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.Crl.A.No.359 of 2016.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On: 03.08.2023

Delivered On :30.04.2024

CORAM :

THE HON'BLE MR. JUSTICE SATHI KUMAR SUKUMARA KURUP

Crl.A.No.359 of 2016

Bhupender Singh Bisht

...Appellants/Accused

Vs.

State Rep. By
The Inspector of Police,
Wellington Police Station,
The Nilgiris District.
(Cr.No.154/2012)

... Respondent/Complainant

PRAYER: Criminal Appeal filed under Section 374 of Cr.P.C., to set aside the Judgment of the learned Sessions Judge, Magalir Neethimandram (Fast Track Court), Uthagamandalam, The Nilgris made in S.C.No.32 of 2013 by Judgment dated 18.08.2015 and acquit the Appellant herein from the said charges.

For Appellants : Mr.C.S.Pillai
Legal Aid Counsel

For Respondent : Mr.G.V.Kasthuri
Additional Public Prosecutor



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ORDER

This Criminal Appeal has been filed to set aside the Judgment of the learned Sessions Judge, Fast Track Court, Uthagamandalam, The Nilgris in S.C.No.32 of 2013 dated 18.08.2015.

2. The brief facts as per the case of the Prosecution are as follows:

The victim in this case was aged 7 ½ years on the date of the alleged occurrence. The Appeal arose out of conviction of the offence under Section 376 of IPC. The Accused in this case is Buddy of Lieutenant Colonel. Vivek Singh Thakur. The victim is the daughter of Lieutenant Colonel. Vivek Singh Thakur and Major. Prashasti. The victim's family left from the Bhatinda in Punjab State to Wellington on the transfer of Lieutenant Colonel, Instructor Defence Services Staff College, Wellington in Nilgiris District. Three months prior to the transfer, only the Buddy was employed by Bhatinda Unit for helping Lieutenant Colonel. Vivek Singh Thakur and his wife Major. Prashasti Thakur is also serving in the Army. Till June 2012 the family of Lieutenant Colonel. Vivek Singh Thakur was in Gurdaspur in Punjab.



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Subsequently, July 2012, they were shifted to Willington Defence Services Staff College, The Nilgiris. The Accused who was serving as Buddy of Colonel. Vivek Singh Thakur also transferred along with him and stayed at Barn B Quarters at Staff College from 10.07.2012. The children of Lieutenant Colonel. Vivek Singh Thakur was studying in the Army Public School, Ooty. On 19.07.2012, the mother of the victim Major. Prashasti along with her mother went shopping at Coonoor leaving with the children under the care of the Accused and the Cook at Quarters. When the mother of the victim and the grandmother of the victim returned to the Quarters, they found the victim missing. The mother of the victim/Major. Prashasti called her daughter, when she searched her daughter, found that she was in another bed room. She appeared as tired. When the mother of the victim enquired victim, victim opened up, she started crying. She removed the upper garment and showed her chest and thigh. She was afraid to express it to her mother, then she slowly came out and told her mother that the Accused removed her clothes and put in her in the bed playing with her body parts. He pressed on the chest of the child/victim and kissed her private part. The child also informed her that he did the same thing even at Bhatinda.



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Instead of her resistance, he closed her mouth. That occurrence had taken place between 11 a.m., and 12 p.m., the mother of the victim went to bed room and found out that the bed cover had semen. Immediately, she took her daughter to Military Hospital, Coonoor. Dr.Malik, the Military Hospital treated her and asked the mother to take the child to the Civil Hospital. The mother of the victim took her to Coonoor Government Hospital. P.W-10-Dr.Neelavan, Coonoor Government Hospital examined the child and directed the parents to take the child to the Headquarters Hospital at Ooty. At Ooty Government Hospital, P.W-11-Dr.Lakshmi Priya examined the child victim and issued Ex.P-16. She also took the swab from the vagina of the victim and took the swab from the mouth of the victim and forwarded it to the Forensic Laboratory. The mother of the victim preferred a Complaint under Ex.P-1 to the Sub Inspector of Police, Wellington Police Station. Based on the Complaint given by the mother of the victim, P.W-8-Sub Inspector of Police, Wellington Police Station registered a case in Cr.No.154 of 2012 dated 19.07.2012 for the offences under Section 376 of IPC r/w. Section 511 of IPC. P.W-8 forwarded the original Complaint under Ex.P-1 and the FIR under Ex.P-13 to the learned Judicial Magistrate, Coonoor and the copy



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of the same was sent to the higher Officials/P.W-12-Inspector of Police, Wellington Police Station. On receipt of the copy of the FIR and Complaint, the Inspector of Police, Wellington Police Station proceeded with the investigation. He visited the house of the Complainant/P.W-1 and prepared Rough Sketch under Ex.P-7 and the Observation Mahazar under Ex.P-3 in the presence of the Witnesses viz., P.W-4 and P.W-6. P.W-12 had examined the Witnesses including the Medical Officer, Coimbatore who examined the victim and Dr.Lakshmi Priya who had issued the Certificate under Ex.P-15. He had also forwarded the Accused to be examined by the duty Medical Officer and issued Potency Certificate. P.W-10 examined the Accused and issued Accident Register under Ex.P-15. P.W-12 examined all the witnesses and on completion of the investigation, laid the final report before the Court of the learned Judicial Magistrate, Coonoor. Taken on file as PRC, the learned Judicial Magistrate had issued summons to the Accused. On appearance of the Accused, copies were furnished under Section 207 Cr.P.C., and he was directed to appear before the learned Principal Sessions Judge, Ooty. On appearance of the Accused, the learned Principal Sessions Judge had made over the case to the Court of the learned Sessions Judge, Fast Track



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Mahila Court, Ooty. On appearance of the Accused and on hearing the arguments of the Prosecution and the Defence, the learned Sessions Judge, Fast Track Mahila Court, Ooty had framed charges under Section 376 (ii) of IPC since the Accused denied the charges, the learned Sessions Judge, Fast Track Mahila Court, Ooty had ordered trial. During trial, the Prosecution had examined the Witnesses viz., P.W-1 to P.W-13 and marked documents viz., Ex.P-1 to Ex.P-25. After closing of evidence of Prosecution, the Accused was examined under Section 313 of Cr.P.C., the Accused denied the Charges and examined D.W-1. After hearing the Prosecution and the Defence, the learned Sessions Judge had convicted the Accused for the offence under Section 376 (ii) (f) of IPC and imposed a sentence of imprisonment of 10 years and fine of Rs.5,000/- in default to undergo one year of Rigorous Imprisonment. The period already undergone the detention from 20.07.2012 to 10.10.2012 was also set aside.

3. Aggrieved by the Judgment of Conviction recorded by the learned Sessions Judge, Fast Track Mahila Court, Ooty, the Appellant/Accused before the learned Sessions Judge who is the



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Appellant before this Court.

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4. The learned Counsel for the Appellant submitted that the Judgment of Conviction recorded by the learned Sessions Judge, Fast Track Mahila Court, Nilgiris made in S.C.No.32 of 2013, by Judgment dated 18.08.2015 is to be set aside as perverse. The materials available in favour of the Accused in the cross-examination of the Prosecution Witnesses was not at all considered by the learned Sessions Judge, Fast Track Mahila Court. On mere surmises and conjectures, the learned Sessions Judge, Fast Track Mahila Court had convicted the Accused. Therefore, the same is to be set aside.

5. The learned Counsel for the Appellant submitted that the evidence of P.W-10 who had examined the child victim had issued Ex.P-15 and Ex.P-16 had clearly stated that the child was not subjected to sexual intercourse. Therefore, the conviction of the Accused and the sentence of imprisonment of 10 years imposed on the Accused is to be set aside. The husband and wife who are serving in the Army, are not satisfied with the performance of the Buddy. Therefore, they sorted to



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wreak vengeance on the Accused. Only for the sake of vengeance, case had been foisted by the Husband and Wife who served as Officers in the Indian Army. The evidence of the Prosecution Witnesses cannot at all be acceptable. The Prosecution Witnesses/P.W-1 to P.W-4 are related and they have nothing foisted the case against the Accused. The cross-examination of P.W-12 will not be sufficient to arrive at a conclusion that there was no sexual assault on the victim minor girl. Therefore, the Judgment of conviction recorded by the learned Sessions Judge is to be set aside. The Prosecution has not proved the medical evidence. The child victim can depose evidence as tutored by the parents. To wreak vengeance, the case had been foisted, based on the fertile imagination of the parents of the victim. For no fault on the Accused, the Accused had been convicted as though he had committed rape on the minor aged about 7 ½ years. The Forensic Expert who was examined as P.W-5 has clearly stated that in the forensic examination of the swab produced by the Police, the semen was not deducted. Also, after the seizure bedspread was sent for forensic examination and the same did not contain semen. The learned Judge failed to consider the fact that the elder female was available in the house when the mother and father were away from the



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Official Quarters. Also, the Accused had examined the retired Forensic Expert as D.W-1 which clearly states that the Prosecution case had not been established. Therefore, the Judgment of conviction recorded by the learned Sessions Judge, Fast Track Mahila Court is to be set aside as perverse.

6. The learned Additional Public Prosecutor by way of reply submitted that the case of the Prosecution had been proved beyond reasonable doubt. After shopping, when the mother and the maternal grandmother of the victim came back home, the victim was crying and opened up stating that the Accused had misbehaved with her. He inserted the male organ into the female genital. Based on the information provided by the victim, the Medical Officer examined the Accused as well as the victim. The case of the Prosecution is bristled with suspicion.

7. By way of rejoinder, the learned Counsel for the Appellant When the parents were away from the house only, the maidservant/P.W-4-Sheela was at home. Therefore, when the incident happens, she enters the incident and interferes. At the earliest point of time, the child was



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observed and examined by Dr.Malik who had treated the victim but he was not examined as a witness. The mother of the victim as P.W-1, in her cross-examination, stated that there is no bleeding from the genital on the victim. Apart from that P.W-11 who had examined the victim had clearly deposed that her hymen was intact and no injuries were found on the genital of the victim. Also, as per the case of the Prosecution, the victim and the Accused were found to have indulged in the sexual assault in the bed room adjacent to the Kitchen. Therefore, the bedspread on which blood and semen were found was seized by the Investigation Officer and sent to the Forensic Department. The Forensic Expert/D.W-1 had clearly stated that the semen found on the underwear worn by the Accused did not match with the semen detected on the bedspread. Similarly, blood found on the bedspread did not tally with the blood collected from the victim. Therefore, the Prosecution case had not been proved against the Accused. The Expert opinion under Ex.C-2 is against the Prosecution case/P.W-11. The evidence of the D.W-1 is against the Prosecution case. While so, based on mere surmises and conjectures, the learned Sessions Judge, Fast Track Mahila Court had convicted the Accused. Therefore, the learned Counsel for the Appellant seeks to set aside the Judgment of



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Conviction recorded by the learned Sessions Judge as perverse.

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8. The learned Counsel for the Appellant had relied on the following citations:

(I) (1997) 7 SCC 677 in the case of *Madan Lal Vs. State of J &*

K. The relevant portion reads as follows:

12. The difference between preparation and an attempt to commit an offence consists chiefly in the greater degree of determination and what is necessary to prove for an offence of an attempt to commit rape has been committed is that the accused has gone beyond the stage of preparation. If an accused strips a girl naked and then making her flat on the ground undresses himself and then forcibly rubs his erected penis on the private part of the girl but fails to penetrate the same into Vagina and on such rubbing ejaculates himself then it is difficult for us to hold that it was a case of merely assault under Section 354 I.P.C. and not an attempt to commit rape under Section 376 read with 511 I.P.C. In the facts and circumstances of the present case the offence of an attempt to commit rape by accused has been clearly established and the High Court rightly convicted him under Section 376 read with 511 I.P.C.

13.....This would undoubtedly be a corroborating piece of evidence which the High Court has rightly relied upon. Then again the salwar of the prosecutrix was seized and had been sent to the Chemical Examiner for chemical analysis and the Scientific Officer of the Jammu and Kashmir, Forensic Science Laboratory after examining the said salwar reported that chemical and microscopical tests revealed the presence of semen/Human Spermatozoa on the said salwar.



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This is also a strong corroborative piece of evidence to the prosecutrix version even if it has not been established that the Human Spermatozoa is that of the accused. the statement of the mother of the prosecutrix to the effect that the prosecutrix narrated the entire episode immediately when she arrived at home can also be held to be a corroborative piece of evidence which the learned Sessions Judge excluded from consideration and in our view erroneously.

(ii) Crl.A.No.1827 of 2011 in the case of State of Madhya

Pradesh Vs. Mahendra alias Golu. The relevant portion reads as follows:

“11. It is a settled preposition of Criminal Jurisprudence that in every crime, there is first, Mens Rea (intention to commit), secondly, preparation to commit it, and thirdly, attempt to commit it. If the third stage, that is, ‘attempt’ is successful, then the crime is complete. If the attempt fails, the crime is not complete, but law still punishes the person for attempting the said act. ‘Attempt’ is punishable because even an unsuccessful commission of offence is preceded by mens rea, moral guilt, and its depraving impact on the societal values is no less than the actual commission.

12. There is a visible distinction between ‘preparation’ and ‘attempt’ to commit an offence and it all depends on the statutory edict coupled with the nature of evidence produced in a case. The stage of ‘preparation’ consists of deliberation, devising or arranging the means or measures, which would be necessary for the commission of the offence. Whereas, an ‘attempt’ to commit the offence, starts immediately after the completion of preparation. ‘Attempt’ is the execution of mens rea after preparation. ‘Attempt’ starts where ‘preparation’



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comes to an end, though it Page | 9 falls short of actual commission of the crime.

14. *Section 511 IPC is a general provision dealing with attempts to commit offences which are not made punishable by other specific sections of the Code and it provides, inter alia, that, “whoever attempts to commit an offence punishable by this Code with imprisonment for life or imprisonment, or to cause such an offence to be committed, and in such attempt does any act Page | 10 towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one half of the imprisonment for life or, as the case may be, onehalf of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both”.*

17. Even prior thereto, this Court in *Madan Lal vs. State of J&K2* opined that the degree of the act of an accused is notably decisive to differentiate between ‘preparation’ and ‘attempt’ to commit rape. It was held thus:

“12. The difference between preparation and an attempt to commit an offence consists chiefly in the greater degree of determination and what is (1997) 7 SCC 677 Page | 12 necessary to prove for an offence of an attempt to commit rape has been committed is that the accused has gone beyond the stage of preparation. If an accused strips a girl naked and then making her lie flat on the ground undresses himself and then forcibly rubs his erected penis on the private parts of the girl but fails to penetrate the same into the vagina and on such rubbing ejaculates himself then it is difficult for us to hold that it was a case of merely assault under Section 354 IPC and not an attempt to



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commit rape under Section 376 read with [Section 511 IPC.](#)

(iii) ***Manu/GJ/7184/2007 in the case of Shankar Vs. State of***

Gujarat. *The relevant portion is extracted hereunder:*

“Criminal Conviction Sections 363, 366, 376 and 323 of Indian Penal Code, 1860 (I.P.C.) Additional Sessions Judge convicted accused for offence of kidnapping, kidnapping with intention to have illicit intercourse, rape and voluntarily causing hurt - Hence, this Appeal Whether, Trial court had rightly convicted accused - Held, prosecutrix was kidnapped by accused from lawful guardian of her father - From evidence of P.W. 12 and P.W.15 it was proved that act of accused was not an offence of rape but it was an attempt to commit rape after kidnapping prosecutrix - Commission of actual rape was not established There was sufficient evidence to prove that attempt to commit rape was made Offence under Section 363 I.P.C. was established Voluntarily causing hurt to prosecutrix was also established Thus, conviction under Sections 363, 366 and 323 IPC was upheld and conviction under Section 376(2) (f) I.P.C. was altered to Section 376(2) (f) read with Section 511 I.P.C. Custodial sentence of more than six years undergone by Accused was treated as substantive sentence for all offences - Appeal partly allowed.”

9. The learned Additional Public Prosecutor vehemently objected stating that the evidence of the Prosecution Witnesses cogently proved.

The case of the Prosecution, the evidence eventhough charged under



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Section 376 (ii) (f) IPC and an attempt of rape is made out under Section 376 (ii) (f) of IPC r/w. 511 of IPC. Therefore, the Prosecution was able to establish the case. The learned Additional Public Prosecutor had relied on the citation reported in ***(2022) 2 SCC 74 in the case of Phool Singh Vs. State of Madhya Pradesh.*** The relevant portion is extracted hereunder:

“Held:At the outset, it is required to be noted that in the present case, the Prosecutrix has fully supported the case of the Prosecution. She has been consistent right from the very beginning. Nothing has been specifically pointed out why the sole testimony of the Prosecutrix should not be believed. Even after thorough cross-examination, she has stood by what she has stated and has fully supported the case of the Prosecution. There is no reason to doubt the credibility and/or trustworthiness of the Prosecutrix. The submission on behalf of the Accused that no other independent witnesses have been examined and/or supported the case of the Prosecution and the conviction on the basis of the sole testimony of the Prosecutrix cannot be sustained, has no substance.”

Point for consideration:

Whether the Judgment of conviction recorded by the learned Sessions Judge, Fast Track Court, Uthagamandalam, The Nilgris made in S.C.No.32 of 2013 by Judgment dated 18.08.2015 is to be set aside as perverse?



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10. Perused the Judgment of the learned Sessions Judge, Fast Track Mahila Court, Uthagamandalam in S.C.No.32 of 2013 and perused the deposition of the witnesses viz., P.W-1 to P.W-13, perused the documents under Ex.P-1 to Ex.P-17 and perused the deposition of D.W-1.

11. From the Complaint and from the deposition of P.W-1 and P.W-2, it is found that they are hearsay witnesses eventhough they are parents of the victim. P.W-3 had in her deposition narrated the incident since the child claims that she had been subjected to sexual assault, it is the duty of the Court to verify it. When the child was produced before P.W-11, she had found scratches on the body particularly chest and thighs. Therefore, it gives a suspicion that there could have been an attempted sexual assault. The ruling relied on by the learned Additional Public Prosecutor reported in ***(2022) 2 SCC 74 in the case of Phool Singh Vs. State of Madhya Pradesh*** claims that if the evidence of the Prosecutrix inspires confidence of the Court, the Court can convict the Accused. The defence of the Accused is that the parents of the victim were serving in Indian



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buddy of the Officers. Therefore, they wanted to send him back. Without any complaints, there cannot be recalling the buddies. Therefore, the case was foisted against the buddy. If the evidence of the child victim. P.W-3 is to be believed the Accused is alleged to have taken her to bed room that was near to the kitchen. If the evidence of P.W-1 is to be believed, when she returned home from shopping, she could not find her daughter in the room where she used to sleep. On her search, she found the victim in another bed room near the kitchen. In the evidence during the cross-examination, P.W-1, the mother of the victim claims that kitchen is a separate building, outside the bungalow. Therefore, even if the child cries for help P.W-4 the woman cook will not be able to hear her. Believing the words of the child and the mother of the victim/P.W-1, the Investigation Officer seized the bed spread from the bed room adjacent to the kitchen and subjected the same to forensic examination. From the evidence of D.W-1-the Forensic Expert, there was semen found on the bed spread. The semen that was found on the bedspread did not match with the semen detected from the underwear worn by the Accused and seized by the Investigation Officer. Similarly, blood on the bed spread did not tally with the blood of the victim. Apart from that the



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spread did not tally with the blood of the victim. Apart from that the earliest opportunity P.W-11-Dr.Laxmi Priya who had subjected the victim for medical examination found that her hymen is intact. In the cross-examination of P.W-11-the Doctor clearly admitted that there was no injury found on the vagina of the victim. If the Accused is alleged to have pressed the male organ into the female organ at the time of occurrence, she would have suffered bleeding or rashness or reddishness on her vagina. That was not found. As per the claim of the child, the child was subjected to sexual assault by the Accused. The bed spread did not contain the semen of the Accused. Also, the vaginal swab collected from the victim by P.W-11-Dr.Lakshmi Priya, did not contain any semen. Under those circumstances, convicting the Accused for the offence under Section 376 (2) (f) of IPC is to be treated as perverse. The learned Judge had only considered the evidence of the victim. It is the defence of the Accused that the victim was tutored by the mother and grandmother of the victim.

12. The POCSO Act came into the force as per notification on 14.11.2012 whereas the occurrence in this case is alleged to have taken



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ignored the medical evidence and also was carried away by the oral testimony of the victim who was aged about 9 ½ years at the time of deposition and who was aged about 7 ½ years at the time of occurrence.

13. In the light of the evidence of the mother that there was no visible injury on the private part of the daughter. The evidence of P.W-11-Doctor that the hymen was intact and there is no rashness and reddishness colour on the vagina of the victim. The swab collected from the mouth and vagina of the victim did not contain semen as per the forensic report. The evidence of D.W-1 that the bed spread seized from the alleged place of occurrence by the Investigation Officer contained semen which did not match with the semen collected from the underwear worn by the Accused. That falsified the case of the Prosecution. The narration of the incident as per the evidence of mother of the victim is found unbelievable in the light of the Forensic and Medical evidence, it does not inspire confidence. When an adult woman, P.W-4-Cook was available in the home, in the absence of the parents, the child is alleged to have been abused by the buddy of the Military Officer is found unbelievable and unacceptable. The scientific evidence part of the



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unbelievable and unacceptable. The scientific evidence part of the investigation does not support the claim of the mother of the victim who is the defacto complainant/P.W-1. Under those circumstances, the Judgment of the learned Sessions Judge, Fast Track Mahila Court is found perverse.

14. Usually, the Appellate Judges shall not disturb the finding of the trial Court as per the Judgment of the Hon'ble Supreme Court in **(1997) 7 SCC 677 in the case of Madan Lal Vs. State of J&K**. The relevant portion is extracted hereunder:

“A. Criminal Procedure Code, 1973 Ss. 378 and 386 Appeal against acquittal Power of High Court to review evidence Scope Held, High Court can review the evidence and come to its own conclusion However, it should also examine the reasons for acquittal and should interfere only if the view of the trial court, which recorded the order of acquittal, was unreasonable No interference if two views possible Reasons should be given for reversing the order of acquittal In the instant case, in view of the reasons given by the High Court, held, the High Court did not exceed its powers in interfering with the order of acquittal passed under Ss. 376 and 511, IPC, by the trial court Penal Code, 1860, Ss. 375, 376 and 511



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by the Investigation Officer from the bed room where the alleged occurrence had taken place should have confirmed the victim version that the Accused attempted to indulge in sexual intercourse, by the time, the mother and grandmother entered the house immediately he had rubbed his genital organ on the bed spread and left the room. Believing these version, the bed spread was seized and subjected to forensic examination. The result of the forensic examination was otherwise. Therefore, the Prosecution had not examined the forensic expert who had examined and given report about the same. After closing of Prosecution Witnesses, the Accused had summoned the Forensic Expert, as the report of the forensic examination had not supported the case of the Prosecution and the Prosecution had not summoned the Forensic Expert. Therefore, the Forensic Expert was examined as D.W-1. Therefore, the reliance placed by the learned Counsel for the Appellant in **(1997) 7 SCC 677 in the case of Madan Lal Vs. State of J&K** is found acceptable to the facts of the case. When there are two views possible, the Court has to consider or lean towards the acquittal. The learned Sessions Judge ignored the evidence available before the trial Court particularly in the cross-examination of the mother of the victim/P.W-1 and the cross-examination



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examination of the mother of the victim/P.W-1 and the cross-examination of P.W-11-the Doctor who had examined the victim at the earliest point of time and D.W-1, the Forensic Expert who had conducted the forensic examination of the bed spread seized from the bed room where the alleged occurrence had taken place. Under those circumstances, convicting the Accused on the basis of the surmises and conjectures are not found proper. Therefore, this Court has to necessarily interfere to set aside the conviction.

16. In the light of the above discussions, the Point for Consideration is answered against the Prosecution and in favour of the Appellant/Accused.

In the result, ***this Criminal Appeal is allowed.*** The Judgment of Conviction recorded by the learned Sessions Judge, (Fast Track Court), Uthagamandalam, The Nilgris made in S.C.No.32 of 2013 by Judgment dated 18.08.2015 is set aside.

The bail bond already executed by the Appellant/Accused shall be cancelled if is not required for any other cases. The fine amount imposed



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To

1. The Sessions Judge,
Fast Track Court,
Uthagamandalam,
The Nilgris.
2. The Inspector of Police,
Wellington Police Station,
The Nilgiris District.
3. The Public Prosecutor,
High Court, Madras.



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SATHI KUMAR SUKUMARA KURUP, J.

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Pre-delivery Order made in
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