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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 18.08.2021

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CORAM

THE HONOURABLE Mr.JUSTICE P.N.PRAKASH

AND

THE HONOURABLE Ms.JUSTICE R.N.MANJULA

CRL.A.No.335 of 2018

AND

CRL.A.No.398 of 2018

Rajesh

.. Appellant/A-5
in Cr1.A 335/2018

1.Jayasurya

2.Ajeeth @ Santhosh

3.Birla

.. Appellants/A1,A3&A4
in Cr1.A 398/2018

Vs.

The State rep. by
The Inspector of Police
All Women Police Station
Rasipuram
Namakkal District
(Cr.No.3 of 2015)

.. Respondent/Complainant
(in both the Cr1. Appeals)

These Criminal Appeals are filed under Section 374(2) Cr.P.C. to set aside the conviction and sentence imposed vide judgment and order dated 05.06.2018 in S.C.No.57 of 2015 on the file of the Court of Session (Fast Track Court Mahila Judge), Namakkal.



For 1st Appellant : Mr.A.M.Rahamath Ali
in CrI.A.398/2018 for Mr.K.Balasubramaniam

For 2nd Appellant : Mr.K.Balaji
in CrI.A.398/2018

Appellant in : Mr.R.Sankarasubbu
CrI.A.335/2018
For 3rd Appellant
in CrI.A.398/2018

For Respondent : Mr.M.Babu Muthu Meeran
in both the CrI Additional Public
Appeals Prosecutor

C O M M O N J U D G M E N T

P.N.PRAKASH, J.

These criminal appeals are directed against the judgment and order of conviction and sentence dated 05.06.2018 passed by the Sessions Judge (Fast Track Mahila Judge), Namakkal, in S.C.No.57 of 2015.

2. Since this is a case of gang rape, to maintain anonymity, the prosecutrix will be referred to as "X".

3. The prosecution story runs thus :

3.1. "X" is a Dalit. She was married to one Chelladurai and got separated from him. Thereafter, she got married to Balakumar (P.W.7) and together, they were working as daily wagers in various sago factories in Erode and Namakkal areas. They also used to go as farmhands, when there was no work in the sago factories.

3.2. The date of incident in this case is 15.03.2015. Ten days prior to 15.03.2015, the couple got employment in a sago factory near the old bus stand, Namagiripet, Namakkal District and so, they took up a residence in Thottinaicker Street, Namagiripet.

3.3. "X's" husband Balakumar (P.W.7) was addicted to



liquor and on account of that habit, there were frequent quarrels between the spouses. On the evening of 15.03.2015, a quarrel ensued between "X" and Balakumar (P.W.7), pursuant to which, Balakumar (P.W.7) took his bicycle and went to the house of one Viswanathan (P.W.2) in whose farm, the couple had earlier worked.

3.4. Since Balakumar (P.W.7) did not return home, "X" went to Viswanathan's (P.W.2's) house, where they arrived at a temporary truce, brokered by Viswanathan (P.W.2) and were returning home around 10.30 p.m. by walk, pushing their bicycle.

3.5. While they were passing through the village cremation ground, three persons who came from the opposite direction, accosted them and asked them why they were alone. They replied that they are married couple, working in the nearby sago factory and were discussing among themselves as to how to vacate their house. In response, one of them said that he has an auto rickshaw and if he (Balakumar-P.W.7) gives Rs.2,000/-, he would help them in vacating the house.

3.6. When Balakumar (P.W.7) stated that he cannot afford, they started ragging "X" and when one of them put his hand on her shoulder, she pushed his hand saying that she is not of that character. They did not listen to her. When Balakumar (P.W.7) protested, they assaulted and abused him by referring to them as outsiders who have come in search of work.

3.7. One of them broke a brandy bottle found nearby and brandished it at the neck of Balakumar (P.W.7). At that time, one of them called the other, "Surya, you take care of that fellow, I and Ajeeth first take care of this one". Saying so, one after the other raped "X". She pleaded with them to leave her saying that she will go out of the village, but, to no avail. Notwithstanding that, Ajeeth called his two friends viz., Birla and Rajesh from his mobile phone and asked them to come to the place saying that they have caught hold of 'one item'. Soon, Birla and Rajesh came there and they also ravished "X".

3.8. After that, they dropped both of them ("X" and P.W.7) at the road leading to their house and left them by saying that if they go to the police, they would be finished. Since "X" was completely shattered and physically worn out, she dozed off



in her house and on the next day, she went to the nearby All Women Police Station and stated everything to Zaheera (P.W.33), Inspector of Police, hereinafter would be referred to as the I.O.

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3.9. The I.O. had "X's" complaint statement typed out in the station computer and obtained her signature and the complaint statement was marked as Ex.P1. On the said complaint, the I.O. registered a case in AWPS Rasipuram P.S. Crime No.3 of 2015 for the offences under Sections 376-D, 342 and 506(II) IPC at 11.00 a.m. on 16.03.2015 and prepared the printed FIR (Ex.P42), which reached the jurisdictional Magistrate at 09.30 p.m. on the same day.

3.10. The I.O. collected the nightie (M.O.2) and the inskirt (M.O.3) that were worn by "X" in Form-95. The I.O. sent "X" with a requisition for medical examination through Leelavathi, WHC-207 (P.W.23) and Sumathi, WHC-241 (P.W.24). "X" was examined by Dr.Saralabai (P.W.17) at the Government Kumarangalam Medical College Hospital, Salem on 16.03.2015 at 09.55 p.m., who noted the following in the Certificate of Examination for sexual offences (Ex.P24) :

"No injuries over mammal, cheek, lips, thighs and external genitalia. Old contusion 4 in number left infra scapular region varying in size from 4cm, 5cm, 0.5cm. Dark blue in colour. Tubectomy scar over abdomen present. External genitalia normal. Pubic hair not present. Shaved by victim girl. Vulva normal. Hymen absent. Vagina patulous admits 3 fingers easily. Parous women - 2 female children, (1) age-15 yrs and (2) age-13 yrs. Cervix healthy. Cervix ut AV NS FF."

3.11. Vaginal smear for spermatozoa study was taken and sent to the Tamil Nadu Forensic Science Laboratory (TNFSL), where, Senthil Kumar (P.W.20), Scientific Officer examined the same and gave a report (Ex.P35), in which, it is stated as follows :

"Report : Did not detect spermatozoa in the smear of the above slides."

3.12. After receipt of the report, Dr.Saralabai (P.W.17) gave her final opinion in Ex.P35, which is as follows :

"Vaginal smear for spermatozoa did not detect spermatozoa in the smear from clinical examination and



from chemical analysis report of vaginal smear, I am of the opinion that the victim is used to sexual life
"clYwt[f;F gHf;fkhfp cs;shh;"

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3.13. The I.O. sent Balakumar (P.W.7) to Rasipuram Government Hospital, for medical examination, where he was examined by Dr.Nithya (P.W.15) at 07.50 p.m. on 16.03.2015 who noted the following injuries in the accident register, a copy of which was marked as Ex.P20 :

" L/E

1. Multiple linear abrasion both forearm and arm 5 x 0.2cms -
5-6 in number
2. Multiple linear abrasion right thigh 6 x 0.3cms
3. Small abrasion right thigh 2 x 0.2cms - 4 in number"

3.14. The I.O. went to the place of occurrence and in the presence of witnesses viz., M.Vasanthakumar and V.Ravi (P.W.16) seized the following items under the cover of a mahazar (Ex.P22) :

- i. Atlas ladies bicycle (M.O.4)
- ii. Broken brandy bottle (M.O.5)
- iii. Broken bottle glass pieces (M.O.18)

She prepared a rough sketch (Ex.P43). She arrested all the five accused and on their confession statements, seized the following items :

Accused	Date of arrest & Time	Seizure Mahazar	Material Objects with description
Jayasurya (A1)	16.03.2015 11.00 p.m.	Ex.P7	Black colour Nokia cell phone including sim card (M.O.1) Black colour jeans pant (M.O.6) Blue colour checked half sleeve shirt (M.O.7) Coffee colour viking underwear (M.O.8)



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Accused	Date of arrest & Time	Seizure Mahazar	Material Objects with description
Ganesh Kumar (A2)	16.03.2015 11.00 p.m.	Ex.P8	Maroon colour panty with osho letters written (M.O.9) Green, blue and white checked lungi (M.O.10) Blue, green and white checked full sleeve shirt (M.O.11)
Ajeeth @ Santhosh (A3)	18.03.2015 10.15 a.m.	Ex.P12	Black colour square checked lungi (M.O.16) Light red colour full sleeve shirt (M.O.17)
Birla (A4)	16.03.2015 11.00 p.m.	Ex.P9	Blue colour sandal colour lined lungi (M.O.12) white colour with black collar jersey (M.O.13)
Rajesh (A5)	16.03.2015 11.00 p.m.	Ex.P10	Blue colour pant (M.O.14) Orange colour T-shirt (M.O.15)

3.15. On the request of the I.O., "X" was admitted in the Psychiatry Ward in the Government Hospital, Namakkal on 19.03.2015, where Dr.Gunamani (P.W.12) gave her psychiatric counselling and treatment to help her to come out of the trauma that she was in after the occurrence.

3.16. Dr.Murali (P.W.18), Assistant Medical Officer, Government Hospital, Namakkal, examined Jayasurya (A1), Ganesh Kumar (A2), Ajeeth (A3) and Rajesh (A5) on 24.03.2015 and issued the report on medical examination of a male accused of sex offence in Exs.P27, P28, P25 and P26 respectively. In each of the said reports, it is stated that the accused therein is not suffering from any major illness and there is nothing to suggest that they are incapable of performing sexual act. Dr.Raja (P.W.13), Assistant Medical Officer, Government Hospital, Namakkal, examined Birla (A4) on 28.03.2015 and issued the medical examination report (Ex.P13), wherein, it is stated that the person (Birla) is not suffering from any major illness and there is nothing to suggest that he is incapable of doing sexual act. During medical examination, the semen of the accused were



collected and sent to the Tamil Nadu Forensic Science Laboratory, for examination.

3.17. On the request of the I.O., Mohanambal (P.W.19), learned Judicial Magistrate No.I, Namakkal, recorded the statements under Section 164 Cr.P.C. of "X" and Balakumar (P.W.7) on 19.03.2015 and their statements were marked as Exs.P33 and P34 respectively.

3.18. The I.O. made arrangements for conduct of a Test Identification Parade (TIP) by D.Balu (P.W.21), District Munsif-cum-Judicial Magistrate, Paramathi, by submitting necessary applications to the Chief Judicial Magistrate, Namakkal. On 20.03.2015, D.Balu (P.W.21) conducted TIP for identifying Jayasurya (A1), Ganesh Kumar (A2), Ajeeth (A3) and Rajesh (A5) by "X" and Balakumar (P.W.7). "X" and Balakumar (P.W.7) correctly identified Jayasurya (A1), Ganesh Kumar (A2), Ajeeth (A3) and Rajesh (A5) in all the rounds. The TIP report in respect of Jayasurya (A1), Ganesh Kumar (A2) and Rajesh (A5) were marked as Ex.P38 and the TIP report in respect of Ajeeth (A3) was marked as Ex.P39. Again, on 25.03.2015, D.Balu (P.W.21) conducted TIP for the purpose of identifying Birla (A4) by "X" and Balakumar (P.W.7) and in that parade also, they correctly identified Birla (A4) in all the three rounds. The TIP report dated 25.03.2015 in respect of Birla (A4) was marked Ex.P40.

3.19. The clothes that were worn by the accused at the time of the occurrence and which were seized during the investigation were sent along with the nightie (M.O.2) and inskirt (M.O.3) to the TNFSL for examination. Senthilkumar (P.W.20), Scientific Officer, examined the clothes and detected semen in the underwear (M.O.8) that was seized from Jayasurya (A1) and in the nightie (M.O.2) and inskirt (M.O.3) that were worn by "X".

3.20. After examining witnesses and collecting the various reports from the experts, the I.O. completed the investigation and filed a final report in P.R.C.No.14 of 2015 in the Court of the Judicial Magistrate, Rasipuram, for the offences under Sections 341, 323, 376(g), 392 and 506(II) IPC and Section 4 of the Tamil Nadu Prohibition of Women Harassment Act, 1988 against Jayasurya (A1), Ganesh Kumar (A2), Ajeeth (A3), Birla (A4) and Rajesh (A5).

3.21. On appearance of the accused, the provisions of Section 207 Cr.P.C. were complied with and the case was committed



to the Court of Session in S.C.No.57 of 2015 and was made over to the Fast Track Mahila Court (Sessions Level), for trial. The trial Court framed the following charges :

Name of the accused	Charged under Section
Jayasurya (A1) Ganesh Kumar (A2) Ajeeth (A3)	4 of TNPWH Act for harassing "X" on the night of 15.03.2015
Ganesh Kumar (A2) Ajeeth (A3)	341 IPC for wrongfully restraining Balakumar (P.W.7)
	323 IPC for causing simple injuries to Balakumar (P.W.7)
	506(II) IPC for criminally intimidating "X" and Balakumar (P.W.7)
Jayasurya (A1)	392 IPC for snatching away the mobile phone of Balakumar (P.W.7)
Jayasurya (A1) Ganesh Kumar (A2) Ajeeth (A3) Birla (A4) Rajesh (A5)	376(g) IPC for gang rape
	506(II) IPC for criminally intimidating "X" and Balakumar (P.W.7), after committing rape that they would be murdered if they inform the police

3.22. When questioned, all the accused pleaded "not guilty".

3.23. To prove the case, the prosecution examined 33 witnesses, marked 52 exhibits and 18 material objects. When the accused were questioned under Section 313 Cr.P.C. on the incriminating circumstances appearing against them, they denied the same. Rajesh (A5) examined 5 defence witnesses, out of whom, Sekar (D.W.3), Ramasamy (D.W.4) and Sundari (D.W.5) have not stated anything in favour of the defence. Only Senthilkumar (D.W.1) has stated that two years ago, on a Sunday, he went for work along with Rajesh (A5) at 08.00 in the morning and returned



home at 09.00 in the night; thereafter, he was with Rajesh (A5) till 12.00 in the midnight; on the next day at 8'o clock, the police came and took away Rajesh (A5) and foisted the present case on him. Sakthivel (D.W.2) has stated that he went to Rajesh's (A5's) house two years ago, on a Sunday, around 11.00 p.m., in order to take the help of Rajesh's (A5's) father, who is an electrician as some electrical work had to be done. At that time, he saw Rajesh (A5) in his house.

3.24. After considering the evidence on record and hearing either side, the trial Court, by judgment and order dated 05.06.2018, in S.C.No.57 of 2015, convicted and sentenced the appellants as under :

Name of the accused	Provision under which convicted	Sentence
Jayasurya (A1)	Section 4 of TNPHW, 1998	2 years rigorous imprisonment with fine of Rs.10,000/-, in default to undergo 6 months rigorous imprisonment
	Section 392 IPC	10 years rigorous imprisonment with fine of Rs.2,000/-, in default to undergo 4 months rigorous imprisonment
	Section 376(g) IPC	Life imprisonment with fine of Rs.2,000/-, in default to undergo 4 months rigorous imprisonment
	Section 506(II) IPC	5 years rigorous imprisonment with fine of Rs.2,000/-, in default to undergo 4 months rigorous imprisonment



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Name of the accused	Provision under which convicted	Sentence
Ganeshkumar (A2) Ajeeth (A3)	Section 341 IPC	1 month rigorous imprisonment
	Section 323 IPC	1 year rigorous imprisonment
	Section 506(II) IPC	5 years rigorous imprisonment with fine of Rs.2,000/-, in default to undergo 4 months rigorous imprisonment
	Section 376(g) IPC	Life imprisonment with fine of Rs.2,000/-, in default to undergo 4 months rigorous imprisonment
Birla (A4) Rajesh (A5)	Section 376(g) IPC	Life imprisonment with fine of Rs.2,000/-, in default to undergo 4 months rigorous imprisonment
	Section 506(II) IPC	5 years rigorous imprisonment with fine of Rs.2,000/-, in default to undergo 4 months rigorous imprisonment

The aforesaid sentences were ordered to run concurrently.

3.25. Aggrieved by the said conviction and sentences, Rajesh (A5) has filed CrI.A.No.335 of 2018 and Jayasurya (A1), Ajeeth @ Santhosh (A3) and Birla (A4) have filed CrI.A.No.398 of 2018. It is pertinent to state that Ganeshkumar (A2) has not chosen to appeal against his conviction and sentence.

4. Heard Mr.A.M.Rahmath Ali, learned counsel representing Mr.K.Balasubramaniam, learned counsel on record for Jayasurya (A1); Mr.K.Balaji, learned counsel for Ajeeth @ Santhosh (A3); Mr.R.Sankarasubbu, learned counsel for Birla (A4) and Rajesh (A5) and Mr.Babu Muthu Meeran, learned Additional Public Prosecutor appearing for the respondent State.

5. The entire prosecution case rests on the testimony of



"X", Balakumar (P.W.7) and Viswanathan (P.W.2). For better appreciation of the evidence on record, we give hereunder the free English translation of the testimony of "X", who was examined as P.W.1 :

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"At present, I am residing in Karur. At the time of occurrence, I resided at Namagiripettai. The witness Balamurugan(sic) is my husband. I am working in Kilangu Mill (Sago Factory) at Orakurai. I have two daughters. The eldest daughter's name is Pon.Kanmani and the name of second daughter is Pon. Arasi. My native is Karur. Already, I had been married to one Selladurai. These two daughters are the children born to that husband. I knew the accused present. As we had difference of opinion, we got separated. I worked in the Kalimark Cool Drinks Company at Karur. Balakumaran worked as Manager there. Both of us got acquainted, and we got married. So, the father and mother of Balakumaran did not accept me. Then, we stayed at Vannangadu Valasu in Erode for two years. Then, we shifted to Oduvankurichi. There, I worked at Manikam Kilangu Mill (Sago Factory). As the work was incompatible to me, I worked at boiler in Rajendran Kilangu Mill at Namagiripettai. As we did not get work properly there, we went to Odakara mill. The Odakara Mill is situated nearby Namagiripettai Old Bus stand. Only ten days prior to the day of occurrence, we shifted to Thottiya Naicker Street. On 15.03.2015, an altercation arose between us as my husband did not give the salary after getting it. As my husband was working in Shanmugam's farm already, he fought with me and went to that farm. On reaching there, I pacified my husband and having vacated the house, we arranged a rental vehicle to go to our native place and both of us were coming by walk by pushing the cycle at 10.30 pm. At that time, three persons namely Jayasuriya, Ajith and Rajeshkumar came opposite from Thottiya Naicker graveyard. One boy Surya had touched holding the nightie. At that time, my husband told them not to touch me and to take their hands off me. Ajith and Kumar told Suriya to look after me and hence Suriya held me. Both Ajith and Kumar threatened me by picking up the brandy bottle found on the ground and placed it over my husband's neck stating that if I did not give



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in to their desire, they would kill my husband. I screamed stating that I am like their elder/younger sister. I also told him that he was like my blood born younger brother. I also shouted saying that I was not like that sort of girl and also pleaded by stating that I am like his blood born elder sister, and hence, not to harm me. Both Ajith and Kumar picked up a brandy bottle found on the ground, broke it and placed it over my husband's neck and threatened that if I did not give in to their desire, they would kill my husband. Suriya came and said that he had done it and asked other two to take over then. They raped me against my wish. A few moments later, Ajith called Birla over phone and invited him to come there stating that he had got an item(whore) there. After a few minutes, Birla and Ganesh came there. A4 and A5 are present in the court. Then, A4 and A5 raped me against my wish. When they left me on the street, there was luminance of light and in that light, I saw those five accused. They threatened us stating that if we disclose this to anyone, they will kill both of us alive. As I got affected both physically and mentally, we went to the house and slept. The next day, i.e., on 16.03.2015, I went to All Women Police Station, Rasipuram around 11.00 am, and lodged the complaint. They typed and recorded the complaint as dictated by me. They got my signature. The signature in the complaint, which is shown to me, is mine. That complaint is Ex.P.1. The signature in the First Information Report is mine only. That signature alone is Ex.P.2. Then, they gave an alternative dress to change the nightie and the inskirt, which I had worn and got me admitted immediately in the Government General Hospital, Salem. There, I was given treatment for 3 days. On 19.03.2015, I gave statement before the Judicial Magistrate No.1, Namakkal. On 20.03.2015, I had identified 4 persons in Velur - Paramathi Sub Jail. Then on 25/3/2015, I went to the Central Prison, Salem and identified one person. Suriya had taken away the cell phone and cycle. The cell phone, which is shown to me, is the one, which I was having at the time of occurrence. That black colour Nokia cell phone along with the SIM card is M.O.1. The black rose and blue coloured nightie with design is



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M.O.2. The pale blue colour inskirt is M.O.3. Atlas Ladies Cycle is M.O.4. The broken brandy bottle used by the accused at the time of occurrence is M.O.5. The police enquired me."

6. "X" was subjected to grilling cross-examination by the accused on 16.10.2015 and 24.11.2015. In the cross-examination, "X" has stated that the house of Viswanathan (P.W.2) is about 1 km. from the place of occurrence. When she was confronted in the cross-examination as to whether, she knew the five persons earlier, she stated that she did not know them at all. When it was asked to her as to how, she was able to give their names, she stated that she knew the names only from their inter se conversation. She has further stated in the cross-examination that after the incident, she saw the five accused only in the sub jail in the presence of the Magistrate.

7. The learned defence counsel submitted that in the cross-examination, "X" has stated that the accused had taken away the bicycle, whereas the police found the bicycle near the place of occurrence. He also contended that "X" has stated that she was examined by the doctor after she lodged the police complaint, whereas, the evidence of Dr.Saralabai (P.W.17) shows that "X" was examined only at 09.55 p.m. on 16.03.2015. Therefore, the learned counsel contended that these discrepancies make her evidence suspect.

8. We carefully perused the cross-examination of "X" and found in the cross-examination that was conducted on 24.11.2015, she has clearly stated she was taken to the hospital where she was given treatment and counselling. When she was asked as to why, she did not go to the police station immediately, which was hardly half a kilometre. from her house, she stated about her physical condition as, "அப்பவே மகளிர் காவல் நிலையம் சென்று புகார் கொடுக்கவில்லை என்றால் அந்த கன்டிசனில் உடம்பு வலி உடல் நடுக்கம். மயக்கம் இருந்ததால் உடனே காவல் நிலையம் சென்று புகார் கொடுக்க முடியவில்லை," [(free English translation) I did not immediately go to the All Women Police Station, because, I was in such a condition that there was body pain, trembling and giddiness.] When she was asked as to whether, she informed about this to her neighbours, she stated that she told the person, who was living in the opposite house and some others, but, since she had moved into the house only 10 days prior to the occurrence, she did not know many of her neighbours.



9. As regards the contention of the defence that "X" has stated that the accused had taken away the bicycle, but the bicycle was found near the place of occurrence, we do not see this as a glaring contradiction in the facts and circumstances of the case in hand. "X" and Balakumar (P.W.7) have stated that the accused snatched away their bicycle, but, would not have noticed in the stressful condition they would have been in, as to what the accused did with the bicycle.

10. Mr. Rahmath Ali took us through the chief examination of "X" and contended that "X" has initially stated that Jayasurya (A1) and Rajesh (A5) came and accosted them, whereas, the prosecution case is, Jayasurya (A1), Ganesh Kumar (A2) and Ajeeth (A3) accosted "X" and Balakumar (P.W.7) and after they raped "X", Birla (A4) and Rajesh (A5) came subsequently.

11. Similarly, Mr. R. Sankarasubbu took us through the cross-examination on behalf of Rajesh (A5) and contended that "X" was not able to properly identify Rajesh (A5), in that, in one line, she has stated that she does not remember that who is the fifth person and subsequently, she has stated that the 5th person is Rajesh (A5).

12. We minutely read the entire evidence of "X". It is true that she has stated in her chief-examination that three persons, who accosted them at the beginning were Jayasurya (A1), Ajeeth (A3) and Rajesh Kumar (A5). But, in the subsequent line, she has referred to them as Ajeeth (A3) and Kumar. She has referred to Rajesh as Ganesh. Rajesh does not have a suffix 'Kumar' to his name and only Ganesh has suffix 'Kumar' to his name. While identifying the accused, she has correctly identified the fourth and fifth accused as the persons, who came subsequently and they are Birla (A4) and Rajesh (A5).

13. Similarly, in the cross-examination of Rajesh (A5), when she was asked as to whether, the fifth person standing from north is Ganesh, she has stated that she did not remember. After two lines, she correctly stated that fifth person is Rajesh. In our experience, the accused is likely to invite more trouble, when a truthful witness is subjected to unbridled cross-examination. In the cross-examination, "X" has stated that she was able to see the face of the accused, as there was street



light near the place of occurrence. To establish this fact, the prosecution has examined one Kanagaraj (P.W.8), Electricity Board Wireman, who has stated that the street light SS4 SC595/19 was glowing on 15.03.2015.

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14. Balakumar (P.W.7) has stated that he moved into Namagiripet, ten days prior to the incident; 15.03.2015 was a Sunday, at 07.00 p.m., he had quarrelled with his wife ("X") as she was demanding money from him and left the house to Viswanathan's (P.W.2's) farm by his bicycle; around 09.00 p.m., his wife ("X") came to Viswanathan's (P.W.2's) house looking out for him and the people there mediated and sent them home; while they were walking towards home around 10.30 p.m., three persons (identified those three persons as Ajeeth (A3), Surya (A1) and Ganesh (A2) came from the opposite side and asked them as to why, they were quarrelling; at that time, they picked up a conversation and Surya (A1) put his hand on his wife's (X's) shoulder; when he (P.W.7) objected to it, they hit him and pulled his wife ("X") into a nearby dense area; Surya (A1) kept a piece of broken brandy bottle piece on his (P.W.7's) neck and threatened him; they raped his wife ("X") one after the other; not stopping with that, Ajith (A3) telephoned his friends and asked them to come saying that they have caught hold of a "figure"; Birla (A4) and Rajesh (A5) came and ravished his wife ("X"); around 1'o clock, they dropped them in the main road and warned them against going to the police; since his wife ("X") was in a state of shock and pain, they could do nothing in the night hours and only when the day dawned, they went to the police station and lodged a complaint.

15. Balakumar (P.W.7) was extensively cross-examined from the route that he has taken from Viswanathan's (P.W.2's) house to his (P.W.7's) house. It was suggested to him that it was not necessary to pass through the cremation ground for returning to his house from Viswanathan's (P.W.2's) house and that there is yet another shorter route, for which, he has stated that to reach his house from Viswanathan's (P.W.2's) house, one has to pass through the cremation ground and that he does not know about any alternative route, as he had relocated to that area only ten days prior to the incident. It is the case of the defence that in the place where the alleged rape had taken place, there are so many thorny bushes. When the said suggestion was put to the witness (P.W.7), he denied the same.



16. Viswanathan (P.W.2) in his evidence has stated that, on 15.03.2015, he had gone out of the village and returned home around 8.00 p.m.; at that time, Balakumar (P.W.7) was in his house and when he asked him for the purpose of his visit, he stated that he had quarrelled with his wife and had come here; while he was talking to him, his wife ("X") also joined; she ("X") complained about her husband (P.W.7) that he is not going for work at all, but is coming drunk and quarrelling frequently; so, he asked Balakumar (P.W.7) why he is doing that and advised him to go to work properly and sent them to their house and on the next day, he heard the news that "X" was raped on the way to their home.

17. In the cross-examination, he (P.W.2) was asked as to the distance of his farm from Namagiripet, for which, he has stated that his farm will be around 1 km. from Namagiripet. He has stated that it will take about 20 minutes to reach Namagiripet. He has also stated that around 8.30 p.m., "X" and Balakumar (P.W.7) left his house.

18. Much argument was advanced by the defence by contending that when Viswanathan (P.W.2) has stated that "X" and her husband (P.W.7) left his house around 08.30 p.m., the evidence of "X" and Balakumar (P.W.7) that the incident had taken place at 10.30 p.m. deserves to be rejected.

19. We carefully analysed this aspect also. Viswanathan (P.W.2) has stated that he returned to his house only at 08.00 p.m. on 15.03.2015 and at that time, Balakumar (P.W.7) was in his house; while he was discussing with Balakumar (P.W.7), "X" joined and she complained about her husband (P.W.7). There were mediation talks in Viswanathan's (P.W.2's) house, which will normally not end that easily, especially, when it is between a warring couple. In villages, people do not work on clock precision. What we are impressed with the evidence of Viswanathan (P.W.2) is that, he corroborates the testimonies of "X" and Balakumar (P.W.7) that on the fateful day, they came to his house in the night individually and he brought a truce between them and sent them back.

20. Now, the most important question that deserves to be addressed is, what motive did "X" and her husband (P.W.7) have



for implicating the accused. We find from the depositions of "X" (P.W.1) and Balakumar (P.W.7) that P.W.1 ("X") is a Dalit, got married to a person and separated from him, thereafter, she got married to Balakumar (P.W.7), who is a non-Dalit and younger to her in age. That is not a sin at all. Viswanathan (P.W.2) is also a non-Dalit and in his farm, "X" and Balakumar (P.W.7) used to work during harvest seasons and on other occasions, they used to go for job in the local sago factories.

21. It is not the case of "X" and Balakumar (P.W.7) that they knew the accused earlier. The accused had put a very vague suggestion to "X" that in order to get Rs.3 lakhs as compensation from the Government, she has falsely implicated them. That apart, the accused had suggested to her that at the instance of one Selvaraj, a local Councillor, "X" has falsely implicated all of them. However, in her cross-examination, "X" has stated that she does not know, who the said Selvaraj is. Apart from this, no other motive has been suggested to "X" for falsely implicating the accused.

22. It may be pertinent to state here that "X" and her husband (P.W.7) had moved to Namagiripet village, only 10 days prior to the incident and the accused had exclusively referred to them as outsiders. The accused also did not know the name of "X" and so they were referring her as "item" and "figure". If "X" had wanted to falsely implicate the accused, why should she say that initially, she was accosted by three persons and after that, one of them called his two friends saying that they had caught hold of one item and asked them to come immediately. Following it, the other two came and ravished her. She could have straightaway stated that all the five accosted her and ravished her.

23. Mr.Sankarasubbu placed strong reliance on passages from the textbook of Forensic Medicine and Toxicology by Anil Aggrawal (Avichal Publishing Company) and submitted that rape means the male genital organ should penetrate into the vagina of the prosecutrix and that in the absence of any injury, it cannot be stated that "X" was raped. We are unable to countenance this submission, in the light of the definition of rape in Section 375 IPC as amended by Act 13 of 2013 w.e.f. 03.03.2013. That apart, even in the treatise relied upon by Mr.Sankarasubbu, it has been stated as follows:



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"When absent - Accused often takes the plea of absent marks of violence as indicative of consent. Marks of violence absent even in the absence of consent due to (i) fear of injury, death-submission by the victim (ii) Incapacitation caused to victim by (a) throat grips (b) strong neck holds (c) severe blow on the head (iii) force used is insufficient to cause injury (iv) Too early examination. Bruises may be noticed for up to 48 h following assault (v) Too delayed examination - due to late reporting. Marks of minor injuries would fade or heal. (vi) Description of marks of injury-is a legal necessity."

24. Mr.Sankarasubbu relied upon the judgment in Yerumalla Latchaiah Vs. State of A.P. [(2006)3 SCC (Cri) 373], in support of the proposition that in the absence of any injury in the private part of the victim, the accused has to be acquitted. We are afraid that the said ruling does not say so as a matter of legal proposition. In the said judgment, the Supreme Court has observed as follows :

"... .. Immediately after the occurrence, she was examined by Dr.K.Sucheritha (P.W.7) who has stated in her evidence that no injury was found on any part of the body of the victim, much less on private part. Hymen was found intact and the doctor has specifically stated that there was no sign of rape at all."

Thus, in that case, the hymen was intact. All these factors were taken into consideration by the Supreme Court for acquitting the accused.

25. Learned counsel relied upon the judgment in Santosh Prasad @ Santosh Kumar Vs. State of Bihar [(2020)3 SCC 443], wherein, the Supreme Court has disbelieved the evidence of the prosecutrix. It is true that in that case, the Supreme Court had, on facts, found the evidence of the prosecutrix unreliable and has given reasons for the same. In fact, in the said judgment, the Supreme Court has held as follows :

"It cannot be disputed that there can be a conviction solely based on the evidence of the prosecutrix. However, the evidence must be reliable and trustworthy."

In this case, on facts, we find the evidence of the prosecutrix to be reliable and trustworthy.

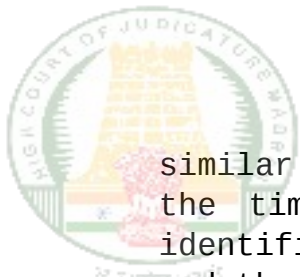


26. Coming to the defence witnesses, as stated by us above, Sekar (D.W.3), Ramasamy (D.W.4) and Sundari (D.W.5) have not stated anything in support of the defence. In fact, Sundari (D.W.5), in her chief-examination has stated that, she has not seen "X" and Balakumar (P.W.7). That is because, "X" and Balakumar (P.W.7) had moved into the village only ten days ago. As regards the route, Sundari (D.W.5) has stated that there are two routes from Namagiripet bus stand to Thottinaicker Street.

27. Senthil Kumar (D.W.1) has stated that he was with Rajesh (A5) in his house on a Sunday till 12 in the midnight. Similarly, Viswanathan (P.W.2) had stated that on the Sunday night, he had gone to the house of Rajesh (A5) to take the help of his father, who is an Electrician, to fix an electrical problem and at that time, he saw Rajesh (A5) in his house. Both the witnesses have not stated the date on which they were with Rajesh (A5). Alibi is a relevant fact under Section 11 of the Evidence Act and that has to be proved like any other fact by the person who asserts it. Unfortunately, in this case, alibi has not been proved by Rajesh (A5) satisfactorily. It may be pertinent to reiterate here that "X" and Balakumar (P.W.7) identified A1 to A5 in the TIP that was conducted by D.Balu (P.W.21).

28. Mr.Sankarasubbu submitted that "X" has admitted that the news of the rape was published in the local newspaper and therefore, the TIP is a farce. We carefully examined the evidence of "X", wherein, she has stated in the cross-examination that in the local newspapers, a news item came that five people had raped a lady. Beyond that, she has not stated that the news item carried the photographs of the accused. Nor did the accused mark any newspaper with their photographs.

29. The learned counsel attacked the TIP by picking holes in the procedure that was adopted by D.Balu (P.W.21). He contended that D.Balu (P.W.21) should have kept 10 dummies and not 8 dummies. We are unable to countenance this submission because, in the manner of conducting a TIP in the Criminal Rules of Practice, 2019, it is not stated, as to how many dummies a Magistrate has to employ amongst the suspects. The number of dummies depends upon the availability of persons with features



similar to that of a suspect in a sub jail or a central jail, at the time of conducting the parade. In any event, the test identification proceedings is not a substantive piece of evidence and the identification of the suspect in the parade can only be a corroboration for the identification of the accused in the dock during trial. Identification during trial is relevant under Section 9 of the Evidence Act and TIP is normally conducted by the Investigating Officer, in order to ensure that the investigation is going on in the right track.

30. For all the foregoing reasons, we find no merit in these appeals and accordingly, they are dismissed.

In the result, the judgment and order of conviction and sentence dated 05.06.2018 passed by the Sessions Judge (Fast Track Court Mahila Judge), Namakkal, in S.C.No.57 of 2015, is confirmed.

Sd/-

Assistant Registrar(CS-III)

//True Copy//

Sub Assistant Registrar

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To

- 1.The Sessions Judge
(Fast Track Court Mahila Judge)
Namakkal
- 2.The Principal Sessions Judge,
Namakkal.
- 3.The Judicial Magistrate
Rasipuram.
- 4.(Do Through) The Chief Judicial Magistrate
Namakkal.



5.The Inspector of Police
Rasipuram All Women Police Station
Namakkal District

6.The Public Prosecutor
High Court,
Madras

7.The Superintendent
Central Prison,
Coimbatore.

+1cc to M/s.K.Balasubramaniam, Advocate, S.R.No.48366
+1cc to M/s.K.Balaji, Advocate, S.R.No.48487

Cr1.A.Nos.335 & 398 of 2018

RSI(CO)
SB(06/10/2021)