced before her at 11.00a.m., on 20.02.2014 and she was brought by a police constable - P.W.14. P.W.2 narrated the incident, which took place on 14.02.2014. P.W.9, having found that P.W.2 was fit and conscious steady mind, had examined her and issued accident register copy under Ex.P.15. P.W.9 opined that



P.W.2 was pregnant and a sap from the private part was taken and sent for medical examination and as per the report, no spermatozoa was deducted and as per her opinion, there is evident with regard to the sexual intercourse.

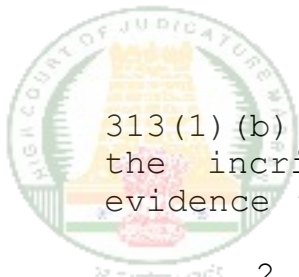
2.8. P.W.15 proceeded with the investigation on 22.02.2014 and arrested the accused and A.1 voluntarily came forward to give the confession statement, which lead to the recovery of M.Os 12 and 13, which were seized under the cover of mahazar - Ex.P.13 and the confession of A.1 also lead to the recovery of clothes worn by the accused, which were seized under the cover of mahazar Ex.P.13 and the clothes worn by the accused were M.Os 7 to 11 respectively.

2.9. P.W.15 examined P.W.13 - the Headmaster of Government Girls Higher Secondary School, Papanasam and got the victim girl's transfer certificate, which evidenced the fact that she was born on 10.06.1998 and at the time of commission of offence, she was a minor. Accordingly, P.W.15 altered the Sections to Sections 341, 323, 342 and 506(II) I.P.C. r/w Sections 6 and 17 of the Protection of Child from Sexual Offences Act, 2012 and alteration was marked as Ex.P.13. The arrested accused were also sent for medical examination and the medical opinion as per the medical examination opined that they were potent. The said documents were marked as Exs.P.21 to 24. P.W.15 took the victim girl to the Judicial Magistrate, Thiruvaiyaru, for recording her statement under Section 164 Cr.P.C. and the statement of the victim girl - P.W.2 recorded under Section 163 Cr.P.C., was marked as Ex.P.2 and thereafter, P.W.15 received an information that P.W.2 was bleeding heavily and therefore, he took steps to admit P.W.2 in Thanjavur Medical College Hospital and in this regard, he had recorded the statement of P.W.12 - Assistant Professor of department of gynaecologist attached to Thanjavur Rasamirasuthar Government Hospital. P.W.15 also collected the scientific evidence i.e., Ex.P.17 to Ex.P.20 and after completion of the investigation, had charged the accused for the commission of offences under Sections 341, 363, 352, 342 and 365 I.P.C. r/w Section 6 of the Protection of Child from Sexual Offences Act, 2012 r/w 34 I.P.C., and accordingly, filed the final report charging the appellants/accused as stated above, on the file of the Mahalir Fast Track Court, Thanjavur and he took the same on file in S.S.C.No.14 of 2014.

2.10. The Trial Court, upon filing of the final report, issued summons to the appellants/accused and on their appearance, furnished to them the copies of the documents under Section 207 of the Code of Criminal Procedure, 1973 and thereafter, the charges were framed against them for the commission of offences under Sections 341, 365, 342 I.P.C., and Section 6 of the Protection of Child from Sexual Offences Act, 2012 r.w 34 I.P.C., and Section 8 of the Protection of Child from Sexual Offences Act, 2012. The accused pleaded not guilty to the charges framed against them and prayed for trial of the case.

2.11. The prosecution in order to sustain their case, examined P.W.1 to P.W.15, marked Exs.P.1 to P.38 and also marked M.Os.1 to 13.

2.12. The appellants/accused were questioned under Section



313(1)(b) of the Code of Criminal Procedure, 1973, with regard to the incriminating circumstances made out against them in the evidence tendered by the prosecution and they denied it as false.

2.13. On behalf of the appellants/accused, neither oral nor documentary evidence was let in.

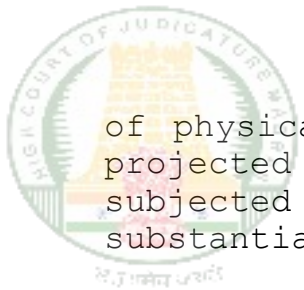
2.14. The trial Court, on consideration of the oral and documentary evidences and other materials, found the accused guilty and convicted and sentenced the appellants/accused as stated above vide the impugned judgment and challenging the legality of the same, the present Criminal Appeals have been filed.

3. Mr.Karunanithi, learned Counsel appearing for the appellants/A.1 to A.3 and A.5 in CrI.A.(MD)No.277 of 2017 made the following submissions:

3.1. P.W.1, while he was examined in chief, on 26.09.2014, had supported the case of the prosecution and on the request made on the part of the accused, the cross-examination was deferred and subsequently, he was examined on 19.10.2015, where in the cross-examination, he did not support the case of the prosecution and therefore, he was treated as a hostile witness and with the permission of the Court, he was cross-examined. P.W.2 - victim girl was examined in chief on 26.09.2015 and on the petition filed on the part of the accused, the cross-examination was deferred and subsequently, the prosecution did not produce her for cross-examination.

3.2. Mr.Karunanithi, learned Counsel, has also drawn the attention of this Court to the order dated 06.02.2018 made in CrI.M.P.(MD)No.665 of 2018 in CrI.A.(MD)no.277 of 2017 and would submit that pending disposal of these appeals, the appellants/ A.1 to A.3 and A.5 filed this Criminal Miscellaneous Petition for suspension of sentence and during the course of arguments, the learned Additional Public Prosecutor sought permission of this Court to trace out P.W.2 and produce her for cross-examination. This Court was inclined to grant suspension of sentence and accordingly, suspension of substantive sentences of imprisonment was granted, subject to certain conditions. It is pointed out that till today, the prosecution did not produce P.W.2 for cross-examination. As undertaken, the prosecution is unable to produce P.W.2 for cross-examination, even before this Court.

3.3. It is further submitted by the learned Counsel appearing for the appellants that the medical evidence viz., the testimony of P.W.9 coupled with the Accident Register marked as ExP.6 did not even support the case of the prosecution, for the reason that the alleged occurrence took place on the early morning of 19.02.2014 and she was subjected to medical examination within two days i.e., on 20.02.2014 and P.W.9 did not note any injury on the private parts as well as the body of P.W.2 and P.W.9 also opined that there is evidence of physical relationship on the part of P.W.2 and she did not specifically depose that any forcible act



of physical relationship was done to P.W.2 and as such the story projected by the prosecution that P.W.2 was forcibly taken away and subjected to physical ravishment, have not been proved and substantiated at all by the prosecution.

3.4. It is also pointed out by the learned Counsel appearing for the appellants that though it is the evidence of P.W.1 in his chief statement under Ex.P.1 as well as his chief-examination that he was forcibly tied and caught up and beaten up, he was not subjected to any medical examination and was subjected to potency test and as such, the alleged corroborated evidence of P.W.1 also did not support the case of the prosecution.

3.5. The learned Counsel appearing for the appellants, on the question of law, has invited the attention of this Court to the judgment of the Honourable Supreme Court of India in **Gopal Saran Vs. Satyanarayana** reported in **(1989)3 Supreme Court Cases 56** and would submit that as per the proposition laid down in the said judgment, it would not be safe to rely on examination-in-chief recorded, which was not subject to the cross-examination and admittedly, P.W.2 was not offered for cross-examination and assuming for the sake of arguments, her testimony in chief-examination can be taken into consideration to find out the guilty on the part of the appellants/accused, still there are no corroborating evidence made available by the prosecution and in any event, the trial Court ought to have awarded the benefit of doubt and acquitted the appellants/accused and hence, prays for setting aside the impugned judgment and prays for acquittal of the appellants/accused Nos.1 to 3 and 5.

4. Crl.A.(MD)No.132 of 2018 is filed by the appellant/A.5 and the learned Counsel appearing for him viz., M/s S.Venkatesan and T.Sekar are absent.

5. From the materials placed, it is revealed that the said accused is also stand on similar footings as that the appellants in Crl.A.(MD)No.277 of 2017, Mr.V.Malaiyendran (Enrolment No.250/2012, No.71, Law Chambers, Cell No.94443-33331), learned Counsel is appointed as *amicus curiae* to argue this appeal.

6. The learned *amicus curiae* has invited the attention of this Court to the materials placed and also adopted the arguments of Mr.Karunanithi, learned Counsel appearing for the appellants/accused in Crl.A.(MD)No.277 of 2017.

7. Per contra, Mr.S.Chandrasekar, learned Additional Public Prosecutor, appearing for the State would submit that though P.W.1 in the cross-examination turned hostile and the victim girl - P.W.2 did not offer herself for cross-examination, her statement recorded under Section 164 Cr.P.C., was marked as Ex.P.2, where she has narrated the physical abuse meted out by her and Ex.P.2 can also be the basis to sustain the case of the prosecution.

8. It is the further submission of the learned Additional Public Prosecutor that the testimony of P.W.9 also supported the case of the prosecution to certain extent and the scientific



evidence marked as Exs.P.21 to P.23 would also disclose that A.1, A.2 and A.3 were potent at the relevant point of time and the valuable reports viz., Exs.P.17 to P.20 would disclose the clothes worn by the accused and spermatozoa was deducted in the clothes worn by the accused and that apart, the transfer certificate of P.W.2, marked as Ex.P.13 would also reveal that she was minor at the relevant point of time. The prosecution, by letting in overwhelming oral and documentary evidences, had sustained their case and hence, prays for dismissal of these Criminal Appeals.

9. This Court paid its anxious consideration on the rival submissions and also considered the oral and documentary evidences and other materials and also perused the original records.

10. The following questions arise for determination in these Criminal Appeals:

(1) Whether the prosecution is able to sustain that A.1 to A.5 had committed various offences, for which, they are charged? and

(2) Whether the reasons assigned by the trial Court for convicting and sentencing the appellants/accused are sustainable?

11. This Court has perused the complaint given by P.W.1, marked as Exs.P.1 to P.14, as well as his testimony. P.W.1 was examined in chief on 26.09.2014 and his chief examination would reveal that A.1 to A.3 had forcible physical relationship with P.W.2 against her consent and wishes and the rest of the accused outraged the her modesty and according to him, immediately after the crime, he once again returned to his brother's house, who is P.W.3 and narrated the incident and thereafter proceeded to Ammapettai police station, for the purpose of lodging a complaint and the victim girl was taken to the hospital by P.Ws.3 and 4. The cross-examination of P.W.1 was deferred and thereafter, he was examined in cross on 19.10.2015, wherein he did not support the case of the prosecution and he was treated as a hostile witness and thereby given a complete go by to the complaint marked as Ex.P.1 as well as the chief-examination. P.W.2 - the victim girl was examined in chief on the same day on 26.09.2014 and her chief examination is inconsonance with her statement recorded under Section 164 Cr.P.C., which is marked as Ex.P.2. The cross-examination was deferred on the petition filed by the accused and thereafter, she did not offer herself for cross-examination. As already pointed out, after conviction and sentence awarded by the trial Court, the appellants/Accused 1 to 3 and 5 in CrI.A.(MD) No.277 of 2017, pending disposal of the appeal, filed CrI.M.P.(MD) No.665 of 2018 praying for suspension of sentence and learned Additional Public Prosecutor has undertaken to produce the victim girl for cross-examination and taking into consideration the above said fact, the substantive sentence of imprisonment was suspended by this Court till P.W.2 is produced for cross-examination. The fact remains that even now till today, P.W.2 has not been produced for cross-examination and when this Court has put up a specific query to the learned Additional Public Prosecutor, during the course of hearing of these Criminal Appeals, it is the response of the learned Additional Public Prosecutor that though all efforts

have been taken to trace out P.W.2, they are unsuccessful so far.

12. Incidentally, an interesting question arises for consideration as to the effect of chief-examination of witness, when the said witness did not offer himself/herself for cross-examination.

13. In **P.Ramanatha Aiyar's Advanced Law Lexicon of 5th Edition, Volume 2**, Halbury's Laws of England, 1st Edition, Volume 15, para 145 and 242 has been extracted and it is as follows:

"The mere statement of plaintiff's witnesses cannot constitute the plaintiff's evidence in the case unless and until it is tested by cross-examination. The right of the defence to cross-examine the plaintiff's witnesses can, therefore, be looked upon not as a part of its own strategy of defence but rather as a requirement without which the plaintiff's evidence cannot be acted upon."

14. In **Mohammed Ibrahim Or Ibrahim Vs. Emperor** reported in **36 Cr1.LJ.581**, scope of S.253 of Cr.P.C./Central Act 5/1898 came up for consideration and it is observed that "the evidence includes the examination, cross-examination and re-examination".

15. In **Ripen Kumar Vs. Department of Customs**, reported in **2001 Cr1.L.J.1288 (Delhi High Court)**, a Division Bench of the Delhi High Court, has considered the scope of Section 3 of Evidence Act and in paragraph No.9, it is observed as follows:

"9. By the impugned order the learned Additional Sessions Judge surprisingly came to the conclusion that even the said incomplete statement of PW-1 should have been read in evidence. It ought to have been looked into as a supporting evidence to the statement recorded under Section 108 of the Customs Act. This observation of the learned ASJ is contrary to the well understood expression of the word "evidence". The words "all statements" include the examination-in-chief as well as the cross examination and subject to the permission re-examination also. It is only when the witness is permitted to be cross-examined that the credibility of the witness can be looked into. The emphasis is on the fact that the witness had been cross-examined fully. Only thereafter the evidence given by a witness in judicial proceeding is relevant for the purpose of proving a particular fact. But if the witness has not been permitted to be cross-examined then such a statement cannot be termed as an evidence of the witness nor can it be read in evidence. It must be remembered that where part cross-examination took place such a statement cannot be called evidence in the eyes of law. The procedure as laid down under the Evidence Act is clear and unambiguous. Under the



Evidence Act, evidence means the examination-in-chief and cross-examination. That statement alone will form evidence. In the present case petitioner had been deprived to cross-examine PW-1 thereby dislodge his testimony. Hence incomplete statement of PW-1 in the absence of cross-examination could not be treated as evidence nor the same could be relied upon. Therefore the observation of learned ASJ that incomplete statement could have been the basis of deciding the question of charge is contrary to law. Part statement of PW-1 did not attain the status of evidence, nor on the basis of the same it could be said that statement of the accused recorded under Section 108 of the Customs Act stood proved."

16. It is to be noted at this juncture that immediately after the chief-examination of P.W.2 was over, her evidence was not closed and upon petition submitted on behalf of the accused, her cross-examination was deferred and therefore, it was the duty of the prosecution to secure her presence before the Court, for the purpose of cross-examination and however, every endeavour made by the prosecution in that regard did not fructify and she could not be produced.

17. In the light of the above said legal position, this Court is of the considered view that since P.W.2 did not offer herself for cross-examination, the testimony in chief-examination would not come to aid of the prosecution to sustain their case. Though it is vehemently contended by the learned Additional Public Prosecutor that the statement of the Victim girl - P.W.2 was recorded under Section 164 Cr.P.C., and it was marked as Ex.P.2 and therefore, this Court can find supporting evidence through Ex.P.2, this Court is of the considered view that the said submission is liable to be rejected for the reason that the statement recorded under Section 164 Cr.P.C., cannot be treated as substantive evidence and therefore, the submission made in this regard is liable to be rejected.

18. One more incidental question arises for consideration in these Criminal Appeals is whether the conviction can be passed, entirely on the basis of the testimony of the victim girl. It is also came up for consideration before the Honourable Supreme Court of India in **State of Haryana Vs. Basti Ram** reported in **(2013)4 Supreme Court Cases 200**, wherein the earlier decision of the Honourable Apex Court in **Vijay Vs. State of Madhya Pradesh** reported in **(2010)8 SCC 191** was considered and in paragraph No.14 of the decision reported in **(2010)8 SCC 191**, it is observed as follows:

"14. Thus, the law that emerges on the issue is to the effect that the statement of the prosecutrix, ~~found~~ to be worthy of credence and reliable, requires no corroboration. The court may convict the accused on the sole testimony of the prosecutrix."



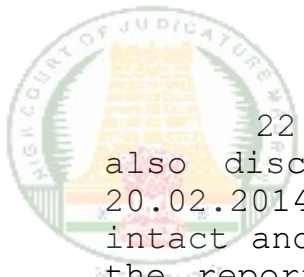
The said decision was also referred to in the subsequent decision of the Honourable Apex Court in State of **Rajasthan Vs. Babu Meena** reported in **(2013)4 Supreme Court Cases, 206**.

19. In **Mohd.Ali alias Guddu Vs. State of Uttar Pradesh** reported in **(2015)7 Supreme Court Cases, 272**, the Honourable Supreme Court has summarised the principles and also taken into consideration that the sole testimony of the prosecutrix and the facts of the case, found that on account of the delay in F.I.R., a non-examination of recovery witnesses, associated circumstances and medical evidence has left a mark of doubt to treat the testimony of prosecutrix as natural and truthful to inspire confidence and recorded the finding that the evidence of prosecutrix is not of such quality which can be relied upon and accordingly, allowed the appeal filed by the accused therein.

20. It is relevant to extract hereunder Paragraph No.30 of the said judgment, which culled out the legal proposition:

"30.True it is, the grammar of law permits the testimony of a prosecutrix can be accepted without any corroboration without material particulars, for she has to be placed on a higher pedestal than an injured witness, but, a pregnant one, when a Court, on studied scrutiny of the evidence finds it difficult to accept the version of the prosecutrix, because it is not unreproachable, there is requirement for search of such direct or circumstantial evidence which would lend assurance to her testimony. As the present case would show, her testimony does not inspire confidence, and the circumstantial evidence remotely do not lend any support to the same. In the absence of both, we are compelled to hold that the learned trial Judge has erroneously convicted the accused-appellants for the alleged offences and the High Court has fallen into error, without re-appreciating the material on record, by giving the stamp of approval to the same."

21. As rightly pointed out, P.W.1 found in the company of P.W.2, was also forcibly taken and according to his complaint, which is marked as Ex.P.1 and his chief examination, he was forcibly tied and caught up and beaten up and in his presence, P.W.2 was ravished by A.1 to A.3, but unfortunately, in the cross-examination, he turned hostile. Though the testimony of the prosecutrix viz., P.W.2 can also be the sole basis to record conviction and sentence, unfortunately she did not offer herself for cross-examination and the steps taken by the prosecution to trace and produce her had also ended in vain, despite an opportunity was granted by this Court while granting suspension of substantive sentence of imprisonment to A.1 to A.3 and A.5, vide <https://hcservicecourtsapp.in/hcservices/02.2018> in Crl.M.P. (MD) No.665 of 2018 in Crl.A. (MD) No.277 of 2017.



22. In expert evidence, though the testimony of P.W.9 would also disclose that at the time of her medical examination on 20.02.2014, P.W.2 was found three months pregnant and hymen was not intact and her vaginal orifice freely admitted two fingers also and the report did not deduct any spermatozoa, in cross-examination, P.W.9 would also depose that it cannot be stated that 48 hours prior to medical examination, P.W.2 had physically inter-course.

23. In **Selvaraj @ Chinnapaiyan Vs. State** represented by the Inspector of Police reported in **2015-2-L.W. (Cr1.) 500 (SC)**, in paragraph No.16, it is observed as follows:

"16.It is settled principle of law that benefit of reasonable doubt is required to be given to the accused only if the reasonable doubt emerges out from the evidence on record. Merely for the reason that the witnesses have turned hostile in their cross-examination, the testimony in examination-in-chief cannot be outright discarded provided the same (statement in examination-in-chief supporting prosecution) is corroborated from the other evidence on record. In other words, if the court finds from the two different statements made by the same accused, only one of the two is believable, and what has been stated in the cross-examination is false, even if the witnesses have turned hostile, the conviction can be recorded believing the testimony given by such witnesses in the examination-in-chief. However, such evidence is required to be examined with great caution."

24. As per the ratio laid down in the said decision, merely because, the witnesses turned hostile in their cross-examination, the testimony in chief-examination cannot be outrightly discarded, provided the statement in examination-in-chief supporting the prosecution is corroborated from the other evidence on record.

25. Unfortunately, in this case, the testimony of P.W.1 is not corroborated by other witnesses and as already pointed out, the crucial evidence of P.W.2 would have not come to the aid of the prosecution, for the reason that she did not offer her for cross-examination.

26. Though spermatozoa was deducted in the clothes worn by the accused, the swab taken from the vagina of P.W.2 did not deduct any spermatozoa and P.W.9 - Doctor, who initially examined her and issued the accident register, would state in her evidence state that P.W.2 was not subjected to any physical intercourse, prior to 48 hours of her examination. In the considered opinion of this Court, in the light of the infirmities pointed out, the foundation laid by the prosecution charging the accused for the commission of offences, ~~is not~~ weakened and therefore, the benefit of doubt shall enure in their favour and accordingly, they are awarded the benefit of doubt.



27. In the result, both the Criminal Appeals are allowed and the conviction and sentence awarded by the trial Court, vide impugned judgment dated 31.05.2017, S.S.C.No.14 of 2011 stand set aside and the appellants/ A.1 to A.5 are acquitted of the charges. All the appellants were granted suspension of sentence pending disposal of these appeals. The bail bonds executed by them, shall stand terminated. Fine amounts paid if any, shall be refunded to them.

28. This Court place it on record, the valuable assistance rendered by Mr.V.Malaiyendran, learned *amicus curiae* and directs the High Court Legal Services Authority to pay the remuneration as per norms.

Sd/-

Assistant Registrar(CO)

// True Copy //

Sub Assistant Registrar(CS)

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To

- 1.The Sessions Judge,
Mahilar Neethimandram (Fast Track Mahila Court),
Thanjavur.
- 2.The District Munsif Cum Judicial Magistrate,
Papanasam, Thanjavur.
- 3.do Thro' The Chief Judicial Magistrate,
Thanjavur district
- 4.The Inspector of Police,
Ammapettai Police Station,
Thanjavur District.
- 5.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.
- 6.The Section Officer,
Criminal Section(Records),
Madurai Bench of Madras High Court,
Madurai.



7. The Superintendent, Central Prison,
Trichy.

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+1CC TO MR.M.KARUNANITHI, Advocate Sr. No. 73551

Criminal Appeal (MD) Nos. 277/17 and 132 of 2018
04.07.2019

SGS (CO)

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