

(2002) 04 MAD CK 0142

In the Madras High Court

Case No : Criminal Appeal No. 281 of 1998

Rakiappan, Subramanian, Somaraj and Aarusamy **APPELLANT**

Vs

State by: Inspector of Police, Uthiyur Police Station, Erode **RESPONDENT**

Date of Decision : 25-04-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 109, 302, 307, 34

Citation : (2002) 04 MAD CK 0142

Hon'ble Judges : R. Balasubramanian, J; A.S. Venkatachalamoorthy, J

Bench : Division Bench

Advocate : V.K. Muthusamy, S.C. for A.K. Sridharan and N. Jothi, for the Appellant; E. Raja, Additional Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

This Judgment has been overruled by : State by Inspector of Police, Tamil Nadu Vs. Rakiappan and Others, (2008) 14 SCALE 637 : (2008) 15 SCC 715

R. Balasubramanian, J.—Accused 1 to 4 in S.C.No.192 of 1997 on the file of Court of Sessions, Erode, are the appellants in this appeal. At the end of the trial, A.2 and A.3 were found guilty for an offence u/s 302 I.P.C.; A.1 and A.4 were found guilty for an offence u/s 302 read with 34 I.P.C. for which each one of the accused stands sentenced to undergo imprisonment for life. A.2 and A.3 also stands convicted for the offence u/s 307 I.P.C. for which each one of them stands sentenced to undergo nine years rigorous imprisonment. A.1 also stands convicted for the offence u/s 307 read with 109 I.P.C. and sentenced to undergo seven years rigorous imprisonment. The sentences were directed to run concurrently. The convicted accused are challenging their conviction as referred to above by filing this appeal. Heard Mr.V.K. Muthusamy, learned senior counsel appearing for A.1 and A.2, Mr. N. Jothi, learned counsel appearing for A.3 and A.4 and Mr. E. Raja learned Additional public prosecutor for the State.

2. The facts of the prosecution case are as follows:-

"Nachimuthu Gounder and Saraswathi, husband and wife were the subject matter of attack on the night of 7.12.1995 is the prosecution case. Nachimuthu Gounder died on the spot while Saraswathi breathed her last when she was on her way to the hospital. We will refer to them hereafterwards as D.1 and D.2. Another boy by name Ramu examined in this case as P.W.2 was also injured in the same incident. P.W.1 is the son of the deceased. He would state that around 10.00 p.m. on 7.12.1995 he reached home and found D.1, D.2 and P.W.2 each lying in a pool of blood while his father had already breathed his last. He would state that his mother and P.W.2 were struggling for life. After taking some time in speaking to his relatives, he took his mother and P.W.2 in a vehicle to a private Hospital at Coimbatore, where his mother was pronounced dead. P.W.2 was admitted in the hospital. He brought back his mother to the Government Hospital at Dharapuram and the body was kept in the mortuary. Then he reached the police station at 7.00 a.m. on 8.12.1995 and gave the complaint Ex.P.2. P.W.15 is the Sub Inspector of Police on duty in the investigating police station and on receipt of Ex.P.2, he registered it in Crime No.196 of 1995 for offences under Sections 302 and 307 I.P.C. He prepared Ex.P.21, the printed first information report and sent the material records to the court as well as to the higher officials. P.W.2 would state that he is a shepherd boy and he was in the house of the deceased on that night watching television. All the four accused entered the house and A.1 and A.4 caught hold of D.1 and D.2 respectively. A.2 gave a fatal blow on D.1 while A.3 gave a fatal blow on D.2. He would also state that he was also attacked by A.2 and A.3 on A.1 instigating them. He would state that he fell down unconscious and he came to regain his consciousness at the hospital at Coimbatore about five days later. P.W.3 is examined to speak about the movement of the accused on that night from the garden land of the deceased. P.W.4 would depose that around 11 p.m. he received information over telephone from one Chellamuthu that both the deceased have been murdered by the accused and that he reached the scene of occurrence in a car within a short time thereafter, where he found Nachimuthu lying dead and the other two were struggling for their lives. He would also state that the surviving injured were taken by a car to the hospital at Coimbatore and enroute Saraswathy died. P.W.5 would speak about mediating between the family of the accused on the one hand and the family of the deceased on the other hand on a land dispute.

(b) P.W.16 on receipt of the material records took up investigation in this case. He proceeded to the scene of occurrence where he prepared in the presence of witnesses Ex.P.16, the Observation Mahazar and Ex.P.22, the rough sketch. He conducted inquest over the dead body of D.1 at the spot itself and prepared Ex.P.23, the inquest report. The incriminating materials available at the spot were recovered by him under Ex.P.17 immediately past noon on that day. M.Os.14 to 19 were thus recovered. He sent the dead body of D.1 for post-mortem through police constable. He examined the witnesses present there and recorded their statements. Then he went to the Government Hospital at Dharapuram and conducted inquest over the dead body of D.2 and prepared

Ex.P.24, the inquest report. Then he gave a requisition for conducting post-mortem on that dead body. P.Ws.6 and 7 are the respective police constables, who were present during post-mortem done on D.1 and D.2. P.W.9 is the doctor who did post-mortem on D.1 and Ex.P.13 is the post-mortem report. The doctor is of the opinion that the death of D.1 is due to injury to the Spinal Cord at C.3 level and the death would have been instantaneous and it would have occurred 36 to 38 hours prior to autopsy. P.W.10 is the doctor who did post-mortem on D.2 and Ex.P.15 is the post-mortem report. The doctor is of the opinion that the deceased (D.2) would appear to have died of Haemorrhage due to multiple fractures and its complications about 30 to 32 hours prior to autopsy. As Exs.P.13 and P.15 forms part of the record and are in English, we do not propose to restate the symptoms as noted therein once again in this judgment to save time.

(c) P.W.16 continued the investigation. On 8.12.1995 he proceeded to the private hospital at Coimbatore to examine Ramu, P.W.2. As he was unconscious, he could not examine him. He sent the case properties to the court with a request to send the same for chemical examination. P.W.8 is the Magisterial Clerk, who on receipt of the case properties and Ex.P.5, the requisition, sent the same to the laboratory as an enclosure to Court's letter Ex.P.6. Exs.P.7 and P.8 are the Chemical Examiner's Report and Serologist's Report. Ex.P.9 is the requisition given by the investigating agency to send the collected bones for examination. It was sent to the laboratory as an enclosure to court's letter Ex.P.10 and Ex.P.11 is the report. P.W.16 examined P.W.2 on 13.12.1995 in the private hospital at Coimbatore and recorded his statement. At 11.00 a.m. On 15.12.1995 on prior information he arrested all the accused in the presence of P.W.13 and another. At that time, the second accused gave a voluntary confession statement, the admissible portion of which is Ex.P.18. Pursuant to Ex.P.18, M.Os.1,2 and 20 to 27 came to be recovered under Ex.P.19 attested by P.W.13 and another. P.W.11 is the photographer, who took photographs on the dead body of D.1. M.O.13 series are the photographs and negatives. P.W.17 is the doctor in the private hospital at Coimbatore. He would depose about P.W.2 having been admitted in the hospital; the symptoms noted on him in the hospital and the treatment given to him. P.W.18 is another doctor who took C.T. Scan on P.W.2. M.O.28 is the C.T. Scan Films and Ex.P.27 is the C.T. Scan Report. Ex.P.25 is the discharge certificate of P.W.2 and Ex.P.26 is the accident register of P.W.2 issued by the private hospital at Coimbatore. After completing the investigation, P.W.16 filed the final report in court against the accused on 31.1.1998 for the offences referred to earlier. When the accused were questioned u/s 313 of the Code of Criminal Procedure on the basis of the incriminating materials made available against them, they denied each and every circumstances put up against them as false and contrary to facts. They would also contend in substance as follows:-

Palaniswamy is the junior paternal uncle of P.W.1; a portion of his land has been purchased by P.W.1's family; the other portion was successfully purchased by the accused, though P.W.1 was aiming to purchase it; there was a path-way in that land and in using the same there was a dispute between the family of P.W.1

and the family of the accused; using their influence and affluence they have lodged a complaint on us; P.W.2 is speaking falsehood on he being told to speak against us by P.W.1 and his elder brother Balasubramanian, who is the Sub-Inspector of Police; the accused did not participate in the crime at all; there was a wide talk in the village that some dacoits entered the house of P.W.1 and committed the crime while they were attempting to steal; Sniffer dogs reached the scene of occurrence on 18.12.1995 and there was no fruitful result; the investigation is a biased one; the accused were very much available in the village from 8.12.1995 till 12.12.1995; they were not arrested during that time but they were taken into custody by the police only on the night of 13.12.1995 from their house; it is false to state that they were arrested on 15.12.1995; they have not given any confession statement nor did they produce any incriminating materials; the clothes produced in court do not belong to them.

3. Mr. V.K. Muthusamy, learned Senior Counsel would strenuously contend that as the entire case of the prosecution rests only on the oral evidence of P.W.2, who is shown to be 12 years of age on the date of occurrence, this court must have caution in mind while the evidence of the said witness is appreciated. According to the learned senior counsel though the evidence of a child witness may itself form the basis for a conviction provided it is trustworthy, yet rule of caution demands corroboration from independent sources. Taking the totality of the circumstances available in this case, it is clear that P.W.2 appears to have been swayed by the influence of P.W.1 and his elder brother. Therefore the evidence of P.W.2 before court cannot be said to be a true version given by P.W.2. On the day when this witness is stated to have been examined by the police, there is no evidence at all about his health condition in the hospital. If that is so, then the statement of this witness stated to have been recorded on 13.12.1995, though it had reached the court on 14.12.1995, is a doubtful one and therefore no credibility could be attached to his oral evidence in court on the basis of such a statement. In other words the materials available in this case do show that P.W.2 was not examined at all during investigation and if this is accepted, then his oral evidence before court recorded later on cannot be a true version. P.W.3, according to the learned senior counsel is only a chance witness and he stays 15 kms away from the scene of occurrence. A perusal of his evidence will not satisfy the conscience of this court as it contains so many inherent improbabilities in itself. Therefore, if the oral evidence of P.Ws.2 and 3 are eschewed from consideration and when the possibility of false implication is looming large in the back ground of deep seated enmity, then this court would be in a position to set aside the conviction. It is further contended by the learned senior counsel that assuming the recoveries are made, yet it can never be substantive evidence by itself. If the other primary evidence on record is not satisfactory, then the recovery evidence alone cannot form the basis for a conviction. Mr. N. Jothi, learned counsel appearing for A.3 and A.4 adopted the arguments of the learned senior counsel. The learned Additional Public Prosecutor defending the State would heavily rely upon the oral evidence of

P.Ws.17 and 18 to show that the health condition of P.W.2 was sound enough to be examined by P.W.16, as spoken to by him. The medical evidence shows that P.W.2 regained consciousness only on 13.12.1995 and therefore his examination on that day by P.W.16 cannot be viewed with any suspicion. Though he may be a child witness, yet this court must bear in mind that he is an injured child witness and therefore his evidence cannot be treated on par with the child witness who had only seen the occurrence. By taking us through the oral evidence of P.W.2, the learned Additional Public Prosecutor would contend that there are no compelling circumstances available on record evidence to discard his evidence. Therefore the learned Additional Public Prosecutor would appeal to us to accept the evidence of P.W.2. He would also submit that the evidence of P.W.3 is definitely corroborative in nature to the oral evidence of P.W.2. P.W.3's evidence shows the movement of the accused from the garden land of the deceased immediately after the occurrence. Therefore, on a reading of the evidence of P.Ws.2 and 3 together there cannot be any difficulty at all for this court to sustain their conviction.

4. Having regard to the arguments advanced by the learned counsel on either side, we perused the records. As we have noted already the medical evidence in the form of P.Ws.9 and 10 coupled with Exs.P.13 and P.15 show beyond doubt that both the deceased met their end due to homicidal violence. Ex.P.26 also shows that P.W.2 had sustained grievous injury. P.W.18 is the doctor who took C.T. Scan on P.W.2. Ex.P.25 is the summary and discharge certificate of P.W.2. P.W.17 is the doctor through whom Ex.P.25 is marked. M.O.28 is the C.T. Scan films and Ex.P.27 is the C.T. Scan Report. Therefore P.W.2 had sustained grievous injuries is also established fully by the medical evidence of the witnesses referred to above. But the question is, who is responsible for causing the death of both the deceased in this case as well as causing the injury on P.W.2, which is brought u/s 307 of the Indian Penal Code by the prosecution. To sustain their case, the prosecution heavily relies upon the oral evidence of P.Ws.2 and 3. There cannot be any dispute that besides the evidence of these two witnesses the prosecution has no other direct material to connect the accused with the crime.

5. A perusal of the evidence of P.W.1 shows that both the families are on a war path. A.1 and A.4 are brothers. We are not going to state the minute details of the various instances in which both the parties were pitted against each other regarding property dispute. Suffice it to conclude even at this stage by saying without any fear of contradiction that there is a deep seated enmity between the two families. It is always held by courts that, when there is deep seated enmity between the two groups, then the possibility of false implication cannot be totally ruled out. Whether there is false implication or not would again depend upon the materials available on record and the truthfulness of the materials that are brought before us by the investigating agency. One of the methods by which false implication can be ruled out is by giving the complaint at the earliest point of time and by giving details of the instances in a crisp manner. Ex.P.2 is the complaint. The complaint itself had come to be lodged at 7.00 a.m. on the next

day. The evidence of P.W.1 shows that he has taken considerable time by visiting many of his relatives before Ex.P.2 complaint had come to be given. P.W.3 would admit that he is closely related to D.2. Therefore he should be naturally related to D.1 as well as to P.W.1. P.W.3's evidence shows that on the night of the occurrence itself, he saw the accused moving away from the garden land of the deceased. The inquest was held at the spot itself by P.W.16 on D.1 on the morning of 8.12.1995. But P.W.3 was not examined during inquest. In view of his close relationship with the deceased, we would expect him to be present at the spot when the inquest goes on. His answer that he went to the town on the next morning and then reached the Village only on the following day and then only he came to know about the occurrence is, too far fetched to be believed. In any event on 9.12.1995 when he is shown to have been examined by the investigating officer, according to the prosecution the relevant material, namely, he seeing the accused moving away from the garden land of the deceased came to light. We see no reason at all as to why then the investigating agency had not chosen to arrest the accused even on that day. We are not for a moment saying that the failure to arrest the accused on that day by itself would affect the prosecution case. But however on the totality of the circumstances available and if really the materials spoken to by P.W.3 in court had come to light on 9.12.1995 itself, then the failure to arrest the accused adds suspicion in our mind.

6. Having reflected our mind to the above aspect, we proceed to consider the trustworthiness of the oral evidence of P.Ws.2 and 3. Let us consider the oral evidence of P.W.3 first. He would state that he is residing at a distance of 15 kms away from the scene of occurrence. His evidence in sum and substance is as follows: (translation by us)

" Chinnappa Gounder is his father-in-law and he resides at Kullagounderputhur (occurrence village); he used to graze his cattle in the lands of Chinnappa Gounder and tether the cattle there itself; on the occurrence day he tethered the cattle in his father-in-law's lands and went to the garden land of Nataraja Gounder; from there he was on his way to his village and enroute he saw the accused moving away from the garden land of the deceased and A.2 and A.3 were armed with koduval. (Evidence in chief)"

" I went to the house of Nataraja Gounder casually and there was no specific purpose; after grazing my cattle in my mother-in-law's land, I used to tether them in the garden land of D.1; on the occurrence day I tethered my cattle only on the garden land of D.1; however D.1 did not know about it; only after tethering the cattle in the garden land of D.1, I went to the house of Nataraja Gounder; while returning from there only I saw the accused; I went to Vellaikoil to have my account settled in respect of the money due from power looms; I had told the police during investigation that I had gone out on that day to do my personal work and did not tell the police that I had gone to Vellaikoil to have my account settled due from power looms. (Evidence in cross)"

The learned Sessions Judge himself found that P.W.3 is only a chance witness.

The evidence of this witness as extracted above is not consistent on material aspects and therefore his claim that he was in the occurrence village and that he saw the accused moving away is not free from doubt. The death news of the deceased in this case would have spread like forest fire. Therefore there is every possibility for P.W.3 also coming to know about the incident within a short time after he claimed to have seen the accused in the village. This is all the more so because his mother-in-law is the elder sister of D.2 in this case. Under these circumstances his evidence that he came to know about the death only on the day following the next day after the occurrence is farfetched. Therefore we are of the firm view that P.W.3's evidence lacks credibility and accordingly we disbelieve it.

7. Now we proceed to analyse the oral evidence of P.W.2. Even at the outset we are in a position to say that if the evidence of P.W.2 is trustworthy and satisfies our conscience, then there could not be any difficulty at all in accepting his evidence to sustain the conviction. But we have every difficulty in accepting his evidence and the reasons are as follows:-

The occurrence took place on 7.12.1995; P.W.17 is the medical officer in the private hospital at Coimbatore; his evidence show that around 2.30 a.m. on 8.12.1995 P.W.2 was admitted in that hospital as an inpatient by one Dr. Saravanan. Dr. Saravanan had not been examined. He speaks about the treatment given to him. The relevant portion of his evidence to decide the trustworthiness of the evidence of P.W.2 is extracted hereunder:

"Surgery was performed; blood clot in the brain was removed; Dr. Manokaran operated on the left hand wrist; immediately after first aid on that morning he was put in the ventilator for two hours; after 48 hours he was removed from ventilator; he was breathing on his own; when I examined him at 8.30 a.m. on 12.12.1995, he regained consciousness slowly; he was discharged on 21.12.1995; at the time of discharge (21.12.1995) his condition was that he could understand what is told; however he could not answer questions; he would be talking to himself at random; however his spoken words would convey a meaning." (Evidence in chief)

"I have brought the case sheet relating to P.W.2; the case sheet shows that P.W.2 was attacked at 10.00 p.m. on 7.12.1995 by unknown persons; however in Ex.P.26, wound certificate it is not found so; I examined P.W.2 on 9.12.1995; I have made an entry in the case sheet that he had regained consciousness on that day; even on 10.12.1995 he was in the same condition." (Evidence in cross)

Ex.P.25 is the case summary and discharge record. It shows that on the date of admission namely 8.12.1995, on examination, the patient was unconscious and he was responding to painful stimuli. The other endorsements in Ex.P.25 are as follows:-

" Patient GC was not permitting to take him up for surgery. He was put on ventilator blood was given.

On 8.12.95: Wound debridement elevation and fixation of the depressed fracture of the skull and left wrist injury.

On 12.12.95: Repair of the ulnar nerve and the flexor tendon injuries were performed.

On 9.12.95: Patient regained consciousness, obeys commands."

From the above endorsements it is seen that the general condition of the patient on 8.12.1995 did not permit a surgery to be undertaken on that day and he was put on ventilator and blood was given. One of the relevant endorsement is found noted on 9.12.1995 where it is seen that he had regained consciousness and was obeying commands. P.W.17 in his oral evidence would state that the condition of the patient as noted on 9.12.1995 prevailed as it is even on 10.12.1995. From the above material records and the oral evidence of P.W.17 we find that the health condition of the injured witness P.W.2 does not appear to be consistently and continuously good. There appears to be set-backs in his condition. On 19.12.1995 when surgery was about to be performed on him it is found noted that the general condition does not permit a surgery to be done and he was put on ventilator and blood was given. Therefore the symptoms are not encouraging to hold that P.W.2 would have been in a conscious and fit state of mind to give any statement on 13.12.1995. It may be noticed here that there is total paucity of medical evidence, both oral and documentary, to show the health condition of P.W.2 on 13.12.1995.

8. In any event, we searched the other materials available on record to find out what was the condition of this witness on 13.12.1995. We now refer to Ex.P.9, which is the requisition given by the investigating officer to the court to send the bone pieces of the head to the laboratory. The following is found in that report. (Translation by us)

" On 9.12.1995, 10.12.1995 and 11.12.1995 I went to the Private Hospital at Coimbatore and found P.W.2 was unconscious and therefore I could not record any statement from him."

This report of the investigating officer as found in Ex.P.9 is contrary to the medical record Ex.P.26. P.W.17, in his oral evidence would state that on 9.12.1995 and 10.12.1995 P.W.2 had regained consciousness. P.W.16 in his oral evidence would state that he went to the hospital on 9.12.1995 to examine Ramu (P.W.2) and as he found him unconscious, he could not record his statement. In his evidence in cross, he would state that on 9.12.1995 he did not stay in Coimbatore at all. He would further state that on 8.12.1995 he did not examine the doctor in the hospital and recorded his statement. He would further affirm that on 10.12.1995 he did not go to the private hospital at Coimbatore at all. Once again we have to state that the oral evidence of this witness that he did not visit the private hospital at Coimbatore on 9.12.1995 and 10.12.1995 is belied by the report made by him under Ex.P.9 as referred to earlier. A further perusal of this evidence would show that on 13.12.1995 when he found P.W.2

conscious, he took the precaution of recording the statement from Dr.Ganesan (P.W.17) that the patient is conscious, self oriented and in a fit state of mind. But however he admits that he had not produced that statement before court. In this context we perused the evidence of P.W.17. No where he states that P.W.2 was examined by P.W.16 in his presence. He also does not say that he gave any certificate on that day to P.W.16 certifying the physical condition of P.W.2. Therefore we have serious doubt in our mind as to whether the prosecution is trying to hold back the truth. To add more to the suspicion in our mind, we get the following material in the evidence of P.W.16. The material is as follows:-

" On 13.12.1995 I examined P.W.1 (his statement shows that he visited the hospital at Coimbatore on the morning of 13.12.1995); he found P.W.2 conscious; he was talking freely with everyone; at that time P.W.2 was examined by the inspector and P.W.2 told him the details of the occurrence."

Though P.W.1 would deny the presence in the hospital on 13.12.1995 and so also the other witnesses, namely, P.W.3 and others, yet this statement of P.W.1 stated to have been recorded on 13.12.1995 establishes beyond doubt that P.W.1 was present in the hospital on 13.12.1995, when P.W.16 claims to have recorded the statement of P.W.2. The evidence of P.W.16 also shows beyond doubt that besides P.W.1, his elder brother Balasubramanian was also present. Though P.W.1 would deny that Balasubramanian was not the Sub Inspector of Police on the occurrence day, yet would admit that he was selected to the police force later on. If P.W.1's presence by the side of P.W.2 is established beyond doubt on 13.12.1995 and that there is no medical evidence at all about the fit condition of P.W.2 to give a statement on that day, then the argument advanced by Mr. V.K. Muthusamy, learned senior counsel that the statement produced before court purported to that of P.W.2 cannot be accepted at its face value, as his statement. In other words, we are inclined to agree with the submissions made by the learned senior counsel that P.W.2 could not have been examined at all on 13.12.1995 and the statement produced before court purported to be the statement of P.W.2 could not have originated from the mouth of P.W.2. There is every reason to doubt that the record stated to have been brought out on that day is either a tutored version of P.W.2 or it may not have been his version at all. We have every reason to hold that P.W.2 would not have been examined at all on 13.12.1995 as spoken to by the prosecution and therefore the oral evidence of this witness before court implicating the accused in the crime is not supported by any material collected during investigation. In this context the following materials also may be noticed.

"P.W.17 would admit that, in the case sheet (when P.W.2 was admitted in the hospital) it was informed that the assailants are unknown. P.W.2 in his oral evidence would admit that when the doctor, who treated him, asked him as to how he came to sustain the injuries, he did not disclose the overt acts to any of the accused."

Therefore this is a definite material in favour of the accused to conclude that till

this witness was shown to have been examined on 13.12.1995, he was not sure as to the manner in which he and the deceased had come to sustain the injuries. P.W.2 would admit that only after the police arrived at the scene and enquired him he told the police about the various overt acts attributed to all the accused. Therefore from a reading of the the above materials noted by us, it is possible to conclude that P.W.2 definitely appears to be a tutored witness and what is spoken to by him before court is not his version but a version put into his mouth by others. To show the physical condition of this witness as on 13.12.1995, the prosecution could have atleast marked the case sheet which was before court in the custody of P.W.17 when he was examined. However the prosecution had not taken even this preliminary precaution to produce the case sheet. In view of the importance of the physical condition of P.W.2 on 13.12.1995, at least the trial court could have marked that exhibit as a court exhibit. But unfortunately that is also not done.

9. What should be the approach of the court when a child witness is examined in court in support of a case is no more res integra and it is the subject matter of the decision of the Apex Court reported in Panchhi and others Vs. State of UP, , wherein it has been held as follows:-

"Shri.R.K. Jain, learned Senior Counsel, contended that it is very risky to place reliance on the evidence of P.W.1 being a child witness. According to the learned counsel, evidence of a child witness is generally unworthy of credence. But we do not subscribe to the view that the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell them and thus a child witness is an easy prey to tutoring.

Courts have laid down that evidence of a child witness must find adequate corroboration before it is relied on. It is more a rule of practical wisdom than of law (vide, Prakash and another Vs. State of Madhya Pradesh,

There is yet another judgment of the Supreme Court reported in SURYANARAYANA v. STATE OF KARNATAKA (2001(1) Crimes 99. In that case it has been held as follows:-

"The evidence of a the child witness cannot be rejected per se, but the court, as a rule of prudence, is required to consider such evidence with close scrutiny and only on being convinced about the quality of the statements and its reliability, base conviction by accepting the statement of the child witness. The witness of P.W.2 cannot be discarded only on the ground of her being of Teen age. The fact of being P.W.2 a child witness would require the court to scrutinise her evidence with care and caution. If she is shown to have stood the test of cross-examination and there is no infirmity in her evidence, the prosecution can rightly claim a conviction based upon her testimony alone. Corroboration of the

testimony of a child witness is not a rule but a measure of caution and prudence. Some discrepancies in the statement of a child witness cannot be made the basis for discarding the testimony. Discrepancies in the deposition, if not in material particulars would lend credence to the testimony of a child witness who under the normal circumstances, would like to mix up what the witness saw with what he or she is likely to imagine to have seen. While appreciating the evidence of the child witness, the courts are required to rule out the possibility of the child being tutored. In the absence of any allegation regarding tutoring or using the child witness for ulterior purposes of the prosecution, the courts have no option but to rely upon the confidence inspiring testimony of such witness for the purposes of holding the accused guilty or not."

10. Taking an overall view of the materials referred to above and giving our serious and anxious consideration to the same, we are not in a position to readily accept the evidence of P.W.2 as a true version. It does not inspire the required confidence in our mind. In such circumstances if the evidence of P.Ws.2 and 3 are excluded from consideration then there is no other legal evidence to connect the accused with the crime. The accused had taken a stand that the clothes produced before the court does not belong to them. Two weapons of offence marked as M.Os.1 and 2 are exhibited as the weapons recovered at the instance of the accused. In one of the weapons, no blood at all was detected and in the other weapon where blood was found to be detected, the Serologist's report do not even indicate whether it is human blood or any other blood. Even assuming that the recovery is true, yet it by itself can never be a substantive evidence. In other words, it would not be a conclusive material to hold the accused guilty when the prosecution is lacking on all other material aspects. Consequently, finding that the accused are entitled to the benefit of doubt we are inclined to set aside the judgment under challenge and the accused are acquitted. The appeal is allowed.