Vijayan and Others Vs. the State

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Court : Chennai

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Judge : K.M. Natarajan, J.

Appeal No. : Criminal Appeal No. 665 of 1989

Appellant : Vijayan and Others

Respondent : The State

Advocate for Def. : S. Shanmughavelayutham, Addl. Public Prosecutor

Advocate for Pet/Ap. : V. Srinivasan, ;V.K. Muthuswami and ;T.P. Manoharan, Advs.

Judgement :

1. Accused 1 to 3 in S.C. No. 187 of 1986 on the file of the Assistant Sessions Judge, Sankari, preferred this appeal challenging the legality and correctness of the conviction of accused 1 and 2 under S. 376(2)(g), Indian Penal Code, and sentence to undergo rigorous imprisonment for ten years and that of the third accused under S. 376(2)(g) read with S. 511, Indian Penal Code and the sentence to undergo rigorous imprisonment for five years. These appellants were tried for the charge under S. 376(2)(g) Indian Penal Code on the allegation that on 16-2-1986 between 2 a.m. and 4 a.m. at Mettur Thermal Power Project, in the lane

behind the E.B. office, P.W. 1 Sakunthala was subjected to rape, by accused 1 to 3, against her wishes and thereby committed the offence of rape under S. 376(2)(g) of the Indian Penal Code. In respect of the above charge, the prosecution examined P.Ws. 1 to 11, filed Exs. P1 to 13 and marked M.Os. 1 and 2.

2. The case of the prosecution as disclosed from the oral and documentary evidence can be briefly stated as follows :

P.W. 1 Sakunthala and her husband were coolies and they are residing at Mettur-Salem Camp. On the day of occurrence, namely, on 16th February, 1986, Saturday, after getting her wages at about 9 p.m. from Thermal Power Project, she and her husband went to hotel and took meals. While they were returning along the road leading to Thottilapatti, 4 or 5 persons were indulging in creating kalatta on the way. Being afraid, they returned to the Thermal Power Project and both of them were lying in the E.B. Shed, opposite to Ronega Company in the Thermal Power Project and were sleeping. The security officer of the Ronega Company came and woke them up and told them that they should not sleep there and he took them to the main gate and entrusted at the main gate. At that time in the main gate entrance, three persons in ordinary kakki dress and three other persons in mufti were standing three. They allowed P.W. 1 and her husband to take their bed in the guard room and went away.

3. At about 2 a.m. the first accused woke P.W. 1 up and questioned her as to whether they came for committing theft and threatened her that they would be entrusted with police. He took her to a place by saying that if she stayed there, they would be caught and produced before police charging that they committed theft of iron and so saying, he pushed her down and also removed her skirt and saree above the hip. He removed his dress, including his jatti and thrusted his male organ in her private part. Thereupon he went and talked to two other persons who were in mufti. One of them (she identified him as the third accused) was standing at a distance. Another person (whom she identified before Court as the second accused) came and removed his lungi and drawer and he also did the same as was done by the first accused. Since his private part did not enter the

private part of P.W. 1, he pressed the same with his hand. He told the third accused that P.W. 1 was adamant. Thereupon the third accused came there and dragged her jacket and removed the button on the back side and squeezed her breast and kissed her. Thereupon she was taken to the place where she was first sleeping. The first accused was talking to her husband at the guard room. She informed her husband as to what happened. They detained them till the next morning at about 6 a.m. and allowed them to go after threatening that they should not reveal the same to anybody. They were all keeping watch over them fearing that they would inform the incident to anybody.

4. Two days later on Tuesday at about 10 a.m. P.W. 1 and her husband went to Kurumalaikudal police station. Her statement was reduced into writing by the Sub-Inspector, P.W. 9, and it was read over to P.W. 1. It was attested by her husband. It is marked as Ex. P. 1. On the basis of Ex. P. 1, P.W. 9 registered a case in Crime No. 45 of 1986 under S. 376, Indian Penal Code. He prepared the first information report Ex. P. 12, with copies. He sent the first information report to the higher official. Since the Inspector of Police was on Election bandobust duty, he himself took up investigation and went to the scene place, namely, Mettur Karumalai Tower Project at 12 noon. He prepared the observation mahazar Ex. P. 4 and drew rough sketch Ex. P. 13 in the presence of witnesses. Thereupon he examined P.Ws. 2 and 3 and others and recorded their statements. At about 11 a.m. the same day he sent P.W. 1 with a memo to the Government Hospital for examination and treatment.

5. P.W. 6 is the Civil Assistant Surgeon attached to the Government Hospital, Mettur. She deposed that she examined P.W. 1 at 5.15 p.m. who was brought by constables with a memo for examination alleged to have been raped by two known persons and molested by a known person on 16-2-1986 between 2 a.m. and 4 a.m. She did not find any external injury. External genitalia normal. Hymen absent. O.S. admits two fingers. U.T.A. Normal size. Uterus normal and anteverted fornices normal. Vaginal discharge present. She was of the opinion that P.W. 1 used to have sexual intercourse. Ex. P5 is the wound certificate issued by her. She has further stated that since P.W. 1 is a married lady, injuries could not have been present after three days if she was under threat to life and submitted to the

act.

6. At about 6 p.m. on the same day (18-2-1986) P.W. 9 examined P.W. 1 and her husband Rajamanickam and recorded the statements. He seized M.O. 1 skirt of P.W. 1 in Form No. 95.

7. On the same day at about 9 p.m. P.W. 9 arrested the first accused near the goods-shed at the junction of Mettur-Thangamapuri Patnam, on being pointed out by P.Ws. 1 and 2. He recorded the statement of the first accused and in pursuance of the confessional 1 statement made by the first accused, he took P.W. 9 and witnesses to a place near Thangamani contract (sic), and from there, he took out his dark-brown half trouser and produced the same. It was seized under cover of mahazar. P.W. 9 again examined P.Ws. 1 and 2, Rajamanickam and one Mayilsami. Thereupon he brought the first accused to the station and then sent him to the hospital for taking his blood and semen.

8. P.W. 7 is the Civil Assistant Surgeon, Mettur Government Hospital. His evidence is that on 20-2-1986 at 4.30 p.m. he examined the first accused who was sent to him for examination and for taking blood and semen, with a memo, accompanied by police constables. He found on the first accused the following injuries :

1. Abrasion over the left arm lateral aspect 4 cm. x 1/2 cm.

2. No external injuries found on his genital.

3. Retragtional of the Prepuce smegma present.

He took blood and semen from the first accused and preserved them. He issued Ex. P6 certificate to that effect.

9. The first accused was sent for remand on 20-2-1986. P.W. 9 gave a requisition to the Court to send M.O. 1 skirt of P.W. 1, M.O. 2 trouser of the first accused and other seized items to the Chemical Examiner for analysis P.W. 8 is the Headclerk attached to the Court of the Judicial Second Class Magistrate, Mettur. He deposed about sending the above items to the Tamil Nadu Forensic Science Laboratory,

and the receipt of the reports. Exs. P.10 and P.11 are the reports of the Chemical Examiner and the Serologist respectively.

10. P.W. 9 arrested the third accused on 18-3-1986 at 9 a.m. at the New Quarters, Mettur Dam, and brought him to Kurumalaikudal Police Station and later produced him before the Inspector for further investigation. P.W. 10 is the then Inspector of Police, Karumalaikudal Police Station. It is his evidence that he took up investigation on 1-3-1986 in the case. He arrested the second accused on 9-3-1986 at about 10 p.m. in the bus stand, Mettur. He brought him to the police station and kept him in the lock up. He examined P.W. 1 and recorded her statement on 10-3-1986. He examined P.W. 5 Mariappan. He sent the second accused for remand. The third accused was produced before him by P.W. 9 on 18-3-1986. He again examined P.W. 1 and recorded her statement and during examination P.W. 1 identified the third accused. On 4-4-1986 he examined P.W. 6 Medical Officer and obtained the certificate Ex. P. 5 from her. He was transferred. P.W. 11 succeeded him and he took up investigation on 22-8-1986. After perusing the records, he filed the charge-sheet on the same day against all the three accused.

11. Among the witnesses, P.Ws. 2, 3 and 5 were treated as hostile.

12. When the accused were examined with reference to the incriminating piece of evidence, they totally denied the prosecution evidence as false. They would state that they were taken from their respective houses and this case has been foisted. No witness was examined on their side.

13. The learned Assistant Sessions Judge on the basis of the evidence of P.W. 1 came to the conclusion that the prosecution has proved the guilt of the accused beyond all reasonable doubt and consequently convicted and sentenced them as stated in the opening para of the judgment. Hence this appeal.

14. The appeal was filed by Mr. V. Srinivasan on behalf of all the accused. Later, accused 2 and 3 withdrew their vakalat, and the second accused engaged Mr. V. K. Muthuswami, counsel and the third accused engaged Mr. T. P. Manoharan, counsel.

15. The learned counsel appearing for the appellants took this Court through the evidence of the witnesses examined in this case and made various submissions. According to the learned counsel, the learned Assistant Sessions Judge erred in convicting the accused on the solitary and highly improbable version of P.W. 1, the prosecutrix in this case, they contended that the evidence of P.W. 1 is unworthy of credit and is contrary to her earliest report Ex. P. 1 and there has been embellishments and improvements. Further, her evidence is not supported by medical testimony. In view of the in-ordinate delay of 54 hours in launching the complaint, no credence could have been given to her evidence. Though an attempt has been made to explain the delay, there is nothing to substantiate the same. The non-examination of P.W. 1's husband is fatal to the case of the prosecution and he was the only person who could lend support or corroboration to her evidence. They vehemently argued that in view of the evidence of P.W. 1 that she had not seen the accused previously and saw them only at the time of the occurrence and since it was admittedly dark at the time of the alleged occurrence, the failure to hold any test identification parade is fatal and on the basis of the identification said to have been made before the investigating officer, her subsequent statements are hit under S. 162, Cr.P.C. The identity of the assailants is not established and the mistaken identity of these accused cannot be ruled out. It is vehemently argued that though it is now stated by P.W. 1 in her evidence that she came to know all the three accused since they called each other by his name, she has not given the names of accused 2 and 3 in the report. In respect of the first accused also, according to her, she was taken by police about 10 or 15 days after the occurrence and she identified the first accused. But, it is the evidence of P.W. 2 that even on the next day of the occurrence the police came along with P.W. 1 and her husband to the Thermal Project and in the face of the said evidence, which has not been challenged either the earlier report would have been suppressed or after taking into illegal custody of the first accused his name would have been introduced on suspicion. It is also vehemently argued that in respect of the place of the occurrence, there are as many as three versions of P.W. 1 in the first information report, before Court and statement before police. The medical testimony in this case did not support the version of P.W. 1 as regards the injuries sustained by her as well as the alleged rape committed by the accused. The

learned counsel vehemently argued that the trial Court committed a grave error with regard to the identification of the accused by P.W. 1 during investigation, since such identification is hit by S. 162, Cr.P.C. as held by the apex Court.

16. Per contra, the learned Additional Public Prosecutor fairly submitted that in view of the absence of identification parade and the failure to mention the names of accused 2 and 3 or any identification marks in the first information report and in view of the fact that they were arrested long after the occurrence and they were said to have been identified by P.W. 1 after they were arrested, it cannot be said that the prosecution has proved the case against accused 2 and 3 beyond reasonable doubt. But, he would submit that as far as the first accused is concerned, in view of the fact that his name is mentioned in the first information report and his trouser was recovered in pursuance of his 27-statement, it is clear that it was he who was responsible for the commission of the crime. According to him, since the first accused took the lady by cheat and by exercise of threat, the conviction of the first accused is sustainable on the basis of the evidence of P.W. 1.

17. The point for consideration is whether the prosecution has proved the charge against accused 1 to 3 beyond all reasonable doubt.

18. Though the prosecution examined 11 witnesses, P.Ws. 2, 3 and 5, who were examined to prove the circumstances with regard to the offence did not support the prosecution. P.W. 4 has attested the observation mahazar. P.Ws. 6 and 7 are medical officers. P.W. 8 is the Court clerk. P.Ws. 9 to 11 are investigating officers. The entire case rests on the evidence of P.W. 1. We will have to see how far her evidence can be accepted to prove the guilt of the accused. The learned counsel for the appellants, vehemently argued that this is a case where the occurrence, according to P.W. 1, is said to have taken place in the early morning, that is, between 2 a.m. and 4 a.m. on 16-2-1986 and P.W. 1 and her husband were allowed to go even at 6 a.m. The report was given to P.W. 9, Sub-Inspector of Police, on 18-2-1986 at about 10 a.m. According to the learned counsel, there is a delay of 54 hours in launching the first information report and this enormous delay is fatal and no reliance can be placed to the belated report, wherein a fabricated

version has been given in respect of the occurrence implicating the first accused. The reason for the delay, according to the first information report, was that on Sunday and Monday they were prevented by the accused from coming out of their house and reporting the matter. In the evidence before Court P.W. 1 has stated that the accused were watching their movements for two days. The learned counsel for the appellants submitted that P.W. 1 and her husband were admittedly staying in Mettur Salem camp itself for two days, where there are several coolies residing and further the Thermal Power Project is 1 1/2 miles away from the Mettur Salem Camp where they were residing. If really the accused were actually preventing them for two days from going out to report to the police, certainly the prosecution would have examined some of the persons in the locality to corroborate the evidence of P.W. 1 in this regard. There is absolutely no evidence on the said of the prosecution except the ipse dixit of P.W. 1, which is contrary to her earliest report. If really such an occurrence took place and if the accused were interested in preventing P.W. 1 and her husband from going out to report, they would not have allowed them to go away at 6 a.m. On the other hand, since the said report itself is a fabricated one and was prepared after due deliberation as they were not aware of the assailants, the delay has occurred and as such the delay assumes importance. It was submitted that in view of the delay no reliance could be placed on the first information report as well as the evidence of P.W. 1. In this connection, the learned counsel for the appellants vehemently argued that it is the evidence of P.W. 2 that even on 17-2-1986 at 9 a.m. the police brought the first accused to the scene place and at that time P.W. 1 and her husband were there and a statement was also recorded. Relying on the same, it was vehemently argued that the earliest report given by her might have been suppressed, and in the face of the said evidence, the subsequent existence of the first information report giving the name of the first accused, no reliance could be placed as it was given only on suspicion. The learned counsel vehemently argued that a perusal of Ex. P1 clearly shows that it is artificial, that it was prepared after deliberation and that it was not one given in usual course by P.W. 1. Even though Ex. P1 was attested by P.W. 1's husband, he was not examined by the prosecution before Court and his non-examination also throws considerable doubt with regard to the genuineness of the first information report and only under suspicious

circumstances it came into existence. According to the evidence of P.W. 1 she came to know all the accused even at the time of the occurrence as they were called by their names by each of the accused. But, the first information report does not contain the names of accused 2 and 3. The learned counsel pointed out that the material evidence before Court is contrary to the material version set out in Ex. P1 with regard to the place of occurrence and other aspects and it clearly shows that P.W. 1 could not have been the author of Ex. P1 and no reliance could be placed on her evidence as well as her report. No investigation has been done by the investigating agency with regard to the delay in launching the complaint. Hence there is every force in the contention of the learned counsel for the appellants that the delay of 54 hours in launching the first information report in this case is fatal to the case of the prosecution.

19. We have to see whether the identity of any of the accused has been established. The learned counsel for the appellants vehemently argued that it is the categorical evidence of P.W. 1 that she does not know any of the accused prior to the time of the occurrence and that she saw them for the first time only at the time of the occurrence. It is also her evidence that at the time of the occurrence it was pitch dark, that it was 2 a.m. and that she was sleeping at that time. Though it is stated in her evidence that as among the accused, they called the other by his name and she came to know their names, she has not given the names of all the accused in Ex. P1. Further, she has not given any identification mark for any of the accused in Ex. P1. It is the evidence of P.W. 1, that about 10 of 15 days later the police came to her house and told her that they caught one person and that she could come and identify him and thereupon she went to the police station and she was able to identify the first accused as he was having squint eye. In this connection the learned counsel for the first accused vehemently argued that P.W. 1 has not given any identification mark with regard to the squint eye of the first accused, anywhere in her 161-statement or in Ex. P1, with which she was able to identify him. Further, according to P.W. 9, Sub-Inspector of Police, the first accused was arrested on the same day (18-2-1986) at 9 p.m. at Mettur-Thangamapatnam branch road, near goods shed, in the presence of P.W. 1 and her husband, on being identified by them, while the evidence of P.W. 1 is that 10 or 15 days later she was taken to the police station where she was asked to

identify the first accused, and from the identification feature, namely, the squint eye, she was able to identify him. This completely falsifies the case of the prosecution that P.W. 1 identified the first accused and thereupon he was arrested. If P.W. 9's evidence is accepted, P.W. 1 could not have identified the first accused 10 or 15 days later as the first accused was arrested, according to the prosecution, even on 18-2-1986 and he was sent for remand on the next day and he was in judicial custody. As regards the second accused it is stated that on 9-3-1986 at 10 p.m. he was arrested at the bus-stand, Mettur, by P.W. 10. According to P.W. 1, about one month later at Mettur-Thangamapuri Patnam branch road, P.W. 9 was enquiring the second accused, she was taken by the police and she identified him and thereafter she returned. This is also quite contrary to the evidence of P.W. 10 with regard to the place of arrest of the second accused as well as the identification by P.W. 1. According to P.W. 10, the second accused was brought to the police station at 11.30 p.m. on 9-3-1986 and kept in the lock-up and on the next day P.W. 1 was again examined and at that time she identified the second accused. This is also at complete variance with the evidence of P.W. 1 with regard to the factum of identification of the second accused done by P.W. 1. As regards the third accused, it is the evidence of P.W. 1 that about 3 months' later, she identified the third accused at the bus stand before the Inspector. This is also contradicted by the evidence of P.W. 9 and P.W. 10 that P.W. 9 arrested the third accused on 18-3-1986, a month after the occurrence, at New Quarters, Mettur Dam, and he was also produced before the Inspector P.W. 10 on the same day at 10 a.m. P.W. 10 examined P.W. 1 at the police station and she identified the third accused at the police station. Thus, as regards the identification done by P.W. 1 during the investigation, the evidence of P.W. 1 is contrary to the evidence of the investigating officers who are alleged to have arrested the accused and before whom P.W. 1 identified the accused and gave statements. In this connection, the learned Counsel drew the attention of this Court to the further evidence of P.W. 1. According to P.W. 1, when she and her husband were entrusted by the Security Officer of Ronega company, at the main gate, there were three persons in kakki uniform and three in mufti standing and they took them and laid them to sleep. In Ex. P. 1 she has stated that at the time when they were entrusted with the security guard, there were 4 or 5 persons and among them, two

persons were in uniform and they threatened them that they would entrust them to the police the next day and allowed them to take bed in the guard room, and within a short time, the occurrence took place. A question was put to P.W. 10 as to whether any identification parade was held and he replied that no steps were taken for holding test identification parade and the reason for not holding the identification parade is that since their identity was known already, it was not held. It is to be noted that if really the identity of the assailants was known to P.W. 1, certainly their identification features would have been given in Ex. P. 1. In the absence of identification features of the assailants given in Ex. P-1 and in view of the fact that the prosecution relied on the evidence of P.W. 10 in respect of the identification done by P.W. 1 after arrest of these accused, certainly a test identification ought to have been held for fixing the identity of the accused. It is not known on what basis accused 1 to 3, especially accused 2 and 3, were arrested. Even though an attempt has been made to show that the first accused was arrested on being pointed out by P.W. 1, that has been falsified by the evidence of P.W. 1 herself. There is no such evidence with regard to accused 2 and 3 and it is not known as to how the investigating officers were able to secure them in the absence of identification features. The learned Counsel vehement argued that identification of the accused relied on by the prosecution during investigation is hit by S. 162 statement and no value could be attached to such identification. The attention of this Court was drawn to various decisions of the apex Court and this Court. In Santa Singh v. State of Punjab : 1976 CriLJ1875 , it is observed in para 9 as follows :

'(9) The decision of the Supreme Court in Ram Kishan Mithanlal Sharma v. State of Bombay : 1955 CriLJ196 , deals specifically with identification parades held by the police and under their supervision and control and it was held that statements made by the witnesses identifying particular accused as involved in the occurrence would be inadmissible under S. 162.

In so holding, this Court preferred the view of the Calcutta and Allahabad High Courts to the view expressed by the Madras High Court and the Judicial Commissioner's Court at Nagpur.'

In Mohd. Abdul Hafeez v. State of A.P. : 1983 CriLJ689 , it was held :

'Where in a robbery case no test identification parade was held even though the victim of the offence did not know the accused persons and it was on the basis of the identification in Court by the victim; who have failed to give any description on the accused in the F.I.R., four months after the incident that the accused was convicted, the conviction was unsustainable.'

In the instant case, no identification parade was held. P.W. 1 was examined in court on 10-7-1989, about three years and five months after the occurrence. She did not know the accused persons previously. Hence her identification of the accused in court is of no value and no conviction can be given on the basis of the said identification. In Chonampara Chellappan v. State of Kerala : 1979 CriLJ1335 , it was observed at pages 1034 and 1035 as follows (at pp. 1338-39 of Cri LJ) :-

'In his evidence P.W. 63 identifies A. 58, A. 15 and one Devassy. Indeed, if this witness had known these persons by name then there was no reason why he should not have mentioned their names in the F.I.R. lodged by him immediately after the occurrence. Again, if the witness whom he identifies in the court as indicated above was not known to him from before, then his identification of the accused for the first time in court without any T.I. parade is absolutely valueless.'

In Kanan v. State of Kerala : 1979 CriLJ919 , it was held :

'Where a witness identifies an accused who is not known to him in the Court for the first time, his evidence is absolutely valueless unless there has been a previous T.I. parade to test his powers of observations. The idea of holding T.I. parade under section 9 is to test the veracity of the witness on the question of capability to identify an unknown person whom the witness may have seen only once. If no T.I. parade is held then it will be wholly unsafe to rely on his bare testimony regarding the identification of an accused for the first time in Court.'

In the face of the conflicting evidence of P.W. 1 and the investigating officers with regard to the time of identification of the accused and the non-mention of the names of accused 2 and 3 in Ex. P. 1 and in the absence of holding an

identification parade and in view of the facts that the occurrence took place in pitch dark, that P.W. 1 had not known the accused previously and that while she was sleeping, the assailants are said to have woke her up and then she was subjected to sexual assault and in view of the fact that P.W. 1 has not given the identification features of the assailants in Ex. P. 1, there is every force in the contention of the learned Counsel for the appellants that the mistaken identity of the assailants cannot be ruled out and in any event the identification of these assailants was not established by the prosecution beyond reasonable doubt.

20. Next it was contended by the learned Counsel for the appellants that with regard to the place of occurrence, there are three versions. According to the first information report, she is alleged to have been raped in a lane behind the Electricity Board Office while in her evidence she has stated that she was pushed down and raped in the cycle stand. The investigating officer has shown the place of occurrence in the plan as one lying between the cycle stand and the office of the Executive Engineer. This clearly shows that she was not definite about the place where she was said to have been raped by the assailants. The learned Counsel for the appellants also vehemently argued that there is absolutely no material on the side of the prosecution as to why P.W. 1 and her husband happened to go there on the date of occurrence and took shelter during night when the occurrence took place. If really P.W. 1 had been asked by her husband to collect her wages at the Thermal Project and wages were paid to the employees and she was an employee of the Thermal Project, the prosecution should have examined the records of the Thermal Project with regard to the payment of wages and should have examined the persons connected with the same. No investigation has been done with regard to the same. Similarly it is now stated that 4 or 5 persons were quarrelling in the road, that P.W. 1 and her husband were afraid of the quarrel and hence they returned and took bed in the shed inside the Thermal Project and the Security Officer took them and entrusted at the main guard room, no investigation has been done with regard to the said incident wherein there was a drunken brawl, in which number of people were quarrelling. Significantly, P.Ws. 2, 3 and 5 who were examined to prove the circumstances connecting the occurrence did not support the prosecution. P.W. 2, the security guard of the Thermal Project also did not support the case of the prosecution. The accused are

Government employees. If really they were on guard duty on that date in the main gate, the best record would be the register maintained there with regard to the persons who were on guard duty on that date. Admittedly the investigating officer has not perused any of the records or seized any of the records and the connected records are not produced before court. The failure to investigate the vital fact as to who were the persons in charge of the main gate on that night is certainly fatal to the case of the prosecution as that will fix identity of the assailants if really any such occurrence happened in the main gate on the night in question. No investigation was done as to who are the six persons, namely, 3 persons in uniform and three in mufti, when P.W. 1 and her husband were left in the main gate by the Security Officer of Ronega company. It is not the case of the prosecution that these accused were absconding. No reason has been alleged for the delay in arresting them. If really these accused were the assailants, they could have been arrested without any delay as they were all Government employees and they were all on duty. The learned Counsel for the appellants drew the attention of this Court to the decision in Sawal Das v. State of Bihar : 1974 CriLJ664 , where it was held :

'Further, the prosecution has not examined an important witness, namely, the main servant, who was on the verandah at the time of the occurrence. Her evidence was necessary for unfolding the prosecution case and hence, the prosecution should not have withheld her evidence whatever may be its effect upon the case. The appellant could therefore ask the Court to give him the benefit of the presumption under S. 114 illustration (g), Evidence Act and to infer that, if she had been produced, her evidence would have damaged the prosecution case against the appellant. Her statement under S. 164, Cr.P.C. could only be used as evidence to corroborate or contradict her if she had appeared as a witness at the trial, and could not be relied upon by the prosecution.'

Further, the failure to examine the husband of P.W. 1 victim, is very much commented upon by the learned counsel appearing for the appellants. It is the evidence of P.W. 1 that she and her husband were sleeping together and at the time of the occurrence her husband was sleeping at a distance of 20' and he also woke up. If that be the case, he would not have kept quiet and he would have

raised a noise. Above all, it is highly improbable that in the presence of her husband, P.W. 1 would have been raped as alleged. It is her evidence that she informed her husband as to what happened immediately after the occurrence and her husband also attested Ex. P. 1. The failure to examine her husband before court to corroborate her evidence is certainly fatal to the case of the prosecution and in any event, adverse inference can be drawn. It is to be noted that the investigating officer has not given any reason for not securing and producing him before court. No explanation is forthcoming on the side of the prosecution. Only in cross-examination she has casually stated that her husband has gone to Kerala for avocation, that he did not return and that she did not know his whereabouts. It is in evidence that the 164-statement of her husband was recorded. It is not the case of the prosecution that any attempt was made to secure him and that they could not secure him. In the circumstances there is every force in the contention of the learned counsel for the appellants that the non-examination of the material witness to corroborate P.W. 1 is certainly fatal and in any event, no reliance could be place on the evidence of P.W. 1 in the absence of corroborative piece of evidence.

21-22. The learned counsel for the appellants vehemently argued that the medical evidence adduced in the case did not support the version of P.W. 1 with regard to rape as well as the injuries sustained by her. According to P.W. 1, she was pushed down and her saree and skirt were pushed above the hip and she sustained injury on her right hand. It is her evidence that since the private part of the second accused did not enter her private part, he pressed her private part with hand and then pressed his private part forcibly into her private part, that she was unable to bear the pain and that she cried. According to her, one of the accused (third accused) squeezed her breast repeatedly and also used violence. Significantly the doctor P.W. 6 who examined her did not find any external injury. She issued a certificate to the effect that P.W. 1 used to have sexual intercourse. She noticed the external genitalia, uterus and anteverted fornices normal. Hymen was absent. O.S. admits two fingers. She has stated in cross-examination that if the victim, without her consent, has been put down forcibly, may be, on earth, and if two persons one by one had sex intercourse, there would have been injuries on her private part, expectly implements on this body and abrasions on the ankle and on

the back. She has also stated that in cases of no consent, there will be other injuries and hence she has stated that she did not find any symptom of rape or injury. P.W. 1 told her that she was married and she used to have sexual intercourse. The medical evidence does not support the evidence of P.W. 1 that she was subjected to violence and she was raped by two persons. Though the semen of the first accused was taken and preserved for chemical examination, the semen of accused 2 and 3 was not taken. It is stated that there was semen in the skirt M.O. 1 seized from P.W. 1 and in the trouser M.O. 2 seized at the instance of the first accused. But there is nothing to establish that the semen of the first accused tallied with the one found in the skirt of P.W. 1. who was a married woman and had sexual intercourse with her husband. The result of the grouping test of the semen was inconclusive according to the report of the Serologist. In this connection, the learned counsel for the appellants drew the attention of this court to the decision in Tukaram v. State of Maharashtra : 1978 CriLJ1864 and submitted that in the absence of anything to show that there was no consent, it cannot be said that the offence under S. 376, IPC has been made out. It was argued that in the face of the medical evidence, it can be presumed that no offence has been made out. In the above quoted case it was observed :

'The onus is always on the prosecution to prove affirmatively each ingredient of the offence it seeks to establish and that onus never shifts. It was therefore incumbent on it to make out that the ingredients of S. 375 of the Indian Penal Code were present in the case of the sexual intercourse attributed to the accused.

In the present case the fear which clause Thirdly of S. 375 speaks of is negatived by the circumstance that the girl is said to have been taken away by the accused right from amongst her near and dear ones at a point of time when they were all leaving the police station together and were crossing the entrance gate to emerge out of it. Her failure to appeal to her companions who were no other than her brother, her aunt and her lover and her conduct in meekly following the accused and allowing him to have his way with her to the extent of satisfying his lust in full, makes one feel that the consent in question was not a consent which could be brushed aside, as 'passive submission'. Hence the conclusion is irresistible that the sexual intercourse in question was not proved to amount to rape and that no

offence was brought home to the accused.

This court finds every force in the submission of the learned counsel for the appellants. Admittedly P.W. 1 is aged 20 years and she was married two years prior to the occurrence and she was living with her husband at the time of the occurrence. As regards the recovery of M.O. 2 trouser in pursuance of the 27-statement given by the first accused, the learned counsel Vehemently argued that though the semen found on the skirt as well as the short (M.Os. 1 and 2) is that of human, the result of the grouping test is inconclusive. P.W. 1 is a married woman. The first accused is also an aged man. Hence the presence of semen in M.Os. 1 and 2 cannot be an incriminating piece of evidence to connect the first accused with the offence. Further, the learned counsel for the first appellant pointed out that P.W. 1 has stated in her evidence that the first accused removed his short also at the time of the commission of the rape. If that is so, the semen found on the trouser, which has been seized at the time of arrest, cannot be connected with the incident in question. Hence that cannot be used against the first accused. In view of the foregoing discussion, this court has no hesitation in holding that the prosecution has not proved the guilt of any of the accused beyond all reasonable doubt. Consequently their conviction is not sustainable.

23. In the result, the appeal is allowed, the conviction and sentence awarded to these appellants are set aside and they are acquitted. Their bail bonds shall stand cancelled.

24. Appeal allowed.