IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

&

THE HONOURABLE MR. JUSTICE G.GIRISH

THURSDAY, THE 8TH DAY OF AUGUST 2024 / 17TH SRAVANA, 1946

CRL.A NO. 813 OF 2018

CRIME NO.496/2014 OF FEROKE POLICE STATION, KOZHIKODE

AGAINST THE JUDGMENT CONVICTING AND SENTENCE IN S.C.NO.1288 OF 2014 DATED 25.10.2016 OF THE COURT OF THE SPECIAL JUDGE FOR THE TRIAL OF OFFENCES AGAINST CHILDREN (ADDITIONAL SESSIONS JUDGE-I), KOZHIKODE

APPELLANT/ACCUSED:

SHAJI M.
S/O.KUNHIKANDAN, VAKERI HOUSE, PWRINGOTTUKUNNU, MANNUR POST, FEROKE, KOZHIKODE-673328.

BY ADVS.
JITHIN BABU A
ARUN SAMUEL
S.K.ADHITHYAN(K/681/2016)
ANOOD JALAL K.J.(K/000854/2024)

RESPONDENT/COMPLAINANT & STATE:

STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM 682031.

BY ADV SMT.AMBIKA DEVI S, SPL.GP ATROCITIES AGAINST WOMEN & CHILDREN & WELFARE OF W & C
SRI ALEX M THOMBRA, SR PP

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 08.08.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

'CR'

JUDGMENT

G.Girish, J.

The unusual act of a girl studying in VIIIth standard weeping without any reasons while the classes were going on, caught the attention of the class teacher. She took her to the school office and enquired about the reason. The girl made a stunning revelation of the sordid episode of sexual exploitation perpetrated upon her by none other than her father right from the period when she was studying in class IV. The class teacher and the headmaster of the school sought the assistance of the School Counsellor who interacted with the girl and found that she was abused right from her childhood by her father. Her mother was called to the school and informed about the most unfortunate revelation which an adolescent girl could make about her biological procreator. It was only then that the mother of that unfortunate girl came to know about the most wretched acts, which even animals abhor to do, perpetrated by her husband upon that little child. The matter was intimated to the Police. A Woman Sub Inspector from the Women Cell of Kozhikode City Police came to the school and recorded the statement of that girl in the presence of her mother.

2. The girl revealed to that Woman Police Officer that her father used to indulge in sexual acts with her right from the period when she was

studying in IVth standard, when she was not even able to understand what he was doing upon her. Her father is said to have resorted to the above treacherous acts during the time when her mother went out for work, after keeping her younger sister away. While she reached the VIth standard, her father is said to have utilized her fully for satiating his carnal desires. When she told him that she would inform this to her mother, her father is said to have threatened that he would do away with her mother and sister, if she told the same to her mother. It is also stated that whenever she resisted the above acts of her father, he tried to smother her by thrusting pillow upon her face and getting hold of her neck. The girl further stated that her father indulged in sexual acts with her from the front as well as from the back, and that he used to lick all over her body. She also stated that at the time of commission of the above sordid acts he used to bite her lips and breasts. According to her, the aforesaid excruciating memories, which cropped upon her mind, was the reason why she wept out in the classroom.

3. On the basis of the above statement of that little girl, the Feroke Police registered Crime No.496/2014 against the accused who is the appellant herein. He was arrested and remanded to judicial custody. The statement of the survivor girl was recorded by a lady Magistrate. The girl was subjected to medical examination, which revealed that her hymen was ruptured at 4'O

clock position. The Investigating Officer took the accused in Police custody and subjected him to potency test, which revealed that there was nothing that prevented him from indulging in sexual intercourse. After the completion of the investigation, the Inspector of Police, Cheruvannoor, who was the Investigating Officer, laid the final report before the Sessions Court (Special Court), Kozhikode, in respect of the offences under Section 376 of the Indian Penal Code and Sections 3(a)(d) read with Section 4, and Section 5(l)(m)(n) read with Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO' Act). The learned Sessions Judge took cognizance of the offence and issued a process against the accused. The case was later on made over to the Additional Sessions Court-I, Kozhikode, which was designated as Children's Court.

4. The learned Additional Sessions Judge-I, Kozhikode, who presided over the Children's Court, after hearing the learned Public Prosecutor and the learned counsel for the accused/appellant, framed charge in respect of the offences under Sections 376 and 377 of the Indian Penal Code, and Sections 3(a)(d) read with Section 4, and Section 5(l)(m)(n) read with Section 6 of the POCSO Act against the accused. The charge was read over and explained to the accused to which he pleaded not guilty. In the trial which followed, 12 witnesses were examined from the part of the prosecution as

PW1 to PW12 and 13 documents were marked as Exts.P1 to P13. After the close of the prosecution evidence, the statement of the appellant/accused was recorded under Section 313(1)(b) of the Code of Criminal Procedure. The accused/appellant denied the accusations and stated that he has been falsely implicated in the case at the instance of his wife. After hearing both sides and finding that there is no scope for acquittal under Section 232 Cr.P.C., opportunity was provided to the appellant/accused for adducing defence evidence. The appellant/accused did not opt to adduce any oral or documentary evidence. After hearing both sides and evaluating the evidence on record, the learned Additional Sessions Judge arrived at the finding that the appellant/accused was guilty of Sections 376 and 377 of the Indian Penal Code, and Section 3(a) read with Section 4 and Section 5(l)(m)(n) read with Section 6 of the POCSO Act, and convicted him thereunder. He was sentenced to undergo rigorous imprisonment for seven years for the offence committed under Section 377 I.P.C., and two separate life imprisonments for the offence committed under Section 3(a) read with Section 4 and Section 5(l)(m)(n) read with Section 6 of the POCSO Act, and to pay a fine of Rs.1,00,000/- with a default clause of rigorous imprisonment for two years. The learned Additional Sessions Judge did not award any separate sentence for the offence under Section 376 I.P.C found against the appellant/accused. It was also directed

that, if the fine amount is realized, it shall be given as compensation to the survivor girl under Section 357(1)(b) of the Code of Criminal Procedure. The appellant/accused was acquitted of the charge under Section 3(d) read with Section 4 of the POCSO Act.

5. Aggrieved by the aforesaid conviction and sentence, the appellant has approached this Court with this appeal, contending, inter alia, that the Trial Court went wrong in relying on the solitary evidence of the survivor girl who was examined as PW1, in arriving at the findings against him. It is further contended that the Trial Court went wrong in relying on Ext.P5 certificate issued by the Headmaster of the school concerned, for concluding that the survivor was a child within the meaning of Section 2(d) of the POCSO Act. It is also stated that none of the offences under the POCSO Act could be slapped against him in the absence of reliable evidence to show that the survivor girl came under the definition of 'child' under the POCSO Act. As regards the findings of the Trial Court in respect of the commission of offence under Section 376 I.P.C and Section 377 I.P.C, the appellant/accused would contend that the evidence of the survivor girl as PW1 ought not have been relied on by the Trial Court due to inordinate delay in preferring the complaint, which is the manifest indication of a false case foisted at the instance of his wife with whom he was having an estranged relationship which

eventually resulted in a divorce.

6. Heard Adv.Sri.Jithin Babu.A, the learned counsel for the appellant, and Adv.Mr.Alex M. Thombra, the learned Senior Public Prosecutor.

7. PW1, the survivor of the offence, stated about the persistent acts of rape she had to suffer from the appellant right from the days when she was studying in 4th Standard. Though she did not state the specific dates and time of commission of offence, the nature of the crime, running over a period of several years, making it impossible to specify the date and time of each and every instance, is writ large in her evidence. PW1 also stated the reason why she did not disclose the disgusting ordeal to anybody till 09.07.2014, when she happened to burst out venting her innermost feeling and by blurting out crying in class room while thinking about it. The first information statement given by her to a Woman Sub Inspector (PW11) is marked as Ext.P1, and the statement under Section 164 of the Code of Criminal Procedure given to the Magistrate, is marked as Ext.P2.

8. PW2, the mother of the survivor girl, stated that she came to know about the incident only on 09.07.2014, when the teacher of PW1 called her to the school and informed about the harrowing experience revealed by PW1. According to the above witness, PW1 also told her thereafter about the sexual misdeeds of her father, and stated that it was due to threat that she

did not disclose it so far to her.

9. PW3 is a neighbour of the survivor girl. According to her, PW2 used to request her to have a watch on her children when she left out for work. PW3 also stated that, once PW1 had informed her that she suffered some abrasion upon her thighs. At that time, PW3 is said to have advised PW1 to wash the affected portion with hot water.

10. PW4 is an attestor to Exts.P3 and P4 mahazars prepared by the investigating agency.

11. PW5 is the Counsellor associated with the school where PW1 was studying. She stated that she had to conduct counselling upon PW1 on 09.07.2014 leading to the disclosure of the sordid episode of sexual exploitation suffered by PW1 at the hands of her father. She also stated that she came to know from the above counselling that PW1 was under the threat of her father, and that she had once attempted to commit suicide.

12. PW6 is the Headmaster of the School where PW1 was studying. The certificate issued by PW6 in respect of the date of birth of PW1, is marked as Ext.P5.

13. PW7 is the Assistant Professor and Assistant Police Surgeon, Department of Forensic Medicine, Medical College Hospital, Kozhikode, who conducted the potency test of the appellant and issued Ext.P6 certificate.

14. PW8 is the Assistant Professor of Department of Gynaecology, Medical College Hospital, Kozhikode, who had examined the survivor and issued Ext.P7 certificate. PW8 stated that the hymen of PW1 was torn to 4 O' clock position, and that the vaginal dilation found was consistent with the insertion of male organ.

15. PW9 is the Village Officer, Kadalundi who issued Ext.P8 site plan, and PW10 is the Secretary of Kadalundi Grama Panchayat, who issued Exts.P9 and P10 ownership certificates of the houses where PW1 was residing.

16. PW11 is the Sub Inspector of Police, Women Cell, Kozhikode who recorded Ext.P1 First Information Statement of PW1. PW12 is the Circle Inspector, Cheruvannoor, who conducted the investigation in this case and laid the final report. The arrest memo prepared by PW12 at the time of arrest of the appellant on 11.07.2014, is marked as Ext.P11, and the report about the address of the appellant is marked as Ext.P12. The First Information Report prepared in connection with this crime is marked as Ext.P13 through PW12.

17. The learned counsel for the appellant vehemently argued that the prosecution had miserably failed to establish any of the offences under the POCSO Act attributed to the appellant, since there is absolutely no reliable evidence to come to the conclusion that the survivor girl is a child as defined

under the POCSO Act. As per Section 2(d) of the POCSO Act, 'child' means any person below the age of 18 years. The evidence let in by the prosecution to prove the age of the survivor girl is Ext.P5 certificate issued by PW6, the Headmaster of the Higher Secondary School, where that girl was studying. Ext.P5 certificate which is dated 08.08.2014 is extracted as follows :

> *"<u>SCHOOL GOING CERTIFICATE</u>*
>
> *Certified that Kum.xxx (Ad No.10225), D/o.xxx, xxxxxxxxxxxxxxxx (H), xxxxxxx (P.O), xxxxxxxxxxxx is a regular student of this school since 29.05.2014. She is now studying in Std.VIII-B. Her date of birth is 13.02.2002 (Thirteenth February Two Thousand Two), as per the school records kept in this office."*

18. According to PW6, he had issued Ext.P5 certificate, after verifying the school admission register. The aforesaid certificate is neither a matriculation or equivalent certificate nor the date of birth certificate issued from the school where the student first attended. It is explicit from Ext.P5 that the survivor girl joined the said school as a regular student only on 29.05.2014, just two months and ten days prior to the date of issuance of that certificate. Thus, it is apparent that the said certificate is not issued from the school first attended by that child. Going by the provisions contained in Rule 12 of the Juvenile Justice (Care & Protection of Children) Rules, 2007, the age determination enquiry shall be conducted by the Authority concerned by seeking evidence by obtaining the matriculation or equivalent certificates, if

available, and in the absence whereof, the date of birth certificate from the school (other than play school) first attended by the child. In case where the aforesaid two documents are not available, the aforesaid Rule provides for accepting the birth certificate given by a Corporation or a Municipal authority or a Panchayath.

19. In **Jarnail Singh v. State of Haryana [(2013) 7 SCC 263]**, the Apex Court held that even though the rules framed under the Juvenile Justice (Care & Protection of Children) Act, 2000 apply strictly only for determination of age of a child in conflict with law, the statutory provisions therein can certainly be the basis for determining the age of even a child, who is a survivor of crime, for there is hardly any difference insofar as the issue of minority is concerned, between a child in conflict with law and a child who is a survivor of a crime. The aforesaid principle has been followed by a Single Judge of this Court in **Maju @ Manu v. State of Kerala [2020 3 KHC 22]** and a Division Bench of this Court in **Santhosh v. State of Kerala [2023 KHC 674]**.

20. As far as the present case is concerned, the prosecution did not care to procure the date of birth certificate from the school where the survivor girl had first attended. Ext.P5 certificate does not conform to the date of birth certificate as required under Rule 12 of the Juvenile Justice (Care & Protection

of Children) Rules, 2007. Neither the survivor girl, nor her mother and other school staff, who were examined as PW1, PW2, PW5 and PW6, state anything about the age of that girl who was said to have been subjected to serial rape by her father, the appellant herein. The mere statements of those witnesses that PW1 was studying in VIIIth Standard at the time of report of the crime, and that she was being subjected to sexual exploitation from IVth Standard onwards, are not sufficient to establish the vital requirement that the said girl would come under the definition of 'çhild' as envisaged under POCSO Act. That being so, the primary requirement to be established for bringing out the offence under Section 3(a) read with Section 4 and Section 5(l)(m)(n) read with Section 6 of the POCSO Act, is lacking in the evidence adduced by the prosecution. In the above circumstances, it cannot be held that the prosecution has succeeded in establishing the aforesaid offences charged against the appellant. To that extent, the impugned judgment of the Trial Court is liable to be interfered in this appeal.

21. Now, the question which remains to be considered in this appeal is with regard to the applicability of Section 377 I.P.C. and Section 376 I.P.C. in respect of the horrendous acts alleged against the appellant. For the applicability of Section 377 I.P.C., the prosecution has to establish that the accused voluntarily indulged in carnal intercourse against the order of nature

with any man, woman or animal. As far as the present case is concerned, the testimony of PW1 is confined to the acts of sexual intercourse perpetrated upon her by the accused/appellant, who is none other than her father. True that, the sexual relationship by a father upon her daughter is a thing which is absolutely unnatural. However, what Section 377 I.P.C. contemplates is the vulgarity and un-naturality in the act of sexual intercourse which could be termed as carnal and against the order of nature, and not in respect of the un-naturality due to the relationship between the persons indulging in the said act. Therefore, the mere fact that the appellant/accused herein is the father of the survivor, does not bring the incestual sex perpetrated by him upon her daughter, within the purview of Section 377 I.P.C.

22. It seems that the learned Additional Sessions Judge found the accused guilty of the charge under Section 377 I.P.C. in the light of the statement of PW1 that her father used to indulge in intercourse from front and back. However, the statement of PW1 in the above regard does not bring out anything pertaining to anal intercourse perpetrated by her father. Nor does the certificate of medical examination of the survivor girl, which is marked as Ext.P7, disclose the indication of any injury upon her body which would confirm carnal intercourse against the order of nature. The prosecution did not bring out anything from the evidence of PW8, the Medical Officer who

examined PW1, as to any marks of injury which would establish carnal intercourse perpetrated upon her body. In the above circumstances, it is not possible to conclude that the offence under the caption 'unnatural offences' envisaged under Section 377 I.P.C is attracted in the facts and circumstances of this case. Needless to say, that the trial court went wrong in arriving at the finding that the appellant/accused committed offence under Section 377 I.P.C.

23. Now the cardinal aspect to be looked into is whether the evidence adduced by the prosecution would convincingly establish the offence of rape envisaged under Section 375 I.P.C against the appellant/accused. As already stated above, the survivor girl testified before the trial court as PW1 about her horrendous experience of sexual exploitation by her father right from the time when she was studying in 4th standard. According to her, she was totally ignorant during initial days about the above wretched acts which her father had been doing upon her body during the occasions when her mother was not there at home. However, she is said to have realised at the time when she was studying in 6th Standard that the aforesaid brutal acts were sexual intercourse perpetrated upon her by the appellant/accused. As regards the reason why she did not disclose it to her mother or any other person during that time, PW1 would state that the appellant/accused threatened her that if she told about it to anybody else, he would do away with the life of her mother

and sister. According to her, she feared that her mother might commit suicide if she becomes aware of this act of her father. PW1 also stated that her attempts to resist the above ghastly acts of her father, were foiled by him by smothering her by pressing pillows upon her face and getting hold of her neck. PW1 has stated that the appellant/accused continued the aforesaid wretched acts on many occasions exploiting the absence of her mother at home, and that the last instance in the above regard was while she was studying in 7th Standard.

24. The learned counsel for the appellant/accused made a futile attempt to show that the statement of PW1 does not bring out the ingredients of the offence of rape as envisaged under Section 375 I.P.C. According to the learned counsel for the appellant, the statement of PW1 would, at the most, show that the appellant/accused used to press his penis upon the outer part of urinary system of her body, and that the above act cannot be termed as penetration as envisaged under Section 375 I.P.C. We are not inclined to accept the above argument of the learned counsel for the appellant, since the testimony of PW1 would clearly bring out that the sordid acts perpetrated by the appellant upon her body was nothing other than rape. PW1 has categorically stated that her father used to disrobe himself, remove her dress, and then laid over her body with his organ meant for urination pressed against

her organ for urination. The above statement of PW1 would clearly indicate that the act which the appellant perpetrated upon her body was nothing but insertion of his penis into her vagina. That apart, PW1 has also stated that she had the experience of thick fluid fallen upon her body after the above acts were done by her father. It cannot be expected that an adolescent like PW1 could state the act of rape perpetrated upon her body by the appellant in any other apt words. Furthermore, PW8 stated that the hymen of the child was torn at 4 O' clock position which indicates penetration.

25. The learned counsel for the appellant made an effort to show that the statement of PW1 about the act of the appellant/accused indulging in persistent rape for a period of several years, is not in conformity with the evidence of PW8, the Medical Officer, who stated that the vagina of the survivor admitted only one finger, and that in the event of successive rapes as stated by PW1, her vagina would have been in a dilated position admitting more fingers. The learned counsel for the appellant/accused also argued on the basis of the evidence of PW8 that rupture of hymen is common for those girls who indulge in sports activities, and that the mere fact that the medical examination of PW1 revealed that her hymen was torn to 4 O' clock position cannot by itself be an indication of sexual intercourse. We are unable to accept the aforesaid arguments advanced by the learned counsel for the

appellant. As regards the contention that the condition of the vagina of PW1 admitting only one finger is an indication against the case of the prosecution of successive rape, it has to be stated that as per the definition of rape as contained in Section 375 I.P.C, even the slightest penetration is sufficient to constitute the offence. It is not necessary for the prosecution to show that the assailant had inserted his organ to the full extent to the vagina of the survivor for establishing the offence of rape. In cases where the assailants do not resort to full penetration, the vagina of the survivor may not be stretched to such an extent to admit more than one finger. Therefore, the argument advanced by the learned counsel for the appellant in the above regard is totally baseless. We deem it apposite to state here that the test of ascertaining rape on the basis of the criteria of the capacity of the vagina of the survivor to admit multiple fingers, has been strongly deprecated by the Apex Court in **State of Jharkhand v. Shailendra Kumar Rai [(2022) 14 SCC 299]**. In the aforesaid case, the Hon'ble Supreme Court made the following parting remarks in paragraph No.63 of the judgment.

> *"63. While examining the victim, the Medical Board conducted what is known as the "two-finger test" to determine whether she was habituated to sexual intercourse. This Court has time and again deprecated the use of this regressive and invasive test in cases alleging rape and sexual assault. This so-called test has no scientific basis and neither proves nor*

> *disproves allegations of rape. It instead re-victimises and re-traumatises women who may have been sexually assaulted, and is an affront to their dignity. The "two-finger test" or per vaginum test must not be conducted."*

Accordingly, the Apex Court directed the Union Government as well as the State Governments to ensure that the guidelines formulated by the Ministry of Health and Family Welfare in connection with the examination of rape survivors shall be circulated through all Government and Private Hospitals and to conduct workshops for health providers to communicate the appropriate procedure to be adopted while examining survivors of sexual assault and rape. It was also directed that the curriculum in medical schools shall be renewed with a view to ensuring that the "two finger test" or per vaginum examination is not prescribed as one of the procedures to be adopted while examining survivors of sexual assault and rape. In the light of the aforesaid directions of the Apex Court, it is not possible for a person accused of the offence of rape to contend that he has to be exonerated since the "two finger test" done on the survivor rendered results in his favour.

26. As regards the contention of the learned counsel for the appellant that the indication in Ext.P7 medical report about the old tear in the hymen of the survivor cannot be considered as a consequence of sexual intercourse since girls who are active in sports are likely to have such condition, it is not possible to accept the above argument since there is absolutely no case for

the appellant/accused that PW1 was actively involved in any type of sports events. Neither the survivor who was examined as PW1, nor her mother and teachers who were examined as PW2, PW5 and PW6 were asked during cross-examination that the survivor girl was actively involved in any sports activities. In the absence of any evidence which would point to such sports activities of PW1 which might have caused the rupture of her hymen, the argument of the learned counsel for the appellant in the above regard cannot be accepted.

27. The learned counsel for the appellant made a futile attempt to show that there are contradictions in the testimony of PW1 which would render it untrustworthy. We are unable to find any material contradiction in the testimony of PW1 which would render it unacceptable in evidence. It is true that PW1 has stated during cross-examination that though she disclosed to the Investigating Officer about an instance when her father sexually exploited her while she was laid up due to a fracture of her leg, she had nothing to say if it is not found in her statement. So also, she had confided during cross-examination that she had disclosed to the Investigating Officer about an instance when her father sexually tortured her while she had to share bed with him in the same cot in the veranda of her house while there was some plastering work going on in her house, but she had nothing to say if it is not found in the statement recorded by the Investigating Officer. Another

contradiction relied on by the defence counsel is the failure of PW1 to state to the Investigating Officer about the instance when her younger sister happened to knock at the door hearing her cries, which resulted in her younger sister being scared away by the appellant. The above omissions brought out from the cross-examination of PW1, cannot be termed as material discrepancies affecting the substratum of the case. Therefore, the argument advanced by the learned counsel for the appellant challenging the veracity of the evidence of PW1 due to the aforesaid contradictions, is bereft of merit.

28. As a last and final endeavour to discredit the evidence of PW1, the learned counsel for the appellant canvassed the point that the estranged relationship between the appellant and his wife had resulted in dissolution of their marriage, and that his wife PW2, who is the mother of the survivor, has foisted a false case against him by exerting undue influence upon PW1. We are not inclined to accept the above argument of the learned counsel for the appellant in view of the evidence of PW1, which on the face of it would reveal that her statements came out of a broken heart, and that it did not reflect the frailties of a tutored witness.

29. It is true that the whole case of the prosecution rests upon the solitary evidence of PW1 about the sexual perversities which she had to suffer from her father. There is also delay of several years in lodging a complaint

against the successive rape committed by the appellant/accused upon PW1. But the above two aspects cannot be said to be of such a nature as to render the prosecution story unbelievable. Having regard to the nature of the offence involved in this case, which took place within the four walls of the home of the survivor at a time when her mother was out for her work, it would be preposterous to expect any other ocular evidence pointing to the offence alleged against the appellant. So also, the delay in reporting the case cannot be termed as fatal in view of the nature of the relationship between the offender and the survivor, and the peculiar circumstances under which the offender had committed the crime. The minor discrepancies in the evidence of PW1 in connection with her omission to state to the Investigating Officer certain instances of sexual exploitation of her father, are not of such a nature capable of shattering the credibility of the evidence of that witness.

30. In **Dildar Singh v. State of Punjab [(2006) 10 SCC 531]**, the Apex Court, in connection with the issue of delay in lodging FIR in rape cases observed as follows:

> *"................ This Court has observed in several decisions that the courts cannot overlook the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to Police and complain about the incident which*

concerns the reputation of the prosecutrix and the honour of her family. A girl in a tradition-bound non-permissive society would be extremely reluctant even to admit that any incident, which is likely to reflect upon her chastity, had occurred, being conscious of the danger of being ostracized by the society or being looked down by the society. Her not informing anyone about incident in the circumstances cannot detract from her reliability. In normal course of human conduct an unmarried girl would not like to give publicity to the traumatic experience she had undergone and would feel terribly embarrassed in relation to the incident to narrate such incident. Overpowered, as she may be, by a feeling of shame her natural inclination would be to avoid talking to anyone, lest the family name and honour is brought into controversy. Thus, delay in lodging the First Information Report cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same on the ground of delay in lodging the First Information Report. Delay has the effect of putting the court on guard to search if any explanation has been offered for the delay and, if offered, whether it is satisfactory."

31. In **State of H.P v. Sanjay Kumar [(2017) 2 SCC 51]**, a case where a nine year old girl was subjected to continuous rape by her uncle, and subjected to serious threat, which compelled her not to disclose the incidents to anybody for a period of three years till a gynaecologist, who examined her on complaint of abdominal pain doubted sexual exploitation and enquired about it leading to the disclosure of the persistent rapes suffered by her years before; the Hon'ble Supreme Court held on the challenge of delay in lodging

F.I.R as follows:

> *"…………. It happened with a nine year old child who was totally unaware of the catastrophe which had befallen her. Her mental faculties had not developed fully; she was in the age of innocence, unaware of the dreadful consequences. Further, at the time when she was being sexually assaulted, her mouth was gagged so that she was not able to scream and after the incident she was threatened not to disclose this incident to anybody. In fact, she kept mum out of this fear. It is quite understandable that a nine year old child, after undergoing traumatic experience and inflicted with threats, would be frozen with fear and she could not find voice to speak against her uncle. In cases of incestuous abuse, more often, silence is built into the abuse. Incident came to light on the tragedy struck on the prosecutrix only when her mother noticed that she was continuously suffering from stomach-ache and was, therefore, taken to a gynaecologist for her treatment. But for the above, matter may not have come to light…………."*

In the aforesaid case, the Apex Court stressed the need for the courts dealing with such cases of sexual abuse to see whether the explanation offered for the delay in lodging the F.I.R is satisfactory or not, and if the explanation is found to be convincing and realistic, to ignore the delay and arguments advanced on the basis of it, to challenge the evidence tendered by the survivor. Accordingly, after discussing various precedents on that point, it was held in paragraph No.27 of the said decision as follows :

> "*Notwithstanding the fact that the Trial Court accepted the explanation for delay as satisfactory by giving detailed reasons, we are dismayed to find that the High Court has been swayed by this delay in reporting the matter with omnibus statement that it is not satisfactorily explained without even an iota of discussion on the explanation that was offered by the prosecution in the form of testimonies of PW1 and PW2.*"

32. The facts and circumstances of the present case are identical to the facts and circumstances of **Sanjay Kumar** (supra). In that view of the matter, it has to be held that the delay of about one year from the last incident of rape to which PW1 was said to have been subjected to while she was studying in VIIth standard, cannot be termed as a vitiating factor rendering the prosecution case unsustainable.

33. It is well-settled by a catena of decisions of the Apex Court that corroboration is not a *sine qua non* for conviction in a rape case. In **State of H.P. v. Manga Singh [(2019) 16 SCC 759]**, the Hon'ble Supreme Court, on the point of corroboration in rape cases, held as follows:

> "*The conviction can be sustained on the sole testimony of the prosecutrix, if it inspires confidence. The conviction can be based solely on the solitary evidence of the prosecutrix and no corroboration be required unless there are compelling reasons which necessitate the courts to insist for corroboration of her statement. Corroboration of the testimony of the prosecutrix is not a requirement of law, but a guidance of prudence under the*

given facts and circumstances. Minor contractions or small discrepancies should not be a ground for throwing the evidence of the prosecutrix."

34. In **Sham Singh v. State of Haryana [(2018) 18 SCC 34]**, the Apex Court observed that testimony of the victim is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of the victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found reliable. It is further observed thereunder that seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury.

35. In **State (NCT of Delhi) v. Pankaj Choudhary [(2019) 11 SCC 575]**, the Apex Court held that as a general rule, if credible, conviction of the accused can be based on sole testimony without corroboration. It is further observed and held that sole testimony of the prosecutrix should not be doubted by the court merely on the basis of assumptions and surmises.

36. After analysing a series of judgments on the point, the Apex Court held in **Ganesan v. State [(2020) 10 SCC 573]** that there can be a conviction on the sole testimony of the victim/prosecutrix and the deposition of the prosecutrix if found to be trustworthy, unblemished, credible and her evidence is of sterling quality.

37. On the challenge based on contradictions and discrepancies in the evidence of the prosecutrix in rape cases, the Apex Court held in **State of Punjab v. Gurmit Singh [(1996) 2 SCC 384]** that in cases involving sexual harassment, molestation, etc., the court is duty-bound to deal with such cases with utmost sensitivity and that minor contradictions or insignificant discrepancies in the statement of a prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. It is further observed in the aforesaid decision that the evidence of the victim of sexual assault is enough for conviction and it does not require any corroboration unless there are compelling reasons for seeking corroboration.

38. In the light of the law laid down consistently by the Hon'ble Supreme Court in the aforesaid decisions, which are only some among the precedents on the points discussed thereunder, the challenge raised by the appellant on the ground of delay in reporting the offence, absence of evidence to corroborate the testimony of PW1 and the minor discrepancies of omission to state some incidents to the Investigating Officer, are of no consequence.

39. As a conclusion to the discussions aforesaid, we have no hesitation to hold that the prosecution has successfully established that the accused/appellant had committed incestual rape upon PW1, his daughter, for several years, right from the period when she was studying in IVth standard.

40. The offence of rape found to have been committed by the appellant/accused under Section 376 I.P.C. is punishable with imprisonment which may extend to imprisonment for life, and fine. The judgment of the Trial Court would show that the appellant/accused was awarded a punishment of life imprisonment and a fine of Rs.1,00,000/- under Section 3(a) read with Section 4 and Section 5(l)(m)(n) read with Section 6 of the POCSO Act. Having regard to the nature of the crime and the other facts and circumstances of the case, we deem it appropriate to impose the very same sentence upon the appellant/accused for the offence of rape punishable under Section 376 I.P.C. found to have been committed by him. The conviction and sentence of the appellant/accused in respect of all other offences will stand set aside for the reasons stated in paragraph Nos.17 to 22 hereinabove.

Accordingly, the appeal is allowed in part as follows:

(i) The conviction of the appellant/accused for the offences under Section 377 I.P.C., Section 3(a) read with Section 4 and Section 5(l)(m)(n) read with Section 6 of the POCSO Act, and the sentence imposed thereunder by the Trial Court, are hereby set aside.

(ii) The conviction of the appellant/accused for the offence under Section 376 I.P.C. by the Trial Court, is upheld.

(iii) The appellant/accused is sentenced to imprisonment for life and fine Rs.1,00,000/- (Rupees One Lakh only) for the

offence of rape under Section 376 I.P.C. found to have been committed by him. In the event of default of payment of fine, the appellant/accused will undergo rigorous imprisonment for a further term of one year.

(iv) The set off granted by the Trial Court will be reckoned with reference to remission, if any, granted by the appropriate Government under Section 432 of the Code of Criminal Procedure.

(v) The direction of the Trial Court for payment of compensation, out of the fine amount, under Section 357(1)(b) of the Code of Criminal Procedure, is also upheld.

Sd/-
RAJA VIJAYARAGHAVAN V,
JUDGE

Sd/-
G.GIRISH,
JUDGE

jsr/vgd