

Veerabharathi and Etc. Vs. State

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Court : Chennai

Decided On : Aug-10-2000

Reported in : 2000CriLJ4236

Judge : V.S. Sirpurkar and ;Prabha Sridevan, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 201, 302, 328, 341, 376, 376(2), 397 and 404; Code of Criminal Procedure (CrPC) - Sections 164, 235 and 366

Appeal No. : Criminal Appeal Nos. 872, 925 and 939 of 1999 and R.T. No. 2 of 1999

Appellant : Veerabharathi and Etc.

Respondent : State

Advocate for Def. : G.M. Syed Fasiuddin, Addl. Public Prosecutor

Advocate for Pet/Ap. : V. Gopinath, Sr. Counsel ;for K. Selvarangan, Adv. in Cri. A. No. 872/99, ;T. Sundanthiran, Adv. in Cri. A. No. 925/99 and ;M. Ajmal Khan, Adv. in Cri. A. No. 939/99

Judgement :

V.S. Sirpurkar, j.

1. This judgment shall dispose of Referred Trial No. 2 of 1999 and Criminal Appeal Nos. 872, 939 and 925 of 1999 as all the matters emanate out of the judgment of the Principal Sessions Judge, Virudhunagar District at Srivilluputhur in Sessions Case No. 30 of 1999 in which the appellants in the above criminal appeals were the accused. The trial Court has convicted all the three accused of the offences under Section 376, I.P.C. as also under Section 302, I.P.C. and other allied offences. The trial Court has awarded death sentence to all the three appellants in the three appeals. Referred trial No. 2 of 1999 is in respect of the death sentence so awarded. For the sake of convenience, the appellants shall be referred to by their original accused numbers, they being Veerabharathi as first accused, Rahmathullah as second accused and Elango alias Murugan as third accused.

2. The prosecution story in short, as is revealed from the evidence, is that one Subalakshmi, a student studying in 9th Standard in S.B.K. Higher Secondary School, Aruppukottai, coming within the jurisdiction of Aruppukottai Police Station, was raped and murdered by all the three accused persons on 4-3-1998 in the evening and her body was thrown into the nearby well in the field of one Kandasamy Nadar. The prosecution case is that on the fateful day, the girl had attended the school and thereafter a special class and in the evening time at 6.00 p.m., she was proceeding towards the farmhouse of her father P.W. 1 Subburaj. At that time, she was followed by the three accused persons, when she was passing from the fields of Chinnapuliyampatti Subarnania Mudaliar and Kandasamy Nadar. The three accused were seen, while following her, by P.W.3 Valasubramanian and, in fact, the girl had complained of the teasing to P.W.4 Gurusamy, who was also coming back to his nearby house after answering the call of nature. The said P.W.4 Gurusamy also remonstrated the three accused who were teasing the girl. It is the prosecution case that soon thereafter, the girl was immobilised by the accused, taken to the nearby spot and she was caught and raped by all the three accused. It is the prosecution case that thereafter she was murdered. The prosecution claims that P.W. 6 Narayanan and P.W. 7 Krishnan saw the said dastardly acts on the part of the accused, but kept quiet. The said two eyewitnesses also saw that the girl was gagged with the help of a churidhar (pants). The prosecution claims that the accused persons then threw the body of the unfortunate girl Subalakshmi into the well of Kandasamy Nadar.

3. Since the girl did not return, her father P.W.I Subburaj became worried and he started searching the girl on 4-3-1998, He went to his farmhouse where his employee P.W. 12 Mariappan reported to him that he heard a girl's shriek. Since their search did not yield any results, the missing of the girl was reported to the Aruppukottai Police Station by P.W.I Subburaj, which report was recorded by P.W. 28 Sub-Inspector of Police Vijayakumar. While the search was on by P.W.I Subburaj and P.W. 12 Mariappan, they also found the bicycle of the girl. On the report, a 'girl missing case' was registered in Crime No. 99 of 1998 and, on the next day, i.e. on 5-3-1998, the matter was investigated by P.W.29 Inspector of Police Durairaj, but to no effect. It is the case of the prosecution that thereafter, the Police tried to search the girl from the nearby places, but to no effect. On 8-3-1998, the brother of P.W. 1 Subburaj saw the body of the unfortunate girl in the well belonging to Kandasamy Nadar. He immediately reported the matter to P.W. 1 Subburaj, the father of the girl. P.W. 1 Subburaj went to the well and found that the body of his daughter Subalakshmi was in the well. In the meantime, the whole village had come to know that the body of the missing girl was found. P.W.3 Valasubramanian, P.W.4 Gurusamy, P.W.6 Narayanan and P.W.7 Krishnari, who were also near the well at that time in the morning, told certain story regarding the rape and murder to P.W.I Subburaj, who immediately lodged a further report and named the three accused in that report. The investigation was then transferred from P.W. 28 Vijayakumar to P.W. 29 Durairaj, Inspector of Police, who proceeded to the spot and executed an inquest mahazar (Ex. P-19). P.W. 29 Durairaj also recorded the statements of the witnesses. Since this dastardly murder of the unfortunate girl, whose body was found to be without any lower wearing apparel including her 'panty' (undergarment), raised a very angry reaction from the villagers of Aruppukottai and the law and order situation prevailing in that locality, probably, the investigation was taken over by P.W. 32 Jayagopal, Deputy Superintendent of Police. The statements of the other witnesses like the mother of the deceased P.W.2 Tmt. Easwari, her teachers, viz. P.W.9 Tmt. Pushpa, Headmistress and P.W. 10 Tmt. Balasaraswathi, class-teacher and her classmate P.W. 11 Gayathri were recorded; so also the statements of the witnesses like P.W. 12 Mariappan were also recorded. The age of the deceased Subalakshmi was found to be 15 years as per the Birth Certificate filed in the school, which is

marked as Ex. P-3. It is confirmed that on the fateful day, the deceased Subalakshmi had attended the school and thereafter a special class. After tier special class was over in the evening, she was accompanied by her classmate P.W. 11 Gayathri up to the bus-stand from where Gayathri went to her house and Subalakshmi proceeded to her.

4. The post-mortem examination of the body of Subalakshmi was conducted on the spot itself by P.W. 16 Dr. Jayanthi. She also conducted internal examination of the body of the deceased including the vaginal examination. The post-mortem report is Ex. P-9, which suggested that the girl had suffered an injury on her forehead as also to the trachea and hyoid bone of her neck. As per the inquest report, her mouth was gagged and her lower wearing apparel was found tightened around her neck. The Doctor, however, opined that the exact cause of death could not be established as the body was highly decomposed. The total process of post-mortem was video graphed. M.O. 25 is the videocassette. Thereafter, the hyoid bone was examined by P.W. 17 Thiyagarajan as also the thyroid cartilage and the glands, larynx trachea and the muscles adjoining the same. He issued a certificate (Ex. P-10) in connection with the injuries.

5. On 8-3-1998 itself, on search of nearby places, a 'panty' (undergarment) was found nearby the well. The wire basket, note books, tiffin box and other materials, which were carried by the deceased Subalakshmi to school, were also found at the secluded spot. The clothes seized after the inquest i.e. Pyjama (M.O. 16), Churidhar (M.O. 17); Brassiere (M.O. 19) and Ribbon (M.O. 20) etc., were despatched to the Court.

6. An attempt was then made for arrest of the accused who were not to be found. Ultimately, the two accused persons, viz. the first accused Veerabharathi and the second accused Rahmathullah came to be arrested on 15-3-1998, while the third accused Elango alias murugari was arrested in Kerala on 2-5-1998 in respect of some other offences. After the arrest of the accused persons, first accused Veerabharathi agreed to discover the incriminating articles from the computer-training centre that he was running. He was accordingly taken there and a bottle containing 'Ether' was found to be in the said computer-training centre. He also

discovered the empty glasses kept in the motorcycle in which they had allegedly consumed liquor before committing the offence. This motorcycle was allegedly used by the accused for going to the spot. The car (M.O. 32) in which the first accused had proceeded up to the house of the third accused was also seized under a mahazar Ex. P-25. Ex. P-24 is the mahazar under which the aforementioned motorcycle, three glass tumblers and a bottle and a piece of cloth were seized; so also the Investigating Officer seized a brandy bottle, smoked cigarette stubs and two leather chappals near the well, where the body of the unfortunate girl was found. These articles were seized under Ex. P-26. On 15-3-1998 at 6.00 p.m. at the instance of the second accused, his house was searched and M.O. 21 watch, M.O. 36 lungi and M.O. 37 shirt, were seized. This watch was allegedly agreed to be discovered by the second accused, which belongs to the deceased Subalakshmi, along with the clothes, which he had put on at the time of incident. The two accused were remanded to the judicial custody. The two accused were examined by P.W. 19 Dr. Rajarajeswaran in the Government Hospital, Virudhuniagar and were found that they were capable of committing sexual intercourse. The third accused was arrested by P.W. 5 Ajit Kumar on 2-5-1998 in front of Hotel Subrabatham and was already remanded to judicial custody. On receiving the information, P.W. 32 Investigating Officer took the third accused in custody on 6-5-1998 and produced him before the Judicial Magistrate No. 1, Virudhunagar. After the third accused was given in the custody of the Police on 8-5-1998 at 6.00 p.m., he gave a confessional statement agreeing to discover the ornaments of the deceased. The Police recorded the statements of P.W. 22 Ammasi Reddiar and P.W. 23 Ponraj. P.W. 22 Ammasi Reddiar was contacted by the third accused for keeping a gold-bangle (M.O. 22), a pair of earrings (M.O. 23) and a finger ring (M.O. 24) and asked him for money. However, P.W. 22 Ammasi Reddiar had refused. The third accused then contacted Ponraj, whom he knew, as the third accused used to come to Uchinatham village for ploughing using tractor. It is the prosecution case that on 5-3-1998 at 10.30 p.m., the third accused came to P.W. 23 Ponraj's house and stayed there and on the next day, he gave a gold-bangle and a coral-ring and asked for money either by pledging them or selling them. P.W. 23 Ponraj pledged them through one Subbiah Chettiar at Senbagavalli Jewellers at Kovilpatti, a shop belonging to P.W. 24 Veerapathiran. The Police

also seized the pawn receipt (Ex. P-46). It is the prosecution case that the third accused had sold M.O. 23 a pair of earrings in the shop of P.W. 25 Muniappan. It is the prosecution case that in pursuance of the information given by the third accused, these witnesses were contacted and the recoveries were made and the articles were seized. The third accused was also examined by P.W. 30 Dr. Bharathi. After these, a requisition was given by P.W. 32 Jayagopal to the Judicial Magistrate No. 2, Virudhunagar for recording the statements of witnesses P.W. 6 Narayanan and P.W. 7 Krishnan. P.W. 8 Judicial Magistrate No. 2, Virudhunagar recorded those statements. The articles, which were sent to the Judicial Magistrate Court at Aruppukottai, were sent for chemical analysis as per Ex. P. 30, and after analysis, a report was received in Ex. P-31. The Serologist Report was received in Ex. P.32. A spray scent bottle was seized in pursuance of the revelation made by the first accused. Its contents were sent for chemical analysis and the chemical analysis report (Ex. P-35) confirms that the fluid in that bottle was 'Ether' which is having anaesthetic. The blood of the third accused was also sent for serologist report. M.O. 35 specimen footprints were sent to Forensic expert and received the report (Ex. P-42). P.W. 32, Jayagopal completed the investigation and filed the charge-sheet against the accused. During the trial, the witnesses named above were examined; so also, three witnesses were examined on behalf of the third accused and ten documents were also tendered. The charges framed against all the three accused under trial were all in nine. All the accused faced the charges under Section 341 r/w 34 I.P.C. while the third accused alone faced the charge under Section 328, I.P.C. for administering the drug to the deceased Subalakshmi. The third charge was against the first accused and second accused under Section 328 r/w 34, I.P.C. The fourth charge was for the offences punishable under Section 376(2)(g) I.P.C. against all the accused. On fifth count, the charge under Section 376(2)(f) I.P.C. was against all the accused. Charge No. 6 was against the second and third accused under Section 397 I.P.C. for committing robbery, while the first accused roped in with the aid of Section 34, I.P.C. Charge No. 8 was against all the accused for offence punishable under Section 302 r/w Section 34, I.P.C., while the last charge was for offence punishable under Section 201 r/w Section 34, I.P.C. for causing disappearance of evidence of crime. All the accused abjured guilt.

7. During the trial, as has already been said, as many as 32 witnesses were examined. The witnesses examined on behalf of the prosecution can be grouped. First group of the witnesses is the parents of the deceased Subalakshmi viz. P.W. 1 Subburaj and P.W. 2 Tmt. Easwari. P.W. 1 Subburaj was the author of the First Information Report which he had tendered on disappearance of the girl, while P.W. 2 Tmt. Easwari spoke about the ornaments put on by Subalakshmi. P.W. 12 Mariappan is another witnesses in this group who was the servant of P.W. 1 Subburaj and who had also joined Subburaj, while searching the girl on 4-3-1998. Second group consists of two witnesses P.W. 3 Valasubramanian and P.W. 4 Gurusamy. These two persons had seen the accused persons at or about the same time when the deceased Subalakshmi disappeared. Out of them, P.W. 4 Gurusamy had also remonstrated the accused for teasing the unfortunate girl. Next group can be conveniently numbered as group No. 2[a] which consists of two eye-witnesses viz. P.W. 6 Narayanan and P.W. 7 Krishnan. The witnesses in the next group i.e. group No. 3 are P.W. 10 Tmt. Balasaraswathi, who is the Class Teacher, who deposed that the deceased Subalakshmi left at 6.30 p.m. on 4-3-1998 after the special class and P.W. 11 Gayathri, who had accompanied Subalakshmi, even after the special class, till Subalakshmi left at the Bus Stand and proceeded to her (sic). The third witness would be P.W. 9 Tmt. Pushpa, who is the Headmistress of the school, who has proved the age of the girl to be 15 - years and a few months approximately. P.W. 13 is Ponraj who had found the body and he can also be included in the first group itself. The next group i.e. group No. 4 would consist of the witnesses on recoveries and discoveries, they being P.W. 14 Gopalakrishnan, P.W. 20 Muthusamy, P.W. 22 Ammasi Reddiar, P.W. 23 Ponraj, P.W. 24 Veerapathiran, P.W. 25 Muniappan and P.W. 26 Rajendran. These witnesses are relating to the various observation mahazars as also the recovery of the incriminating articles including the ornaments of the deceased girl. P.W. 16, Dr. Jayanthi, P.W. 17 Dr. Thiyagarajan, P.W. 18 Dr. Vasuki and P.W. 30 Dr. Bharathi are the witnesses on the medical aspect, while P.W. 28 Vijayakumar, Sub-Inspector of Police and P.W. 29 Durairaj, Inspector of Police and P.W. 32 Jayagopal, Deputy Superintendent of Police are the witnesses, who were connected with the investigation from time to time. P.W. 8 Thiru Murugan is the Magistrate who recorded the statements under Section 164, Cr.P.C. These were

all the material evidence produced before the trial Court. On the basis of the evidence, the trial Court came to the conclusion that all the offences as charged stood proved. First accused was found guilty for offence under Sections 341 r/w 34, 328 r/w 34, 376, 404 r/w 34, 302 r/w 34 and 201 r/w 34, I.P.C., while the second accused and third accused were found guilty under Sections 341 r/w 34, 328 r/w 34, 376, 404, 302 r/w 34 simpliciter and 201 r/w 34 I.P.C. The learned Sessions Judge awarded the sentences, but what is significant to note that each accused was sentenced to undergo rigorous imprisonment for seven years for the offence under Section 376, I.P.C. ten years for offence under Section 328, I.P.C. along with a fine of Rs. 3,000/- each; seven years for offence under Section 201, I.P.C. along with a fine of Rs. 2,000/- each; three years for offence under Section 404, I.P.C. along with a fine of Rs. 2,000/- each; and one week for offence under Section 341 along with a fine of Rs. 500/-, while all the three accused persons were awarded death sentence for offence under Section 302 r/w s. 34, I.P.C. As has already been pointed out, all the three accused have challenged their conviction as also the sentence awarded to them by separate appeals, while a reference came to be made under Section 366, Cr.P.C. for the confirmation of the death sentence.

8. The learned Senior Counsel Mr. V. Gopinath appeared for the first accused, while most of his arguments were adopted by the other two learned counsel Mr. M. Ajmal Khan and Mr. T. Sudarithiram, who appeared for accused 2 and 3 respectively. It is on this backdrop that we have to consider the merits of the appeals as also the death sentence awarded by the trial Court.

9. Before we take up the task of appreciation of evidence as also the consideration of the findings of the trial Court, it must be remembered that Aruppukottai, where this incident took place, is a small town and on 8-3-1998 when ultimately the body of Subalakshmi was found floating in the well in a semi-nude condition, a strong reaction emerged amongst the people therein. It has come in the evidence of Police witnesses, P.Ws. 28, 29 and 32 and also in the cross-examination of some of the prosecution witnesses that the whole town was agitated owing to this dastardly incident and was in the grip of violence. The upsurge of violence in the village appears to be an admitted position both by the prosecution and the

defence. It is significant to note that the defence tried to give a political overtone to the incident. The initial cross-examination of P.W. 1 Subburaj suggests that as if Thiru Vai. Gopalasami, Member of Parliament had gone to the house of P.W. 1 Subburaj along with the M.L.A. of Srivilliputhur Thiru Thamaraiyani. A suggestion is given to the witness that the house of Sattur Assembly Member Thiru Vijayakumar is at Aruppukottai and that on 8-3-1998 in the morning, the public assaulted and smashed the house of Vijayakumar at Aruppukottai in connection with this case. The witness has refuted the suggestion by saying that he did not know about the assault of the house of Thiru Vijayakumar. It is also suggested that the houses of the Chairman and the Vice-Chairman of Aruppukottai Municipality as also the office of the Tamil Manila Congress and the shops which were opened, were all smashed, though the witnesses refuted the suggestion in the ground that they did not know about it. Again, a suggestion appears to be made that M. D. M. K. and A.I.A.D.M.K. parties indulged in riotous activities because of the death of his daughter and ultimately it is also suggested that M.L.A. Thiru Vijayakumar was a relative of the first accused. Very strangely, it is again suggested that the first accused was a D.M.K. partyman and that he had worked against Thiru Vai. Gopalasami in the last Elections. Then, a general suggestion is given that in order to take revenge on those who worked against Thiru Vai. Gopalasami, a Member of Parliament, this false case had been foisted against the first accused. Similar such suggestions, though not specifically, were given to this witness. The cross-examination at the instance of the second accused is also to the effect that the witness was deposing falsely at the instigation of M.D.M.K. partymen. It must at once be observed that there is nothing on record to suggest that there were any political overtone to the angry reaction in the town of Aaruppukottai. The learned senior counsel tried to feebly suggest that the first accused was roped in because of his relationship with the local M.L.A. However, he also could not point out from the evidence that in reality, the first accused belongs to M.D.M.K. party or that his relationship with the local M.L.A. who also belongs to D.M.K. party was the cause behind the violence. In fact, the expression of violent reaction had nothing to do with the party politics and probably; it was a natural result of the horrifying incident resulting in the death of a young girl. However, suggestions appear to have been given that on 8-3-1998 itself the angry mob had attacked the house of the local

M.L.A., who was the relation of the first accused. During his cross-examination, a very strange suggestion has been given to P.W. 29 Durairaj that there were many riots in the town in consequence of the occurrence and that there were agitations on 8-3-1998 for arresting the accused. This cross-examination is common. Though P.W. 29 Durairaj has refuted the suggestion, the suggestion given is rather strange that on 8-3-1998 itself there should have been a demand of arrest of the accused persons. Even to P.W.32 Jayagopal, a wild suggestion is thrown that all the three accused persons were implicated due to political pressure, but without elaborating in any manner as to what was the nature of pressure, who brought the pressure and in whose interest was the pressure brought. It, therefore, appears that there were actually the riots and it further seems to be a defence case that on 8-3-1998 itself the rioting public demanded the arrest of the accused.

10. It is on the backdrop of this, it has to be seen whether the prosecution has been able to prove its case. It has to be borne in mind that Subalakshmi was missing from the evening of 4-3-1998 and ultimately, her body was found floating in the well belonging to Kandasamy Nadar. It is significant to note that the lower part of the body was without any clothes so much so, that even she did not have 'panty' (undergarment) on her body. We have had the advantage of seeing the videotaped version of the postmortem in which, initially the body shown and there also, the body appeared to be naked in so far as the lower half was concerned. It has come in the evidence of the witnesses that the mouth was gagged with 'pyjama' and the 'dupattah' was tightly tied around the neck. There was also a bruised wound found in front portion of the head. The circumstances thus show that the death of Subalakshmi could not be dubbed as natural or even as suicidal. True it is, that due to the elapse of time, no medical opinion could be given as to the cause of her death, but the fact remains that her hyoid bone was found to be damaged. This is apart from the fact that on 5-3-1998 itself her bicycle was found lying in the nearby bush area which cycle was seized on that day itself vide Ex.P-6. It has also come in the evidence that on 8-3-1998 ultimately her school-bag, books, lunch-box, etc. were attached vide Ex. P-19. All these suggest that the girl was obviously waylaid and had not gone out of her own volition, leaving her bicycle, bag, chappals, etc. scattered. True it is that much has been said about non-finding of these articles between 5th and 8th of March 1998, but that will be

considered later on. It has to be, therefore, held that the girl met with homicidal death. After all, she could not have thought of jumping into the well after gagging her mouth herself or after tying the 'duppattah' around her own neck and after shedding of the clothes on the lower part of the body. The death, therefore, must be held to be a homicidal death that too, possibly after her being sexually violated.

11. In this case, there is direct evidence available in the shape of P.W. 6 Narayanan and P.W. 7 Krishnan who have been examined as 'eyewitnesses' to the incident. The evidences of P.W. 3 Valasubramanian and P.W. 4 Gurusamy are in the nature of corroborative evidence to establish the presence of all the accused at the relevant place and time and further to suggest that there were probably, the 'last persons seen in the company of the deceased'. The evidence of P.W. 12 Mariappan is relied upon by the prosecution for corroborating the evidence of P.W. 3 Valasubramanian. But before we consider the oral evidence of these witnesses, it would be better to consider the evidence of P.W. I Subburaj, as he is the one, who, realizing the disappearance of his daughter, had in vain tried to search his daughter in the evening of 4-3-1998. In this evidence, he said that realizing that Subalakshmi had not returned back from the school, he went on to search Subalakshmi at his farmhouse at 10.00 p.m. He had, before that, enquired from his relatives and on not being able to trace, had gone to his farmhouse where he enquired P.W. 12 Mariappan. He deposes that during the search, his daughter's bicycle was found in the thorny blackbabool field of Subramania Mudaliar, which was on the western side of the Weavers Colony. He continued his search till 5-3-1998 and ultimately reported the matter at 2.30 p.m. on that date. This late reporting was tried to be criticized that after finding the bicycle, he ordinarily would not have and should not have waited and should have reported the matter to the Police. It can only be said that this was the question of a young daughter's missing, and, therefore, before approaching the Police, if the father chose to wait for some time, there is nothing unnatural about it. His evidence is also tried to be criticized that even after finding of the bicycle, the articles like school-bag, notebooks, etc. which were lying scattered in the nearby place, or the 'panty' (undergarment) of the girl, which was also recovered on 8-3-1998 only from the little distance near the well, should not have been found by the Police. The criticism would be justified more in favour of the incompetence of the Police party

than bringing in suspicion this witness's evidence. True it is, that he claims, as also P.W. 28 Vijayakumar, Sub-Inspector of Police, that they searched the missing girl on the next day. But, it can be reasonably said that the search was not for the body of the girl, but for the girl herself who was missing. It seems that P.W. 28 Vijayakumar wasted his energy in drawing the sketch (Ex. P-15) and recording the statements of witnesses like mother and the teachers of the unfortunate girl. Perhaps, it was never realized that Subalakshmi could have been done away with and it is probably, therefore, that the whole investigation was based on an idea that Subalakshmi disappeared from Aruppukottai. There is an inkling of this from the fact that Subalakshmi's disappearance was informed to the other Police Stations and her disappearance was published in the newspapers at the instance of the Police. We would, however, consider the criticism on the inability of the Police to find out the other incriminating articles like books, brandy bottle or the 'panty' (undergarment) from the nearby places for full four days, later on. The evidence of this witness further suggests that on 8-3-1998 at 8.00 a.m., he was informed by his brother Rajagopal and P.W. 13 Ponraj that the body of his daughter Subalakshmi was floating in the nearby well belonging to Kandasamy Nadar. Very strangely, while recording the evidence of this witness, the learned Sessions Judge has allowed to go to some totally inadmissible pieces of evidence inasmuch as it is found from the evidence of this witness that he was informed regarding the presence of the accused in the evening on the spot by P.W. 3 Valasubramanian and P.W. 4 Gurusamy as also regarding the incident of rape and murder by P.W. 6 Narayanan and P.W. 7 Krishnan. All that was 'hearsay evidence' and should not have been allowed by the Sessions Judge to go on record. We are excluding that part from consideration. Strangely enough, even the learned Additional Public Prosecutor has remained a mute spectator to this incorrect recording of the evidence. Be that as it may. The evidence of P.W. 1 Subburaj would only establish that the witnesses P.W.3 Valasubramanian, P.W.4 Gurusamy, P.W.6 Narayanan and P.W.7 Krishnan were present when the body of the unfortunate girl was found in the well's. We will refer his evidence while considering the evidence of P.W. 3 Valasubramanian and P.W. 4 Gurusamy, whose evidence was used by the prosecution to establish the presence of accused near the spot in the evening of 4-3-1998 as also the attitude and actions on the part of the accused at that time.

12. P.W. 3 Valasubramanian runs a tea-stall at Gandhi Grounds at Aruppukottai. According to him, in the evening of 4-3-1998, he had gone to the dairy farm of P.W. 1 Subburaj to give order for some more milk, as the same was needed for his tea-stall on 5-3-1998. His claim is that, while he was going to his shop, Subalakshmi was carrying her bicycle while the accused persons walking behind her. This was at 6.00 to 6.30 in the evening. He then claims to have met Mariappa Mudaliar, who was informed regarding the demand of the extra milk. The reason given by this witness for the need of extra milk was that the other tea-stall owners were going to keep their shops closed on 5-3-1998 and, therefore, he expected much more business than usual. Some cross-examination was directed that instead of contacting the wife of P.W. 1 Subburaj, viz. Tmt. Easwari (P.W. 2) regarding his demand for extra milk, he had chosen to go to the farmhouse. It is true that P.W. 2 Tmt. Easwari has a milk-depot in the vicinity of the tea-stall of this witness. Much was tried to be said that this amounted to an unnatural behaviour on the part of the witness that he should have chosen to go to the farmhouse, which is about 2 to 3 kilometres away, rather than to inform about his demand for extra milk in the nearby milk-depot owned by P.W. 2 Tmt. Easwari. As a matter of fact, this criticism loses all its significant. We have perused the evidence of P.W. 12 Mariappan, who has confirmed the visit of this witness to the farmhouse. P.W. 12 Mariappan was a resident servant in the of P.W. 1 Subburaj and it is very significant to note that there is absolutely no cross-examination on the part of the accused regarding the visit of P.W. 3 Valasubramanian on 4-3-1998. Much of the cross-examination of P.W. 12 Mariappan is directed at the shriek which he allegedly heard at about 6.00 p.m. If the visit of this witness to the farmhouse is confirmed and corroborated by P.W. 12 Mariappan, then, his not visiting P.W. 2 Tmt. Easwari for the extra demand of milk loses all its significance. This is apart from the fact that in the cross-examination itself, it has come that P.W. 2 Tmt. Easwari used to do her milk business in the evening only from 3.00 p.m. to 4.30 p.m. There is no further cross-examination on this subject and that would confirm the witness's reason for going to the (dairy-farm) to demand additional milk. We are not impressed by the other cross-examination that the other tea-stall owners in the vicinity would not have all of a sudden decided to keep their shops closed. The witness has given adequate reasons as to why the other shop-owners were to

keep their shops closed on 5-3-1998 and we are quite convinced by that reason that there was some celebration at the temple on 5-3-1998.. Thereafter, much cross-examination was directed to the route taken by the witness. It was tried to be pointed out that the route taken by the witness was unnecessarily a longer route. Now, this cross-examination is also would be of no consequence particularly, in view of the assertion of the witness that he saw Subalakshmi very near to the farmhouse. It has come in the evidence of this witness that Subalakshmi was barely about 150 feet from the gate of the (farmhouse) when he met her. Therefore, his taking longer route loses all its significance. Therefore, barring a suggestion that he had not seen the witness, nothing significant has been brought out in the cross-examination at the instance of the first accused. He has accepted that he did not inform P.W.1 Subburaj and P.W. 2 Tmt. Easwari on 5th, 6th and 7th of March 1998 that he had seen Subalakshmi in the evening of 4-3-1998. Much was tried to be gained by the defence from this silence. The learned senior counsel Mr. Gopinath asserted that the sinister silence on the part of the witness for three days was extremely telling. In the first blush, the argument appears to be attractive, but considering the over all circumstances, the silence on the part of the witness is not as sinister as it is tried to be pointed out. In the first place, it was never known in the village that Subalakshmi was raped and murdered. That fact came to the surface only on 8-3-1998. The witness is obviously and insignificantly a tea-stall owner which suggests his position in life which is quite lower, compared to the position of life of P. W. 1 Subburaj, who, it seems, was a businessman, builder and also an agriculturist. Even if it became known to the witness that Subalakshmi was missing, his remaining silence can quite be understood particularly, because the disappearance of the young girl from the house is quite a sensitive matter for the family and, therefore, an insignificant tea-stall owner like the witness P.W. 3 Valasubramanian did not choose to open his mouth on her disappearance. The reasons can well be understood. The witness could have desisted himself considering that he is a small person to speak about the movements of Subalakshmi, a daughter of a relatively rich and wealthy man like P.W. 1 Subburaj or that his speaking regarding the disappeared girl might not be liked by P.W. 1 Subburaj and/or P.W. 2 Tmt. Easwari. On this peculiar backdrop, the disclosure of P.W. 3 Valasubramanian on 8-3-1998 is quite understandable

again because, it was only that date, it came to the surface that Subalakshmi was no more and had met a violent and unnatural end. Much of the cross-examination on the part of the second accused is more or less a repetition of the cross-examination by the first accused. It is obvious from the cross-examination that this witness first met P.W. 12 Mariappan and it was on his way back that he met Subalakshmi, who appeared to be going towards the farmhouse. If this is so, the route, which he took for going to the farmhouse, becomes wholly insignificant. Considering the evidence, the version of the witness appears to be quite credible.

13. It will now be our task to consider the evidence of P.W. 4 Gurusamy. Gurusamy is a resident of Weavers Colony, Aruppukottai and is a building contractor himself. He deposed that he also used to see P.W. 1 Subburaj passing from his house as also the deceased Subalakshmi, while she used to go to school and come back from the school. He asserts that on the fateful day, i.e. on 4-3-1998 in the evening, when he was coming from the side of the well belonging to Kandasamy Nadar, Subalakshmi was found by him in a tensed mood and was carrying her bicycle. He saw her near the tamarind tree and on seeing him, the girl told that the three accused persons, who were coming behind her, were teasing her. The witness identified all the three accused and even he reprimanded them to which the accused said that they were not teasing the girl. He then claims that on the same day, he had gone to Chennai and returned only in the morning 6th 8-3-1998. On coming back, he heard that the body of Subalakshmi was floating in the well of Kandasamy Nadar. He went there in the morning and also told P.W. 1 Subburaj as to what he had seen on 4-3-1998. In his cross-examination, it was brought out that his house was about 900 sq.ft. to 1000 sq. ft. and there is a toilet and a bathroom in his house and usually, he used the toilet in the house. From this, it was tried to be argued that if he had a toilet in the house, he had no business to go out in the forest to answer the call of nature. We are not impressed by this criticism at all for the simple reason that it is not clear as to whether this witness had gone out of his house in the forest to answer the call of nature. All that the witness says is that he was coming along with the side of the well after having answered the call of nature. Therefore, the availability of a latrine in his house would be of really no consequence. Again, though it is slightly unusual for a person to answer the call of nature in a jungle in the wake of availability of a latrine

in his house, it is not altogether an impossible circumstance. This witness knew well all the accused. He has seen all the three accused prior to the occurrence. The house of the third accused Elango alias Murugan was at a distance of three houses from the house where he was residing. Much cross-examination was wasted on the topography of the spot and even in his cross-examination, he asserted that the girl was tensed and told her that the accused were teasing her and thereafter, according to him, the girl went towards the west, meaning towards the (sic). Some unnecessary cross-examination was also made as to when he came back from Chennai and it was tried to be suggested that he could not have been at all near the well on 8-3-1998. According to us, this cross-examination regarding his being there near the well on 8-3-1998 has absolutely no significance. Really speaking, nothing has been brought in the cross-examination to suspect the version of the witness that he actually saw the three accused and even he reprimanded them. Considering that this man was in the same business as the father of the girl, it appears quite natural to us that Subalakshmi should have complained to this man regarding the teasing by the accused. In short, there is no effective challenge to his version in the cross-examination that he had actually seen the three accused and on a complaint having been made by Subalakshmi, had also reprimanded the accused.

14. The learned senior counsel very seriously argued that though this witness and the earlier witness P.W. 3 Valasubramanian had seen the girl almost at the same spot and almost on the same time, they both did not refer to each other. In the first place, there is no cross-examination of either of the witness in so far as the presence of the other witness is concerned. Secondly, the topography of the place is such that it was quite possible for the two witnesses not to meet. Thirdly, the two witnesses were going in an entirely different direction, and, therefore, it is quite possible that both of them did not meet each other. All these, however, go into utter insignificance once it is realised that these two witnesses had actually seen Subalakshmi as also the accused persons in the near vicinity of the girl and one of them went to the extent of reprimanding the accused persons. It is significant to note that P.W. 2Tmt. Easwari, in her evidence, has very specifically referred to the fact that Subalakshmi had complained to her that the third accused Elango alias Murugan used to tease her and that she wanted to report this to her father. This

very important assertion on the part of P.W. 2 Tmt. Easwari was completely ignored by the defence and there is no challenge to the version. Under such circumstances, the presence of the third accused along with the two other accused as deposed and the fact that the girl complained regarding the teasing on their part is extremely significant and in our opinion, the circumstance is well established. Therefore, we are of the opinion that the prosecution established the circumstance that the three accused were found in the near vicinity of the deceased girl on 4-3-1998 at about 6.30 in the evening and at that time they were teasing Subalakshmi.

15. The next group of witnesses is the most important for the prosecution, they being P.W. 6 Narayanan and P.W. 7 Krishnan. Both these witnesses claimed to be the 'eyewitnesses', who have seen the actual act of rape, murder as also the disposal of the body. P.W. 6 Narayanan, in his evidence, reiterated that he is a resident of Karuppannasamy Koil Street at Aruppukottai and was working in Ramalinga Mills. He claims that on the fateful day, at about 6.50 p.m., he and P.W. 7 Krishnan had gone to Kandasamy Nadar's garden to answer the nature's call. He then says that the three accused carried a girl wearing school uniform. They carried her to the cornfield belonging to Kandasamy Nadar and at the time when the girl was being carried, she was unconscious. He then claims that the three accused stripped the girl of the churidar bottom and 'panty' (undergarment) and raped her in turn. He then claims that the girl was strangled by neck with the cloth worn by that girl. The first accused hit the girl with the stone on her head and then threw the girl into the well of Kandasamy Nadar. He claims that later on the three accused went towards southern side from the well. He then claims that after that on 8-3-1998 since he was told that a body of the girl was floating in the well, he went to see at about 8.30 a.m. and, at that time, there was a heavy crowd and he saw P.W. 1 Subburaj crying and, therefore, he told to P.W. 1 Subburaj as to what had happened on 4-3-1998. Almost to the similar effect is the evidence of P.W. 7 Krishnan. He claims that he knew P.W. 6 Narayanan, who was his friend. He also knew the accused persons, as the first accused had owned a timber depot, while the witness is a carpenter. He then claims that he knew the third accused Elango alias Murugan as he was residing at Weavers Colony, while the second accused is the resident in the eastern side behind the house, where this witness is residing. This witness is a resident of Aruppukottai Periyar Nagar. He

claims that P.W. 6 Narayanan had come to his house on 4-3-1998 and asked him Rs. 100/-, which he gave and then the two went to answer the nature's call into the field of blackbabool in the western side of Weavers Colony. The witness did not know the owner of the field, but reiterates that while answering the nature's call, two persons were seen carrying a girl wearing churidar and another man was coming behind; they went towards the southern side and inside the cornfield and there, within the corn stalks, the three accused removed the girl's 'parity' (undergarment) and raped her in turn. He also claims that the girl was unconscious. He then says that they lifted that girl and went in the south and threw her into the well and gone to the south. According to the witness, this incident happened at 6.30 p.m. or 6.45 p.m. The witness says that they were shocked and went to his house and thereafter he went to Madurai for a job and came to Aruppukottai only on 8-3-1998 at 6.00 a.m. when he heard that a dead body was floating in the well. He, therefore, went to the well in the field of Kandasamy Nadar and saw that P.W. 1 Subburaj was crying there and he, therefore, narrated whatever he had seen on 4-3-1998. The substratum of the evidence of both the witnesses is more or the less identical though P.W. 7 Krishnan in his examination-in-chief has not specifically stated about any of the accused committing the murder of the girl. So also, P.W. 6 Narayanan does not speak about his having asked for a loan of Rs. 100/- from P.W. 7 Krishnan, as was the claim of P.W. 7 Krishnan though both of them say that both of them had gone to answer the call of nature in the nearby field and that they saw the actual incident of rape and murder.

16. All the learned counsel appearing on behalf of the appellants severely attacked the evidence of these witnesses. They pointed out that the cross-examination of both the witnesses went on to completely demolish the story given by the two witnesses as also their subsequent conduct in keeping quiet right up to 8-3-1998 was totally unnatural and rendered their claim in the evidence wholly unsustainable. P.W. 6 Narayanan was specifically cross-examined with reference to his proximity with P.W. 1 Subburaj. It was pointed out that he was working at Easwari Water Service and he denied the suggestion that it was run under the name of P.W. 2Tmt. Easwari, mother of the deceased Subalakshmi. He instead insisted that the proprietor of Easwari Water Service was one Chockalingam Chettiar. The witness claimed the complete ignorance about the said concern

being owned by either P.W. 1 Subburaj or his wife Tmt. Easwari (P.W. 2). All this cross-examination was obviously directed with an idea to show that the witness was under the influence of P.W. 1 Subburaj. He admitted that there was a 'pay and use toilet' in Nelpattai, which is about half-a-furlong from his house. This was obviously with the idea that he could not have gone to answer the nature's call in the blackbabool jungle. It is really not necessary that merely because there is a 'pay and use toilet', he should go only to that toilet and not to the nearby jungle. Beyond this, nothing can be said about the criticism levelled by the defence to this circumstance. A very clear suggestion came to be made that there was a channel nearby, which is about 300-400 feet away and that the people residing in Karuppannasamy Koil Street and the neighbouring streets go to answer the nature's call only to the jungle near that channel. Similar such questions were put to the witness. In our opinion, such a cross-examination would be of no consequence because there is no rule that a person should go to answer the nature's call only to a particular place merely because everybody goes there for that matter. Undoubtedly, the witnesses admitted that the place where they went is about 2 Kms. and that for going to Weavers Colony through Sivan Koil or Maninagaram it would be around 2 kms. and that there were a number of hideouts with water facility. It has to be borne in mind that this witness did not start from his house straight away to go to answer the call of nature, but had actually gone to P.W. 7 Krishnan's house probably, with an idea to ask for a loan of Rs. 100/-. Though this witness does not state so, it has come in the evidence of P.W. 7 Krishnan that P.W. 6 Narayanan had come to his house predominantly to ask for money. If that is so, there is nothing to stop the witness to go straightway to P.W. 7 Krishnan's house first, which was almost in the Weavers Colony and very near to the blackbabool jungle instead of the other places, which was near to his house stood well explained. But, again, that is not important because his being there in the jungle along with P.W. 7 Krishnan is confirmed by P.W. 7 Krishnan also.

17. Much was said that this witness or for that matter P.W. 7 Krishnan did not react or make any noise or tried to save the girl from the accused. On this unnatural reaction of the witnesses, all the learned counsel ended very severely. We would only say that this could not be the reason for which the witnesses could be dubbed as untruthful witnesses. After all, how a person would react to a

particular situation would entirely depend upon the individual character of that person and there cannot be any universal rule that the witness would react only in a particular manner. The witness could react in so many ways - some may even freeze due to the unusualness of the occurrence that they see or some other may raise a shout and immediately disclose the matter to others. Therefore, the truthfulness of the witness cannot be judged from the reaction that the witness has shown and such reaction cannot be the only point for judging the truthfulness of the evidence and a particular witness though it may be a relevant circumstance. In the first place, the two witnesses were watching the incident in which three young persons were involved. Therefore, this was clearly a case where the accused were more in number and, probably, that could have raised a fear in the mind of the witnesses, who were only two in number. P.W. 6 Krishnan was specifically asked in the cross-examination and he admitted that there was no water facility to wash the feet around the Kandasamy Nadar's well. It was pointed out that it was very unnatural that the two witnesses did not use the well for washing their hands and feet and came back home and then alone washed their hands and feet which they did after answering the call of nature. We are not impressed by such a cross-examination. In our opinion? that is a too insignificant circumstance. Much was stated about the fact that this witness has told nobody much less to P.W.1 Subburaj regarding the incident. Similar such criticism was made even against P.W. 7 Krishnan that he did not divulge this incident or made a complaint thereof to anybody. On this, it has come in the cross-examination of the evidence of P.W. 6 Narayanan itself that he had told his father about the occurrence and that he did not know Subalakshmi. That apart, he claims to have gone to Theni at 9.30 p.m. on that very night to his uncle's house and claims that he stayed in Theni for three days. He then claims to have come back only in the night between 7th/8th and came to know about the floating body of Subulakshmi in the well of Kandasamy Nadar and on knowing that he claims to have gone to the well to find not only P.W. 1 Subburaj, taut also P.W. 7 Krishnan and others. Now in the cross-examination, nothing has been brought out to falsify his claim that he was in Theni for the next three days. What is being harped throughout is that this witness or P.W.7 Krishnan did not tell anything about the occurrence to anybody. In our opinion, the explanation given by P.W. 6 Narayanan is quite enough and speaks for itself. P.W.

7 Krishnan, who claims that after seeing the incident he had gone to Madurai on the same day, has given similar explanation. In the cross-examination, he has stated that he had told the incident to his wife, but not to the neighbours. It has come in the cross-examination that he had gone to Madurai on the same day and returned from Madurai on 8-3-1998 at about 6.00 a.m. Therefore, it cannot be said that there was no explanation by the witnesses or their not stating the incident to P.W. 1 Subburaj, the father of the girl, or to the other persons in the town. Nothing has been brought out in the evidence of P.W. 7 Krishnan also regarding his visit to Madurai.

18. In so far as the actual act is concerned, there is hardly cross-examination of either P.W. 6 Narayanan or P.W.7 Krishnan. P.W. 6 Narayanan was merely asked regarding the place being full of corn stalks. He has described the place being full of corn stalks, the height of which was about four feet. The corn was harvested. Therefore, there was no question of any obstruction in the site. If the witnesses had seen the incident when they were answering the call of the nature, it is obvious that the witnesses could not be seen by the accused because one would naturally expect the witnesses to be in the sitting position. Therefore, it would be quite natural for us to expect that the existence of the witnesses remained concealed from the accused persons so as to deter them from carrying out their criminal activity. That apart, beyond giving the suggestion that these witnesses were under the thumb of the prosecution, there is no cross-examination worth the name. It was said that these witnesses were only 'chance witnesses' and were set up by the prosecution to depose falsely against the accused. What impressed us is that there is absolutely nothing brought out in the cross-examination of these witnesses or even other that these witnesses bore any enmity towards any of the accused. The witnesses are absolutely 'independent' at least vis-a-vis the accused persons were concerned. It is difficult to accept the defence theory that they would go all the way to depose a totally imaginary story against the accused persons, involving each of them when they have no axe to grind against the accused merely on the basis of their so-called connection with P.W. 1 Subburaj, the father of the girl. In our opinion, nothing much could be said about the so-called nexus between the witnesses and the father of the girl. The whole cross-examination in this behalf is sporadic and slipshod and nothing substantial is brought out in the evidence to

suggest that these two witnesses were so much under the influence of P.W. 1 Subburaj that they would have gone to the extent of deposing to an entirely an imaginary story. We are not prepared to grant that much of intelligence to the two witnesses to be able to describe a totally an imaginary story in the Court on oath. They are ordinary villagers and did know the accused persons who were also the residents of the same town of Aruppukottai. There was absolutely no cause for them to falsely implicate the accused. In our opinion, even if it is accepted that P.W. 6 Narayanan was working in the water service allegedly belonging to P.W.1 Subburaj, that by itself would not be a reason to hold that he was deposing falsely implicating the three accused. Much was said that though P.W. 7 Krishnan has said that P.W, 6 Narayanan had come to his house for getting a loan of Rs. 100/- P.W. 6 Narayanan had not so said. It has come in the cross-examination of this witness that P.W. 6 Narayanan had gone to see P.W. 7 Krishnan for getting money. If P.W. 6 Narayanan had gone to P.W. 7 Narayanan to ask for money then all the cross-examination of P.W. 6 Narayanan as to why he did not have a particular route and as to why he did not go to a particular place for attending the nature's call would be rendered useless. In our opinion, such cross-examination was only in the nature of shots in the dark. The evidence was criticised that these two witnesses had not seen anybody though there arc two persons like P.W. 3 Valasubramanian and P.W. 4 Gurusamy, who claimed to be in the near vicinity at or about the same time. The criticism is wholly incorrect for the simple reason that P.W. 3 Valasubramanian and P.W. 4 Gurusamy had seen the girl and the accused persons prior in point of time. Then again, it cannot be ignored that P.W. 6 Narayanan and P.W. 7 Krishnan had gone to answer the call of nature and, therefore, they would chose to be in a relatively secluded place, avoiding the footpath and it has come in the evidence that P.W. 3 Valasubramanian and P.W. 4 Gurusamy had only used the footpath. Their not mentioning about the presence of P.W. 3 Valasubramanian and P.W. 4 Gurusamy, therefore, does not in any manner speak against the credibility of these two witnesses. A very insignificant suggestion was made to this witness that he, in his police enquiry, had stated about 'sexual intercourse' and not stated about 'rape'. In fact, in the beginning of his cross-examination by the third accused, he was asked about the difference between 'sexual intercourse' and 'rape'. We fail to follow the significance of such

suggestion. A wild suggestion has been put to P.W. 6 Narayanan that his statement was recorded by the police on the assurance given to him that he would be given a job by one Varadhan in Ramalinga Mills. There is absolutely no basis for this suggestion. The evidence of the witness P.W. 6 Narayanan is, therefore, quite trustworthy. The cross-examination of P.W. 7 Krishnan was also on the same lines as that of P.W. 6 Narayanan to the effect that the residents of Periyar Nagar go to Karanchi Oorani for attending nature's call, as water facility is available there. The witness has simply stated that he never used to go there. Very strangely this witness was also asked as to the ownership of the land where they were answering the call of nature. Much was tried to be said that there were discrepancies in the evidence of this witness and the evidence of P.W. 6 Narayanan and also in between the statements given to the Police. In our opinion, whether the girl was wearing 'pyjama' when she was being carried or whether the 'pyjama' was removed from her body when she was put in the spot where she was raped were insignificant discrepancies once it is established that the witnesses had seen the girl being carried by the accused persons. Even in the cross-examination, P.W. 7 Krishnan corroborated P.W. 6 Narayanan that P.W. 6 Narayanan had come to him for asking a loan of Rs. 100/- urgently. The learned counsel pointed out that P.W. 7 Krishnan said that he asked P.W. 6 Narayanan to go to answer the call of nature and, in reality, there could not be such an offer or an invitation to go together for answering the call of nature. According to the learned counsel, this was extremely unnatural. In our opinion, there is nothing unnatural about it. If P.W. 7 Krishnan was going for answering the call of nature and mentioned so, there is nothing unnatural in P.W. 6 Narayanan accompanying him that the villagers go out in the evening for answering the call of nature is a quite natural phenomenon. Even he was asked that he did not make any noise when the girl was being carried by the accused or that he did not shout with the intention of calling the villagers or that he did not throw any stone against any of these three accused. He deposed in the cross-examination that the whole act of rape, etc. took 20 minutes and that they saw the incident for 20 minutes with bated breath. The witness claims that he had told his wife about the details of the occurrence, but he did not tell the neighbours. We do not find anything unnatural in the evidence of this witness also. Much was tried to be said against this witness

that he did not even look into the well on 4-3-1998 after the girl was thrown into the well and that he did not take any steps to intimate the police though he had seen the offence. It has , come in the evidence that he had seen the girl several times. Again it was pointed out that there is a discrepancy in the evidence of this witness to the effect that P.W. 6 Narayanan did not accompany him when he went home after seeing the incident while, according to P.W. 6 Narayanan, he had gone along with P.W. 7 Krishnan. It is really a very insignificant circumstance and the discrepancy, even if any, where the other witness went after the incident is, in our opinion, not a very important circumstance. In short, there is nothing in the evidence of these two witnesses, which can be seriously doubted.

19. It is true that one of the witnesses did not state about the girl being murdered and that the witnesses did not explain the details. It is also true that the subsequent silence of the witnesses till the body was found floating in the well was also unusual, though not unnatural. As regards the details, it cannot be forgotten, that it was in the twilight that the incident was witnessed by the witnesses, who were least expectant of any such happening. The totality of what they were seeing must have shocked the witnesses and, therefore, we do not attach much importance to the absence of minor details. In fact, we are surprised that the witnesses were not even cross-examined as to those details. The whole nature of the cross-examination is beating around the bush. True it is, that the details as to the clothes worn by the deceased or the place where the girl was laid down or the place where the witnesses were sitting and answering the call of nature is somewhat haltingly described by the witnesses. But, it is again true that it was per chance that the witnesses could see the incident. However, it can also be said that such incidents do not occur in the presence of general public. Therefore, if the two witnesses, who were answering the call of nature per chance could witness the incident, that by itself would be no reason to reject their testimony. We cannot at the same time ignore the fact that P.W. 6 Narayanan's story of going to the house of P.W. 7 Krishnan for taking a loan of Rs. 100/-is corroborated by P.W. 7 Krishnan that P.W. 6 Narayanan had a reason to go to P.W. 7 Krishnan and P.W. 7 Krishnan is a resident of Weavers Colony and it would be natural on the part of P.W. 7 Krishnan to go to answer the call of nature in the nearby jungle. It has already been described that the place was full of blackbabool trees. The fact that

the accused were three and the witnesses were only two; the fact that the witnesses were answering the call of nature and came to witness a very unusual incident; the fact that there was every likelihood of the witnesses being shocked because of the dastardly act on the part of the accused; and the fact that all this took place in the lonely surrounding and in the dying hours of the day could be the reasons for the absence of the details and, in fact, in our opinion, the details provided by the witnesses were more than sufficient to establish the presence of the girl and the accused and the act committed by the accused persons. Much was said that none of them described the taking of the watch and the other ornaments of the girl. We would only say that it would depend upon the perceiving and grasping capacity of the witnesses and further on their power to describe. Even if the witnesses failed to watch everything done by all the accused, that could be no reason to reject their testimony. Even their subsequent so-called silence would by itself not be a pointer to the uncreditworthiness of their evidence. In our opinion, the substratum of the evidence of the witnesses has remained unshaken, which would go to prove not only the presence of the accused, but their having dealt with Subalakshmi. The learned senior counsel very heavily relied on a decision reported in : 1992 CriLJ707 (State of Karnataka v. Venkatesh). In paragraph 3, the Supreme Court holds that the failure on the part of the eye-witness of the prosecution to disclose the information at the earliest opportunity to anyone has created doubts about the genuineness of the prosecution case. We do not think that a general principle has been stated in the said ruling. It may be that considering the overall circumstances in that case, the Apex Court refused to believe the said witness P.W. 15 Cheluvamma. Indeed, it cannot be stated as a general rule that where an eye-witness fails to disclose the incident of murder, he should invariably be disbelieved. The Supreme Court had found the conduct of the other witnesses including the eye-witnesses in that case to be extremely unnatural and, therefore, refused to place any reliance on their testimony. In the present case, we may point out that both the eye-witnesses had left the village almost immediately after the incident so that they normally could not have disclosed the incident to those whom it mattered. That apart, the witnesses have actually made a claim that they had stated the incident to their near ones - in case of one witness, the wife and in case of other, the father. That apart, the learned Public

Prosecutor drawn our attention to the recent ruling reported in : 2000 CriLJ400 (State of Karnataka v. Yarappa Reddy) where Thomas, J. has observed in paragraph 26 as follows :

Where in a murder trial, the evidence of eye-witness was disbelieved by High Court on ground that on seeing the incident she did not shout or cry but remained calm, it would not be proper. Criminal Courts should not expect a set reaction from any eyewitness on seeing an incident like murder. If five persons witness one incident there could be five different types of reactions from each of them. It is neither a tutored impact nor a structured reaction, which the eyewitness can make. It is fallacious to suggest that eyewitness would have done this or that on seeing the incident. Unless the reaction demonstrated by an eye-witness is so improbable or so inconceivable from any human being pitted in such a situation it is unfair to dub his reactions as unnatural.

Much rigour of the defence suggestions has been taken out because even in this case, the witnesses were asked as to why they did not shout or why they did not try to save the girl or disclose the incident to anyone immediately. In fact, both the eyewitnesses have in their evidence specifically stated that they were shocked. As regards the non-disclosure, the Apex Court has taken a view in : 1998 CriLJ493 (Raju v. State of Maharashtra). Mukherjee, J. has approved the view taken by the High Court in that case in the following words :

The apathy of even the law-abiding citizens in reporting the outrages, to which they were witnesses, is too notorious to merit a mention, and merely because these witnesses had not reported the matter to the police, it would not follow that they were not telling the truth.

Therefore, merely for their non-disclosure to the concerned persons, the eye-witnesses cannot be dubbed as 'false witnesses'. This we say all the more because these witnesses do not have any enmity with the accused. The witnesses have known the accused since they are the residents of one and the same place and there is absolutely no cross-examination of the witnesses suggesting that they did not know any of the accused persons. There is absolutely no reason brought out on record why these two eye-witnesses would falsely implicate all the three

accused persons in such a serious crime. It was tried to be suggested feebly that these were the witnesses under the thumb of P.W.I Subburaj, father of the deceased Subalakshmi. We have closely examined the evidence and we do not think that any such material has been brought out in the cross-examination of these witnesses, which would show that they were so much under the thumb of the father of the deceased girl and that they were gone to the extent of falsely implicating these accused persons with whom they had hardly anything to do and with whom they had no enmity whatsoever. The learned senior counsel also relied upon the decision reported in 1998 (1) Supreme (Cri) : : 1999 CriLJ467 (Din Dayal v. Raj Kumar alias Raju) where, the Apex Court had approved of the observations of the High Court regarding the unnatural conduct of the witnesses which led to the witnesses being disbelieved. We find that the facts in the above case are quite different and the decision cannot be pressed into service in the present case. On the question of non-disclosure, the learned senior counsel also relied on the Supreme Court judgment in : 1991 CriLJ1391a (Peddireddy Subbareddi v. State of A.P.). In that case, the eye-witness P.W. 1 after seeing the incident had run away to his native village. The Apex Court had held that the conduct of P.W. 1 in not reporting the incident to any of the villagers about the occurrence throws a considerable doubt on the veracity of his evidence. We have gone through the decision and we find that apart from his non-disclosure, the said witness was also an 'interested witness' and it was for that reason also that his evidence came to be disbelieved. We have already shown that it cannot be held as a general rule that merely because the eye-witness has failed to disclose the matter to anybody, his evidence should be dubbed as 'false evidence'. In short, we are convinced that the evidence of these two eye-witnesses is truthful and the Sessions Judge has rightly relied upon the same.

20. There is one significant fact, which supports the evidence of the two eye-witnesses. Both of them have stated that Subalakshmi was in an unconscious state when she was taken by the accused. It has come in the evidence that after his arrest, the first accused discovered a bottle from his own Computer Centre and at that time, the bottle contained 'Ether'. It has come in the medical evidence that 'Ether' could be used for immobilising a person. It has been established by the chemical report (Ex. P-35) that the liquid contained in the bottle discovered by the

first accused from his Computer Centre was 'Ether', which could have the effect of immobilising any person. What perplexes us is the total non-explanation on the part of the first accused regarding this bottle containing 'Ether'. When he was examined and confronted with the circumstance regarding the bottle containing 'Ether', all that he had to say was that the evidence was false. It is quite perplexing that the substance like 'Ether' should be found in the Computer Centre of the first accused. Much was said about that discovery. However, we find that the said discovery is fully established by the prosecution. The discovery was made by the first accused on 15-3-1998 itself when on the day immediately after he was arrested in the presence of two witnesses, one of whom was P.W. 20 Muthusamy. P.W. 20 Muthusamy has specifically deposed that on the arrest of the first accused, he, along with other witness, was present when the first accused was questioned and he agreed to discover a spray bottle containing anaesthetic; a piece of cloth and his other articles like motorcycle, etc. The said confessional statement was reduced to writing vide Ex. P-22. He has also deposed that on being taken to the Gateway Computer Centre, the first accused took out a spray bottle from the table drawer and at that time, there was liquid in the said bottle. Ultimately the bottle was seized vide Ex. P-24 with other things and the liquid therein was sent for chemical analysis. There is practically no cross-examination on this aspect. Much was tried to be suggested that in the cross-examination this witness has stated that when the police party went along with the first accused to the computer centre, it was locked and the key was with the first accused himself. It was also pointed out to us that the first accused was in fact arrested much earlier, but the key was not taken from him. We are not impressed by 'any discrepancy regarding whether the computer centre was opened or locked. The fact remains that the Police have seized the bottle containing 'Ether' from the computer centre owned by the first accused. The failure of the first accused to give any explanation regarding his possession of 'Ether' speaks volumes. The possession of 'Ether' on the part of the first accused is certainly a circumstance against him particularly, in view of the non-explanation by him. It was suggested that P.W. 20 Muthusamy was a 'common witness' and was used all through by the prosecution during investigation and he had attested practically of all the mahazars. That may be so, but his cross-examination does not suggest that he is

in any way under the thumb of Police or was deliberately telling falsehood. We would, therefore, accept the evidence regarding the discovery by the first accused of the bottle containing 'Ether'. In our opinion, the learned Sessions Judge was right in accepting the said discovery. That would be another circumstance against the first accused.

21. The second significant discovery is that of M.O. 21 Wristwatch, which was allegedly worn by Subalakshrni at the time of the occurrence. This was discovered by the second accused on 15-3-1998 vide Ex. P-23. This discovery is also deposed to by P.W. 20 Muthusamy. In his evidence, P.W. 20 Muthusamy deposes that after the arrest of the second accused, he was enquired at about 1.00 p.m. by the Police. He confessed and agreed to discover the clothes that he was wearing on the fateful day and ultimately, when the Police went to the residence of the second accused, he produced 'a round shaped ladies Titan wristwatch with black strap', a half-sleeves shirt and a dhoti. Criticism against this evidence was that in his substantive evidence before the Court, the witness spoke only about lungi and shirt and did not speak about watch. It is pointed out by the learned counsel for the defence that in the English version of Ex. P-23, the admissible portion includes the words 'my watch' meaning thereby the watch belonging to the second accused was agreed to be discovered. We have seen the Tamil version of Ex. P-23 and we are convinced that the watch, which was referred to in Ex. P-23 was not the one belonging to the second accused. Ultimately, the Police party went to the house of the second accused and the said watch has been seized vide Ex. P-27. The seizure mahazar (Ex. P-27) shows that the object was seized at the house of Rahamathullah (A-2) on its being produced by the second accused. This was criticised that this could not be the discovery because the witness had not so stated in his oral evidence and had failed to mention that the second accused agreed to discover the wristwatch. The said watch was shown to P.W.2 Tmt. Easwari, mother of the deceased, who had confirmed the said watch to be that of her daughter Subalakshmi and in her evidence, P.W. 2 Tmt. Easwari has specifically stated that on the fateful day, her daughter Subalakshmi was wearing the said watch. For the time being we may even ignore the fact that the watch was agreed to be discovered and was actually produced by the second accused. However, it cannot be disputed that the watch was found from the house of the

second accused and ultimately, the said watch came to be identified by P.W. 2 Tmt. Easwari, the mother of the deceased Subalakshmi, in her evidence. The evidence of P.W. 2 Easwari in this behalf was severally criticised that she had not stated in her statement that her daughter Subalakshmi was wearing a wristwatch. In fact, a suggestion has been given to her that the wrist-watch was bought after the demise of their daughter Subalakshmi and introduced during the investigation. Merely because the witness had not stated that her daughter was wearing a wristwatch cannot be a reason to hold that the evidence of the witness was wholly false. True it is, that P.W. 2 Easwari admitted that she had not given any identification mark of the wristwatch worn by her daughter Subalakshmi. However, wearing a wristwatch by a school-going girl is not an unusual thing at all. That apart, a mother could always tell about the wrist-watch worn by her daughter by a mere look at it. It would be very natural for a school-going girl to wear a wristwatch and it would be equally natural for the mother to be able to identify the same. It is then stated that it was not possible that Subalakshmi was wearing the wristwatch on the fateful day because nobody had said that she was actually wearing a wristwatch. We have pointed out that wearing of a wristwatch by a school-going girl is an extremely natural and common phenomenon. After all, Subalakshmi was a high-school student, studying in 9th standard, coming from the reasonably well to do background. Therefore, there was nothing unnatural if she was wearing a wrist-watch. The fact remains that the second accused has not been able to give any explanation regarding the recovery of a ladies wristwatch from his house. All that he has done is to deny the said recovery. We are of the considered opinion that the wristwatch which was recovered from the house of the second accused belonged to Subalakshmi and the evidence of P.W. 2 Tmt. Easwari, mother of the deceased, in that behalf is fully credible. It was suggested that the eyewitnesses did not claim that the wristwatch was removed by the accused persons. The only thing that we can say is that the removal of the wristwatch by the accused persons might not have been noticed by the eye-witnesses.. However, the fact remains that the wristwatch belonging to the deceased Subalakshmi was recovered from the house of the second accused. That, according to us, is more than enough to establish the nexus of the second accused in the crime.

22. The prosecution relies on the recovery of ornaments, which were allegedly put on by Subalakshmi when on 4-3-1998 she had gone to the school and which were on her person. The said ornaments were M.O. 22 Gold Bangle, M. O. 23 a pair of leaf like earrings and M.O. 24 a coral finger ring. P.W. 22 Ammasi Reddiar is the first witness examined by the accused in this behalf, who claims that the third accused was known to him as he used to come to his village to plough the fields using tractor. He claims that on 5-3-1998 at 8.00 a.m., the third accused came to his house and showed the ornaments, i.e. a gold bangle, a pair of earrings and a fingerring to him and demanded some money by keeping them. He also identified the said ornaments in the Court. The only relevant cross-examination appears to be that he had seen the ornaments on the day of occurrence, i.e. on 5-3-1998 when the third accused saw him and that he had not seen the ornaments thereafter. Nothing more could be brought out in the cross-examination to the effect that he was inimical in any way against the third accused or was under the thumb of the complainant. The ornaments were identified even by P.W. 2 Tmt. Easwari, the mother of Subalakshmi, who claimed that the ornaments were shown to her by Police and she had identified the same. P.W. 2 Tmt. Easwari also identified the clothes that were found on the body of Subalakshmi as also the 'panty' (undergarment), which was found lying in the pit and found by the Police. The learned defence counsel invited our attention to her admission in the evidence that the said ornaments were shown to P.W. 2 Tmt. Easwari on 15-3-1998. This was obviously incorrect because the recovery of the ornaments is only on 8-5-1998. Much criticism was also levelled that she could not at all show any identification mark on the bangle, earrings and the fingerring. It was also pointed out that she could not remember whether she had stated regarding these ornaments in her statement before the Police. That admission was tried to be used. Again, it was tried to be suggested that these three ornaments were most common and could be bought from the shops commonly. This was obviously with the idea to suggest that the said ornaments were purchased and foisted and that they could not be belonging to Subalakshmi. It was also suggested by the learned senior counsel, Mr. Gopinath, as also the learned counsel for the third accused, that there was no identification parade held for the ornaments. It was suggested that this was a dishonest investigation and the ornaments were set-up probably to

establish the complicity of the accused in the crime.

23. We are not impressed by this criticism. It is not at all unnatural that a grownup girl, belonging to a reasonably well to do family, should wear the ordinary ornaments like bangle, earrings and finger-ring. These are the most common ornaments and are generally worn by the womenfolk. Considering the rural background prevailing in the town of Aruppukottai, wearing of such ornaments by Subalakshmi cannot be said to be unusual or unnatural. Question is whether these three ornaments were really belonging to Subalakshmi. It is true that the Police could have held an identification, parade. However, an Indian mother, coming from the background as P.W. 2 Tmt. Easwari comes from, would certainly be able to know about the ornaments put on by her daughter. It is common knowledge that ladies have a natural-eye for the ornaments and, therefore, nothing unnatural if P.W. 2 Tmt. Easwari could identify the said ornaments, in the Court. Under the circumstances, though it would have been better for the investigating agency to hold an identification parade, we are of the opinion that the identification by P.W. 2 Tmt. Easwari in the Court has not hampered the prosecution's story. Much was said that the ornaments were shown to her on 15-3-1998. We would not attach much importance to the mistake, which P.W. 2 committed about the date. After all, she was extremely grief-stricken and it may be due to the lapse of memory she might have stated that the ornaments were, for the first time, shown to her on 15-3-1998. Much advantage was tried to be gained from the admission in her evidence that the ornaments were shown to her after ten or eleven days after 4-3-1998. We are not prepared to attach much importance to such aberrations in her testimony. After all, as we have already mentioned that could be due to the failure of memory. We do not expect a photographic memory from a lady from the rural background, who was deposing in the Court. We cannot ignore the fact that this lady had no enmity with the third accused. In this behalf, even at the cost of repetition, we may show that her version in the examination-in-chief that Subalakshmi had complained that the third accused teasing her has gone completely unchallenged in the cross-examination by the third accused. Much was stated about there being anything in the complaint dated 5-3-1998 regarding the ornaments of Subalakshmi. We do not think that is a very substantial circumstance for the parents were anxiety-stricken and had no expectation they would be seeing

only the dead body of their daughter. We, therefore, accept the prosecution case that the ornaments recovered and produced before the trial Court belonged to the unfortunate girl Subalakshmi and that on the day of incident, she was wearing the same. P.W. 23 Ponraj has deposed that he was a resident of Kalikoil Street, Maharaja Colony at Koilpatti and that, on 5-3-1998, at about 10.30 p.m., the third accused went to his house and stayed with him and demanded money from him on 6-3-1998 and offered to pledge the gold-bangle and coral-ring, suggesting that these ornaments belonging to his wife. On coming to know that there were known-shops for pledging, he offered to sell the jewels through a known person. He then claims that he was taken by one Subbiah Chettiar to Shenbagavalli Jewellery where, he was introduced to the shop-owner. He is none other than P.W. 24 Veerabadran. He then claims that he pledged the gold-bangle and the finger-ring for Rs. 4.800/- and paid the same to the third accused, who was in his house. He then claims that a pawn-receipt was prepared, but the third accused let that pawn-receipt remained with the witness so that the accused would later on redeem the same. He then claims that when the third accused was brought by the Police to his house, he showed the said receipt and ultimately showed the shop where the receipt was prepared and the ornaments sold. This he did on 9-5-1998. According to him, the Police found out the ornaments and seized them along with the receipt. The pawn-receipt is Ex. P-46. To the similar effect is the evidence of P.W. 24 Veerabadran, completely supporting the version of P.W,23 Ponraj. The evidence of these two witnesses was severely criticised and so also the receipt Ex. P-46 and the seizure mahazar Ex. P-47. It was pointed out that there was no reason for the accused to go to this witness, who was relatively a stranger. It was pointed out that there was no reason for the accused to go to him, as he was a mere acquaintance of the accused as per his own version. It was therefore suggested that the accused could not have taken the risk of going to him for pledging the jewels. The evidence of both these witnesses was dubbed as extremely unnatural. So also, it was pointed out that the so-called discovery vide Ex. P-28 made by this accused was a myth and farcical. It is found from Ex. P-28 that the accused has offered to show the person who bought the earrings as also identified P.W. 23 Ponraj and the ornaments. This was severely criticised that the accused had not stated anything about the said shop being in Koilpatti or had not spoken anything

about the bangle. The criticism undoubtedly is justified to an extent. However, a fact cannot be forgotten that the witness had stated about P.W. 23 Ponraj and had agreed to identify him. Even if these proceedings are ignored as discovered, it cannot be forgotten that ultimately it was the third accused who identified P.W. 23 Ponraj and P.W. 23 Ponraj himself supported the prosecution theory that it was the third accused who handed over the ornaments to him for being pledged. Again it cannot be forgotten that the said ornaments came to be recovered from the shop of P.W. 24 Veerabadran and were ultimately identified to be belonging to Subalakshmi which she was wearing on the fateful day. Once the jewels are recovered and identified by the witnesses, whose version has been tested by the cross-examination, the so-called discrepancies in the discovery, etc. are relegated to the background. Similar is the story of P.W. 25 Muniappan, who is also having a jewellery shop at Koilpatti and who claimed that the third accused had sold one pair of 'leaf-like gold earrings' to him. He contended that the District Superintendent of Police of Aruppukottai had come along with the third accused and seized the said pair of earrings (M.O. 23) vide Ex. P-48. He was searchingly cross-examined that the pattern of the earrings was common and that there was no scope for specific identification of the earrings, which were seized. It was also suggested that he was lying at the instance of one Williams, President of Jewellery Association. We do not see as to why this witness, who is totally unconnected with the third accused, would go to the extent of falsely implicating him by suggesting the sale of earrings at his hands. It was also pointed out to him in the cross-examination that there was no written record of the sale in his registers. Same criticism was levelled as regards the discovery evidence. However, a fact cannot be forgotten here that his evidence has been corroborated by the evidence of P.W. 26 Rajendran, who claimed that the accused was brought by the Police and he showed the shop of P.W. 25 Muniappan to the Police. Of course, all that has to be ignored as inadmissible, but the fact remains that the said earrings (M.O. 23) was recovered by the Police from the shop of P.W. 25 Muniappan and ultimately that pair of earrings was identified by P.W. 2 Tmt. Easwari and the recovery of M.O. 23 earrings worn by Subbalakshmi is further established. After all, both these witnesses had absolutely nothing to do with the accused nor has their cross-examination revealed any connection between these witnesses and the

complainant or the Police. To him also, a wild suggestion is thrown that he was doing all these at the request of ;One Williams, President of Jewellery Association and the Police. It is riot known, who this Williams was and why would he unnecessarily set up witnesses against the accused. We are, therefore, convinced that it was the third accused, who was in possession of the ornaments worn by Subalakshmi almost immediately after her death. There is no explanation as to why these ornaments should have been found in the shops at Koilpatti unless they word brought by the third accused or at his instance by witness P.W. 23 Ponraj.

24-25. This completes the discussion about the prosecution evidence of the eyewitnesses and the other circumstances against the accused. Therefore, what is established is :

(i) That all the accused on 4-3-1998 were found loitering near the spot where ultimately, the body of Subalakshmi was found on 8-3-1998 and at that time, the girl had complained that she was being teased by those accused. This is established by the evidence of P.W. 3 Valasubramanian and P.W. 4 Gurusamy, which is also partly corroborated by the evidence of P.W. 12 Mariappan;

(ii) That the accused were found carrying the girl, who was in unconscious state, and then committed rape on her. The witnesses also suggest that the accused threw the body of the girl in the well. This is established by the evidence of P.W. 6 Narayanan and P.W. 7 Krishnan;

(iii) That the accused 1 and 2 were arrested only on 15-3-1998 and on their arrest, the accused discovered the place where they were sitting from which, some articles were found suggesting that some human beings had visited that spot which was near the well of Kandasamy Nadar. The first accused discovered, amongst other things, a bottle containing 'Ether' from the computer centre that he was running at Aruppukottai. He also discovered some glass-tumblers from his motorcycle. The third accused discovered his clothes and the wrist-watch worn by Subalakshmi from his house or at least the said wristwatch was recovered from the house of the third accused which was ultimately identified to be the wrist-watch of Subalakshmi which she was wearing on the fateful day;

(iv) That the third accused was arrested only on 2-5-1998 and thereafter, at this instance, the Police could recover the ornaments which the girl was wearing on the fateful day, which ornaments ultimately came to be identified as the ones belonging to the girl, which she was wearing and which were pledged by or at the instance of the third accused.

All these main circumstances, which have been held to be proved, would straightaway involve all the three accused for the offence of murder as also the rape and the other allied offences.

26. It was, however, argued by the learned senior counsel as also the other learned counsel of the accused that the reason of the death of Subalakshmi is not established. So also, it is not established independently that the girl was sexually ravished because no traces of spermatozoa were found in the vaginal swab taken by the Doctor at the time of post-mortem examination. The learned counsel, therefore, submits that it is difficult to sustain the theory that the accused first raped the girl and murdered her. They also pointed out that one of the two eye-witnesses did not speak about the murder at all while, the other eye-witness had not described as to in what manner the girl was murdered. It is true that the evidence of the eyewitnesses is somewhat sketchy in that behalf. However, we have given reasons as to why we have accepted the evidence of the eyewitnesses. In the light of the eyewitnesses's evidence both the offences of rape and murder get proved without any independent corroboration. That apart, it must be appreciated here that after her disappearance on 4-3-1998, only the dead body of Subalakshmi was found floating in the well and at that time also her mouth was gagged with her 'pyjama' (pants) and her neck was found strangled with her 'duppattah'. Under such circumstances, the possibility of her committing suicide is completely ruled out. So also, the possibility of natural death or accidental death is also ruled out. What remains is only the homicidal death. Therefore, merely because the post-mortem report (Ex. P-9) says that the possible reason of her death could not be established, it does not help the defence in any manner. Same thing can be said about the offence of rape. The way in which her body was found to be without the clothes on the lower half, it cannot occur that the girl stripped herself, and jumped into the well after tying herself. Therefore, her clothes must

have been removed and then alone after doing her to death; her body was bound to have been thrown in the well. As far as the absence of spermatozoa, P.W. 16 Dr. Jayanthi has opined that because the body remained in water for about four days, the spermatozoa could have been washed off. We accept that theory of the prosecution. We cannot also ignore the fact that in the post-mortem report (Ex. P-9) an injury is mentioned to the head of the girl as also to the hyoid bone. We cannot also ignore the popped-out eyes of which we find a mention in the post-mortem report (Ex. P-9) as also in the videotaped version of the post-mortem. All these go to suggest that the girl was definitely sexually ravished and murdered.

27. The learned counsel then strongly criticised the pathetic state of investigation and pointed out that this was the case of 'finding the accused first and then reach him by collecting the evidence against him'. The learned counsel argued that it was very strange that though the bicycle of the girl was found near the spot,, it was seized only on 5-3-1998 and on 5-3-1998 also the Police did not bother to search thoroughly the nearby places. It was pointed out that the 'panty' (undergarment) of the girl was found only on 8-3-1998 that too, near the well and the place where the accused were allegedly sitting where the empty brandy-bottle and cigarette butts were found was also not far from the spot and, yet the Police did not do anything to search all these places thoroughly. It was also argued that the investigating agency did not at all bother to put up in the identification parade the wristwatch allegedly discovered by the second accused and the ornaments of the girl for being identified by P.W. 2 Tmt. Easwari and others. The criticism was that the whole investigation was one-sided, tainted and dishonest. So much so, that some witnesses like P.W. 3 Valasubramanian, P.W. 4Gurusamy, P.W. 6 Narayanan and P.W. 7 Krishnan were set up by the prosecution against the accused.

28. Before we test the quality of investigation, it has to be borne in mind that nobody suspected in 4-3-1998, as also on 5-3-1998, that Subalakshmi was done to death after having been raped. Till then, the investigation proceeded only on the basis that Subalakshmi had disappeared from her house. She was a grown-up teen-aged girl and probably the investigating agency was misled by a notion that she might have disappeared from her house and there may be a romantic angle attached to her disappearance. Therefore, the investigation never proceeded

keeping in view the possibility of unnatural of Subalakshmi or the possibility of her having been sexually violated. This is, however, not to justify the lapses on the part of the investigating agency because the investigating agency has to proceed necessarily keeping all the angles in mind. It is found that the news of disappearance of Subalakshmi was flashed in the newspapers and the investigating agency tried to contract some other neighbouring places for locating Subalakshmi. All these clear from the evidence of P.W. 28 Vijayakumar. Though he says that he searched near the well and also the places where the bicycle was lying, it seems there was no search worth the name. Otherwise, he would have never failed to locate the school-bag, lunch-box, books, etc. which were lying scattered near the well. Our attention was also invited to his evidence that on 5-3-1998 it was not reported that the girl was wearing earrings, gold-bangle and the ring as also the wristwatch. This was probably not done because at that time it was never thought that Subalakshmi could have been done to death or that it would be only her body to be found and not herself. It has then come on record that the investigation was then taken up by P.W. 29 Durairaj, Inspector of Police, who executed Ex. P-6. Observation Mahazar regarding spot of occurrence near the well. It is really strange while the post-mortem was videotaped, the investigating agency should not have thought of videotaping of the topography of the spot more particularly the areas where the girl was alleged to have been raped and murdered or even the spot where her articles were found scattered. From this, the learned counsel for the accused suggested that all those theories were stage managed. We do not think so. It seems that it is only on the finding of the body of the girl that the investigation got a proper direction and, therefore, more thorough searches might have been made of the spot yielding the results as they did. P.W. 29 Durairaj, who drew the rough sketch of the spot (Ex. P-53) and also seized the 'panty' (undergarment) (M.O.2), handed over the investigation to District Superintendent of Police, District Crime Branch, in pursuance of the order passed by the Superintendent of Police, Virudhunagar vide Ex. P-55 and it seems that further investigation was made by P.W. 32 Jeyagopal. According to the defence, investigating agency was under tension because of the riots that took place in Aruppukottai and, therefore, they fixed the accused and then tried to create evidence against them. This contention is mentioned only to be rejected as, in fact,

it was on 8-3-1998 itself that the witnesses had specifically deposed against ' the accused persons probably, as a result of which, the riots began in the town. Even if there was an anxiety on the part of the investigating agency, that anxiety would be only to the extent of arresting those who were named by the witnesses and not creating or concocting a false case against some innocent persons. It is obvious that the first and second accused were arrested on 15-3-1998 while the third accused came to be arrested only on 2-5-1998 that too in Kerala. Therefore, the accused were at large on 8-3-1998 when the names came to the light. Again, we cannot ignore that it was only on 8-3-1998 that the body of Subalakshmi was found, the immediate report of which was given to the Police and almost immediately the names were stated by the witnesses to P.W. 1 Subburaj who stated the same to the Police. It is difficult that in such a short time as this, the Police or for that matter the witnesses like P.W. 3 Valasubramanian, P.W. 4 Gurusamy, P.W. 6 Narayanan and P.W. 7 Krishnan as also P.W. 1 Subburaj would think of the three names of the accused for being falsely implicated. After all they had nothing to do against the accused persons nor was there any enmity between them. Therefore, this line of argument by the defence that the names of the accused were fixed first and then an attempt was made to reach them appears to be farfetched. In this behalf, it cannot be forgotten that P.W, 3 Valasubramanian and P.W. 4 Gurusamy came to know about the death of Subalakshmi only on 8-3-1998 while P.W. 6 Narayanan and P.W. 7 Krishnan though knew about the incident were not in the town at all and had come to Aruppukottai only in the morning of 8-3-1998. The Supreme Court has number of times commented on the apathy on the part of the witnesses to involve themselves particularly in the sensitive matters like this. We have already made a reference to the relevant observations of the Supreme Court in the earlier part of this judgment. What is required to be seen is whether the witnesses though they were tight-lipped for substantial number of days could be dubbed as 'incredible' only for that reason. We have already given our reasons in paragraph 19 why we have accepted the evidence of the eye-witnesses and once that aspect is cleared, nothing more is left to fix the criminal liability against the accused. We are, therefore, convinced that the trial Court has rightly convicted all the accused of the offence under Section 302, I.P.C. read with Section 34 on the charge of having murdering Subalakshmi

in furtherance of their common intention. Similarly, we accept the finding regarding the conviction under Section 376, I.P.C. In fact, the offence committed by the accused of sexually ravishing Subalakshmi could and should have been viewed as 'gang rape'. The learned Sessions Judge has given a very strange reason for not holding it as a gang rape. The learned Sessions Judge holds that since the three accused could not be considered as a 'gang' and since they committed the offence of rape 'turn by turn', it cannot be a gang rape. Such reasoning is absolutely baseless and suggests total misconception of the trial Court regarding the notion 'gang rape'. The trial Court has convicted the accused only for an offence under Section 376, I.P.C. and not for the offence under Section 376(2)(g) I.P.C. In fact, the trial Court should have taken into consideration the First Explanation to Section 376, I.P.C., but it seems to have been missed by the trial Court. Strangely enough, even the prosecution has not bothered to file an appeal against this. Therefore, perforce we have to only confirm the conviction and sentence under Section 376, I.P.C. The trial Court also convicted the accused for offence under Section 328, I.P.C. Since we have convicted the accused for the major offence under Section 302, I.P.C., it is unnecessary for us to consider the aspect of the offence under Section 328, I.P.C. We are not in agreement with the learned trial Court in so far as the conviction of the accused persons under Section 397, I.P.C. and/or Section 404, I.P.C. is concerned. This cannot be viewed to be an act of robbery as it was not with the idea of depriving the girl of her ornaments, she was waylaid, raped and murdered. It was after the dastardly acts of rape and murder that Subalakshmi was relieved of her ornaments. Therefore, the charge under Section 397, I.P.C. must fail and the accused persons are acquitted of that charge and their sentences are set aside. As regards the other conviction, the trial Court has convicted the first accused for an offence, under Section 404, I.P.C. read with Section 34 while the second and third accused were convicted for the substantive offence committed by them under Section 404, I.P.C. We do not think that it would be proper to convict the accused for the offence under Section 404, I.P.C. for the simple reason that none of the accused had any notice of that charge. The accused were simply charged under Section 397, I.P.C. and we have already acquitted the accused of that charge. Therefore, the accused shall be acquitted of the offence under Section 404, I.P.C. read with Section 34 and Section 404, I.P.C.

and the sentences imposed for that charge are set aside. This leaves us with the question of death sentence awarded by the trial court on account of conviction of the accused under Section 302, I.P.C. and we have to consider whether the death sentence awarded by the trial Court is proper or not and is liable to be confirmed.

29. At the out set, the learned senior counsel appearing on behalf of the first accused urged that there was no proper compliance with Section 235, Cri. P. C. inasmuch as that though after finding of guilt was recorded, the Court, on the same day, questioned the accused regarding the sentence without even adjourning the case and thus without giving any time to the accused to prepare for the defence against the proposed sentence. The learned counsel drew our attention to the decisions of the Supreme Court in : 1976 CriLJ1875 (Santa Singh v. State of Punjab); (Allauddin Mian v. State of Bihar); : 1998 CriLJ2259 (Shobhit Chamar v. State of Bihar) and : 1999 CriLJ2569 (Jai Kumar v. State of M.P.) where the Apex Court has impressed the need to adjourn the matter to some other day thereby giving opportunity to the accused to explain all the circumstances in favour of a lenient sentence. Much stress was laid on Shobhit Chamar's case, cited supra. In view of the these pronouncements, we passed a separate order, directing the accused to be presented before us so that we could afford them with an opportunity to speak about the sentence. All the three accused, accordingly, appeared before us and given written statements. In fact, the learned senior counsel wanted us to set aside the sentence and remand the matter back. However, in view of the fact that two years period is already over since the incident, we, in our discretion, decided to put the questions regarding the sentence ourselves; the present being the continuation of the trial proceedings. In their replies, the accused persons relied on the affidavits filed by their relations. Veerabharathi - the first accused - in his affidavit states that he has completed the engineering course; he is son of a teacher and comes from the educated background; that he is married and has a son, aged three years. The father of the first accused also sworn to an affidavit that there are no bad antecedents to the first accused and that apart from the child of the first accused, his old parents are dependent upon him. The other two accused have also more or the less told the same line. In so far as Rahmathullah - second accused - is concerned, his mother Jannath Beevi has sworn to an affidavit that he was in fact arrested by the Police

on 8-3-1998 and was detained in the police station for seven days illegally. She has also further pointed out that the accused has the responsibility of the four unmarried sisters as also his old parents. In so far as Elango alias Murugan - third accused - is concerned his age is suggested to be 31 years. His father, in his affidavit, has claimed that he is a retired teacher in History and that the accused is an agriculturist owning lands, that the accused is married and has a daughter, who is aged about 3 years. Thus all the three accused plead on their young age and the responsibility, which they have of the relations. The Apex Court has time and again pointed out that such considerations would not matter where a case can be termed as one of the 'rarest of the rare cases'. The learned Public Prosecutor has drawn our attention towards a number of decisions on the question of sentence and has pointed out that this case, wherein a young school-going girl was raped and mercilessly murdered, would be a 'rarest of the rare case'. Even if the case is termed as one of the 'rarest of the rare cases', it will be for this Court to see as to whether all the three accused persons deserve to be awarded the extreme penalty of death sentence. In this behalf, the law laid down by the Supreme Court in : 1998 CriLJ1638 (Ronny alias Ronald James Alwaris v. State of Maharashtra) is very significant. That was a case where three inmates of the house, viz. husband, wife and their 17 years old son were brutally murdered by throttling, after committing sexual assault on the lady, who was aged about 45 years and even the ornaments and other valuables were looted from the house. In fact, one of the accused was a close relative of the deceased persons. The Supreme Court specifically found in paragraphs 46 and 47 of that judgment that this was a 'most foul' murder. Before that, the law laid down in : 1980 CriLJ636 (Bachan Singh v. State of Punjab); : 1983 CriLJ1457 (Machhi Singh v. State of Punjab); (Allauddin Mian v. State of Bihar); : [1995]3SCR1197 (Shamshul Kanwar v. State of U.P.) and : 1995 CriLJ2682 (Sheikh Ishaque v. State of Bihar) was fully considered. In the last two cases aforementioned, it was held by the Apex Court that the number of victims would not per se bring the case falling in the rarest of rare cases. These two cases are of no consequence to us because in this case it is only Subalakshmi who has lost her life. It has been observed in Allauddin Mian's case : 1989 CriLJ1466 , cited supra, that unless the nature of the crime and the circumstances of the offender reveal that the criminal was a menace to the society and the sentence of life

imprisonment would be altogether inadequate, the Court should ordinarily impose a lesser punishment and not the extreme punishment of death which should be reserved for exceptional cases only. Reading all these principles, the Supreme Court found that out of the three appellants, the first appellant was a qualified Civil Engineer and a married person, having a son of four years old and had old parents. It was found that the second appellant was also a married person and since he had performed a love marriage against the will of the parents, there is nobody to look after his wife and two daughters and two sons, of whom one was of tender age. The Supreme Court also found that the third appellant was having a sick father and that the accused was only 27 years old and all the three accused had no adverse antecedents. These were seen to be the 'mitigating circumstances' in that case where the facts show that the three accused persons had gained entry into the house of the deceased because of the relationship of the first accused with the deceased persons, had food with the inmates and killed all the three inmates and had also committed rape on one of the deceased persons. In that case, even the factum of rape was held to have been established on the basis of the vaginal examination. Not only this, but it was also established that the lady was raped by more than one person. The Supreme Court also considered the 'aggravating circumstances' to the effect that the first accused therein was the nephew of the one of the deceased persons (husband). In paragraph 48, the Supreme Court went to the extent of saying that there was nothing to suggest that the offence is committed under the influence of extreme mental or emotional disturbance for, the whole thing was done in a preplanned way. It was also observed that it was not possible for the Court to predict that the appellant would not commit criminal act of violence or would not be a threat to the society. However, the Supreme Court has observed as follows :

A-1 is 35 years' old, A-2 is 35 years' old and A-3 is 25 years' old. The appellants cannot be said to be too young or too old. The possibility of reform and rehabilitation, however, cannot be ruled out. From the facts and circumstances, it is not possible to predict as to whom among the three played which part. It may be that role of one has been more culpable in degree than that of others and vice versa. Where in a case like this it is not possible to say as to whose case falls within the 'rarest of the rare' case, it would serve the ends of justice if the capital

punishment is commuted into life imprisonment.

Here also, as has already been suggested, the mitigating circumstances are that the three accused have relatively clean past inasmuch as nothing has been said about the previous nefarious criminal activities. All the three accused are also in their late 20's or early 30's. Two of the accused persons come from educated background inasmuch as their parents were the teachers. All the three accused have family depending upon them as also the old parents. In so far as the aggravating circumstances are concerned, however, it would be seen that it is not clear as to who has actually murdered the girl. We have seen one of the eye-witnesses has not even chosen to describe about the murder. All that the eye-witnesses stated is that the three persons then committed rape and thereafter the girl was murdered. As to who has actually murdered the girl, therefore, remains a mystery. Again it cannot be said as to which accused has played what part. If that is so, the law laid down in Ronny's case, cited *supra*, would be that under the circumstances when it was not clear as to which accused had played what part, it would be better to commute the sentence. True it is, that a young girl has lost her life possibly after losing her chastity, but we cannot ignore a fact that there is no independent establishment of the rape because no spermatozoa were found in the vaginal swab of Subalakshmi. There is undoubtedly an explanation for the absence of spermatozoa and to the extent of the theory of rape by all the three accused we have believed the eye-witnesses. However, in so far as the murder is concerned, who had tightly tied the 'pyjama' around the neck of Subalakshmi and who had strangled her or when the girl was unconscious who of them carried the girl to the well and threw her into the well is not clear. Therefore, we would be following the rule laid down by the Apex Court in Ronny's case, cited *supra*. Like in that case, here also it cannot be said that the accused cannot be reformed or that they are a total menace to the society to the extent that their remaining in society would itself prejudice the general interest of the society. The learned Public Prosecutor invited our attention to the number of cases, the prominent amongst them being reported in : 2000 CriLJ1793 (State of Karnataka v. Krishnappa); : 2000 CriLJ392 (Molai v. State of M.P.); : AIR 1996 SC922 (Bodhisattwa Gautam v. Subhra Chakraborty); and : 1996 CriLJ4158 (Kamta Tiwari v. State of M.P.). However, there is a striking similarity of the facts in Ronny's case, to which we

have adverted. While the facts in the other cases are justifiable, for example in Molai's case, cited supra, it is clear that the accused there were ex-convicts while in Bodhisattwa Gautam's case, cited supra, it would be seen that the accused was a man of confidence of the deceased and, therefore, the accused deserved the capital punishment. Such is not the situation here. We, therefore, do not agree with the learned Sessions Judge who has awarded the death sentence to the accused and we would refuse to confirm the same. We instead would order that all the three accused shall suffer rigorous imprisonment for life for the offence under Section 302, I.P.C. Before we part with the judgment, we must put on record the appreciation of the sincerity and the labour taken both by ' the defence counsel and the Public Prosecutor by assisting us.

30. In the result, we pass the following order :

The judgment and order of conviction of all the accused under Section 302, I.P.C. read with Section 34 passed by the trial Court is upheld. However, the death sentence awarded by the trial Court is modified to life imprisonment in case of all the three appellants. Criminal Appeal No. 872 of 1999 by the first accused Veerabharathi, Criminal Appeal No. 939 of 1999 by the second accused Rahmathullah and Criminal Appeal No. 925 of 1999 by the third accused Elango alias Murugan are dismissed with the modification in the sentence as stated above. R.T.NO. 2 of 1999 is disposed of and we refuse to confirm the death sentence awarded to the three accused.

The conviction and sentence of all the accused for the offence under Section 376, I.P.C. is confirmed. So also, the conviction of the accused persons on other counts, i.e. under Sections 341 r/w 34, 328 r/w 34 and 201 r/w 34 is upheld that the sentence is confirmed.

The accused persons are acquitted of the offences under Sections 397 and 404 (against second and third accused), Sections 397 read with 34 and Sections 404 read with 34 (against the first accused) and the sentences are set aside.

31. The trial Court had directed M.O. 28 Motorcycle and M.O. 32 Dolphin Car to be kept in the Government Exchequer. These vehicles were seized by the Police

during the investigation perhaps on the ground that they were used for the commission of the offence. It maybe remembered that it is only from the M.O. 28 Motorcycle that the first accused discovered some glasses which presumably were used at the spot of incident. The defence counsel argued that the Sessions Judge could not have confiscated these properties. We also see no reason why these two vehicles should be confiscated to the Government Exchequer. It is not because all the accused went to or near to the spot by these vehicles that these vehicles became the properties used in the crime. It cannot be forgotten that the two witnesses who had seen the accused in the jungle had seen them following the girl on foot. Therefore, there would be no question of confiscation of these two vehicles. The order is set aside and the said two vehicles would be returned back.

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