IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MR. JUSTICE JOHNSON JOHN

WEDNESDAY, THE 7TH DAY OF FEBRUARY 2024 / 18TH MAGHA, 1945

CRL.A NO. 1321 OF 2016

CRIME NO.135/2015 OF Puthenvelikkara Police Station, Ernakulam

AGAINST THE JUDGMENT IN SC 203/2016 OF ADDITIONAL DISTRICT COURT & SESSIONS COURT (VIOLENCE AGAINST WOMEN & CHILDREN), ERNAKULAM

APPELLANT/2ND ACCUSED:

SILVESTER PIGARUZ

BY ADVS.
Franklin Arackal A.R
I.J.AUGUSTINE(K/001547/2000)

RESPONDENT/COMPLAINANT:

KERALA STATE REP.BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA.

BY ADV SMT.AMBIKA DEVI S, SPL.PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING COME UP FOR ORDERS ON 07.02.2024, ALONG WITH CRL.A.160/2017, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MR. JUSTICE JOHNSON JOHN

WEDNESDAY, THE 7TH DAY OF FEBRUARY 2024 / 18TH MAGHA, 1945

CRL.A NO. 160 OF 2017

Crime No.135/2015 OF Puthenvelikkara Police Station, Ernakulam

AGAINST THE JUDGMENT IN SC 203/2016 OF ADDITIONAL DISTRICT COURT & SESSIONS COURT (VIOLENCE AGAINST WOMEN & CHILDREN), ERNAKULAM

APPELLANT/ACCUSED NO.1:

FR.EDWIN PIGAREZ

BY ADVS.
SRI.S.SREEKUMAR (SR.)
SRI.R.GITHESH
SRI.P.MARTIN JOSE
SRI.M.A.MOHAMMED SIRAJ
SRI.MANJUNATH MENON
SRI.P.PRIJITH
SRI.THOMAS P.KURUVILLA

RESPONDENT:

STATE OF KERALA
REPRESENTED BY ITS PROSECUTOR, HIGH COURT OF KERALA ERNAKULAM

BY ADV SMT.AMBIKA DEVI S, SPL.PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING COME UP FOR ORDERS ON 07.02.2024, ALONG WITH CRL.A.1321/2016, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.B.SURESH KUMAR & JOHNSON JOHN, JJ.

Crl.Appeal Nos.1321 of 2016 and 160 of 2017

Dated this the 7th day of February, 2024

JUDGMENT

P.B.Suresh Kumar, J.

The appellant in Criminal Appeal No.160 of 2017 is the first accused and the appellant in Criminal Appeal No.1321 of 2016 is the second accused in S.C.No.203 of 2016 on the files of the Additional Sessions Court, Ernakulam (Special Court for the trial of cases relating to Atrocities and Sexual Violence against Women and Children). Among them, the appellant in Criminal Appeal No.160 of 2017 stands convicted for the offences punishable under Sections 375(a) read with Section 376(2)(i) and (n) and 375(b) read with Section 376(2)(i) of the Indian Penal Code (IPC). He also stands convicted for the offences punishable under Sections 3(a) and 3(b) read with

Section 4, Section 5(l) read with Section 6, Section 9(l) read with Section 10 and Section 11(i) and 11(ii) read with Section 12 of the Protection of Children from Sexual Offences Act (POCSO Act). The appellant in Criminal Appeal No.1321 of 2016 stands convicted for offence punishable under Section 212 IPC. The appellants were also sentenced for the said offences except for the offences found to have been committed by the first accused under Sections 3(a) and 3(b) read with Section 4 and Section 5(l) read with Section 6 of the POCSO Act in the light of the provision contained in Section 42 of the POCSO Act. The appellants are aggrieved by their conviction and sentence in the said cases.

2. The accused are brothers. Among them, the first accused was the Vicar of a Roman Catholic Church during 2014 and 2015. The victim was a parishioner attached to the Church of which the first accused was the Vicar during the said period. The victim was studying in Eighth Standard then. 28.03.2015 was a Saturday preceding the Palm Sunday. The

victim attended the morning prayers held in the Church on 28.03.2015 along with her mother. After the prayers, the victim had gone missing for sometime and on search, her mother found that the victim had been to the presbytery situated on the upper floor of the parish hall attached to the Church in the compound of the Church itself where the first accused was residing. The mother of the victim then went to the presbytery to enquire with the first accused as to the purpose for which the victim had been there. As the mother grew suspicious, she questioned the victim further and on such questioning, it was revealed to her by the victim that the victim was sexually assaulted by the first accused. Consequently, after informing the matter to the authorities of the Diocese including the Bishop, on 01.04.2015, the mother of the victim preferred a complaint to Puthenvelikkara Police alleging that the victim has been sexually assaulted by the first accused. A case was registered by Puthenvelikkara Police on 01.04.2015 based on the said complaint and after investigation, a final report has

been filed in the case disclosing, among others, the offences found to have been committed by accused Nos.1 and 2 as referred to above.

3. In the final report, there were four other accused also. The accusation in the final report against the first accused was that when the victim used to go the Church for prayers, the first accused would invite her to the presbytery with the intention of assaulting and harassing her sexually and that he committed the same at the office room and also at the bedroom attached to the presbytery on various occasions during 2014 and 2015. It was also the accusation in the case that the first accused committed rape on the victim on several occasions between 12.01.2015 and 28.03.2015. The accusation against the fourth accused in the final report, the doctor who examined the victim before reporting the offences to the police, was that though the doctor had knowledge of the offences committed by the first accused, failed to report the same to the police.

4. The Special Court, after taking the final report

into file, framed charges against the first accused for offences punishable under Sections 376(2)(i) and (n) of IPC as also Sections 3(a) and (b) read with Section 4, Section 5(l) read with Section 6, Section 9(l) read with Section 10 and Section 11(i) and (ii) read with Section 12 of the POCSO Act. Charges were framed against accused Nos.2 and 3 for the offences punishable under Section 212 read with Section 34 IPC and charges were also framed against accused Nos.5 and 6 for offences punishable under Section 212 read with Section 34 IPC and under Section 19(1) read with Section 21 of the POCSO Act. As far as the fourth accused is concerned, the charge against her was for the offence punishable under Section 19(1) read with Section 21 of the POCSO Act.

5. As the accused denied the charges, the prosecution examined 40 witnesses as PWs 1 to 40 and proved through them 88 documents as Exts.P1 to P88. MOs 1 to 12 are the material objects identified by the witnesses. Exts.D1 to D3 series are the documents proved by the accused during the

prosecution evidence. Thereupon, the accused were questioned by the Special Court as provided under Section 313 of the Code and they denied the charges. The stand taken by the first accused when questioned under Section 313 of the Code was that the victim was showing some sort of affection towards the first accused and that he ignored the same treating it to be as an infatuation on her part. The first accused, however admitted during his questioning under Section 313 of the Code that on 28.03.2015, the victim had come to the presbytery after the morning prayers and also that after sometime, her mother came to the presbytery with the victim to ascertain as to the purpose for which the victim came to the presbytery earlier that day. As the Special Court did not find the case to be one fit for acquittal under Section 232 of the Code, the accused were called upon to enter on their defence. The accused, however chose, not to adduce any evidence. The Special Court, in the circumstances, on an appraisal of the materials on record, found the first and the second accused guilty of the offences

referred to in the opening paragraph of this judgment and convicted them. Among others, the first accused was sentenced to undergo imprisonment for the remainder of his natural life and the second accused was sentenced to undergo simple imprisonment for one year. The remaining accused except accused No.4 were acquitted. Though the fourth accused was convicted, she was released under Section 3 of the Probation of Offenders Act, 1958. As indicated, accused Nos.1 and 2 are aggrieved by the conviction and the sentence inflicted on them in the said case.

6. The point that arises for consideration is whether the conviction and sentence of accused Nos.1 and 2 are sustainable in law.

7. Heard the learned counsel for accused Nos.1 and 2 as also the learned Public Prosecutor.

8. Before referring to the various arguments advanced by the learned counsel for the accused, it is necessary to refer to the evidence let in by the prosecution to

prove the facts in issue. The witness examined as PW1 is the victim herself. PW1 deposed that as the first accused was the Vicar of her parish church, she had acquaintance with him as she used to confess before him; that one day after the confession, the first accused directed her to meet him, and when she met him at the Church, the first accused called her to his room; that when she went to his room accordingly, the first accused embraced, kissed and touched her body. It was also deposed by PW1 that even though she did not go to the first accused for making confessions for sometime thereafter, she was called by the first accused to the presbytery when she went to the Church for Catechism class and when she went to the presbytery accordingly, the first accused embraced and kissed her again at his office room and such similar occurrences took place thereafter during the month of July also. It was also deposed by PW1 that since the first accused informed her that he will not repeat such things later when he met her once at the Church, she went to the first accused for confession again and

the first accused called her to his room thereafter also. PW1 deposed that when she went to his room on that occasion, the first accused removed his clothes, embraced her and then required her to suck his genital organ. PW1 deposed that she did not do so and left from there. It was deposed by PW1 that later on 12.01.2015, the first accused called her to his room and when she went to his room, the first accused inserted his finger into her vagina. PW1 also deposed that on another day, during the month of February, at about 8.30 a.m., when she was going to the school through the way near the Church, the first accused called her to his room and when she went there, the first accused took her to his bedroom and showed her a sex video in a laptop and insisted her to do as shown in the video. PW1 deposed that the first accused thereupon removed her dress, laid her on the bed and inserted his penis into her vagina by lying over her body. It was also deposed by PW1 that the first accused had sex with her in the similar manner on several occasions during the month of March in his room thereafter. It

was also deposed by PW1 that the first accused did so with her last on 28.03.2015, after the morning prayer. PW1 deposed that on 28.03.2015, her mother having found that she had been to the room of the first accused, took her to the first accused to enquire with him as to the purpose for which she had been there and since her mother was not convinced with the explanation offered by the first accused, the victim was questioned by her mother on returning home and it is then that she informed her mother the true facts. PW1 deposed that she was subjected to medical examination once before the registration of the case, and once after the registration of the case. PW1 also deposed that she gave Ext.P1 statement before the Magistrate. PW1 identified the first accused in the court. Ext.P1 is the statement given by PW1 under Section 164 of the Code, and the evidence tendered by PW1, insofar as it relates to the core of the prosecution allegations is consistent, with her version in Ext.P1. Even though the learned counsel for the first accused cross-examined PW1 thoroughly, the attempt during

the cross-examination was to establish that PW1 was deposing falsehood in Court, and if at all there was any physical relationship between the victim and the first accused, it was consensual. The suggestion made to PW1 during cross-examination was that since the first accused refused her love proposal, the victim has deposed falsely against him.

9. PW2 is the mother of the victim. PW2 gave evidence on similar lines of the evidence given by PW1 as regards the events that took place on 28.03.2015 after the victim was traced out by PW2. In addition, PW2 also deposed that she informed the matter on the same day itself to the Bishop of the Diocese and to a few priests as also a nun known to her and submitted Ext.P2 complaint to the police on 01.04.2015. PW2 also identified her signature in Ext.P3 statement given under Section 164 of the Code. The said evidence of PW2 has not been discredited in any manner in her cross-examination by the counsel for the first accused.

10. PW3 was an Altar boy attached to the Church,

working for the first accused and a schoolmate of the victim and her brother, Christopher. PW3 deposed that food was being delivered to the first accused from the house of his friend who was examined as PW4 and that PW3 used to get the food for the first accused from the house of PW4 occasionally. PW3 deposed that on 28.03.2015, he went to the presbytery for giving food to the first accused which he had collected from the house of PW4 and while coming back, PW3 saw the victim and her mother with the first accused at the presbytery. PW3 also deposed that the mother of the victim was crying then. It was deposed by PW3 that after providing food at the presbytery, he went to a river near the Church where his friends, including Christopher and PW4 were baiting. PW4 affirmed that it is from his house food was being delivered to the first accused and that on 28.03.2015, food was provided by PW3 to the first accused at the request of PW4, as PW4 was going for taking the bait. It was also deposed by PW4 that after providing food to the first accused on the said date, PW3 came back to the place where

he was baiting and informed PW4 that PW3 saw PW1 and PW2 at the presbytery and also that PW2 was crying then.

11. PW5 was a Catechism teacher attached to the Church who had acquaintance with PW1 and PW2 as also the first accused. PW5 deposed that she saw one day, the victim talking to the first accused near the office room of the first accused for a fairly long time and that PW5 advised the victim that she shall not do so as it is not good for her as also for the first accused. PW10 is another Catechism teacher attached to the Church. PW10 also gave evidence on the similar lines of the evidence tendered by PW5.

12. PW6 was the Manager of the School where the victim was pursuing her studies during 2014 and 2015. PW6 had acquaintance with the first accused and she deposed that since the first accused was absent from the Church, she made enquiries and having found out the reason, PW6 enquired with PW2 as to what happened, when she came to the school and PW2 informed her that the first accused had committed sexual

assaults on the victim.

13. PW7 is a parishioner of the Church. PW7 deposed that on 28.03.2015, the first accused met PW7 at his residence and informed him that a lady and her daughter came to the presbytery and abused him alleging that the first accused spoiled her daughter, and the stand taken by the first accused then was that he did not do anything wrong with the daughter of the lady. It was also deposed by PW7 that while they were talking, the first accused received a call from the office of the Bishop requiring the first accused to meet the Bishop and after meeting the Bishop, the first accused came to the house of PW7 again on the afternoon of the same day at about 3.30 p.m. along with the son of the brother of PW7, Ajith Thomas. It was also deposed by PW7 that the first accused came to the house of PW7 on the succeeding day also and informed PW7 that the lady and her daughter had been to a doctor and when PW7 asked the first accused as to the reason for his fear, the first accused informed PW7 that he committed

a mistake and that he has sinned. PW9 is the son of the brother of PW7. It is PW9 who took the first accused to the office of the Bishop on 28.03.2015. PW9 affirmed the facts deposed by PW7.

14. PW8 who is the grandaunt of the victim and a nun, deposed that on coming to know of the incidents, PW8 had the occasion to talk to the victim and the victim affirmed that she has been sexually assaulted by the first accused. It was also deposed by PW8 that it is on the advice of PW8 that the victim was taken to a doctor by her parents and after taking the victim to the doctor, her father informed PW8 that the doctor told him that the victim has been sexually assaulted several times. It was also deposed by PW8 that the relatives of the first accused met her thereupon and requested her to settle the case amicably and PW8 informed them that it is not possible. PW8 identified the second accused in the dock as the brother of the first accused who had met her with the request to settle the case. PW12 was the Bishop of the Diocese during the relevant time. PW12 deposed that the first accused was working as a

Vicar of the Church since July 2012 and that the parents of the victim along with the victim met PW12 on 28.03.2015 and complained that the first accused sexually assaulted the victim. PW12 deposed that he talked to the victim and the parents separately and thereafter called the first accused to his house, and even though the first accused denied the allegation, PW12 suspended the first accused from his office temporarily. Ext.P10 is the circular issued in this regard by the Diocese.

15. PW17 was the doctor who examined the first accused and issued Ext.P13 potency certificate. PW17 deposed the said fact in his evidence. PW20 was a doctor attached to the Taluk Hospital, North Paravur who conducted the medical examination of the victim. PW20 deposed that on a reference by the Sub Inspector of Police, Puthenvelikkara, she examined the victim and issued Ext.P16 certificate of medical examination. It was deposed by PW20 that the condition of the hymen of the victim was “torn old” and there was evidence of penetration.

16. PW25 is the Registrar of Birth and Death attached to Kodungallur Municipality and she deposed that it was she who issued Ext.P31 birth certificate. In Ext.P31, the name of the child is shown as the name of the victim and the name of her father is shown as Raphel Ouso Kaithathara and the name of her mother is shown as Sheela Thomas Thadikkaran. The evidence tendered by PW25 has not been challenged by the first accused.

17. PW30 was the Sub Inspector of Police attached to Puthenvelikkara Police Station as on 01.04.2015. PW30 deposed that on the said day, at about 4.45 p.m., PW2 submitted Ext.P2 complaint, and Ext.P41 First Information Report was registered on the basis of Ext.P2 complaint. PW34 is the police officer who commenced the investigation in the case, PW35 is the police officer who continued the investigation and PW37 is the police officer who concluded the investigation in the case and submitted the final report. The said police officers gave the details of the investigation conducted by them in their

evidence.

18. The first and foremost question to be considered is whether the prosecution has established that the victim was a child at the time of the occurrence, in terms of the provisions contained in the POCSO Act. In **Ravinder Singh Gorkhi v. State of U.P.**, (2006) 5 SCC 584, after referring to the earlier decisions in **Birad Mal Singhvi v. Anand Purohit**, 1988 Supp SCC 604, **Sushil Kumar v. Rakesh Kumar**, (2003) 8 SCC 673, **Updesh Kumar v. Prithvi Singh**, (2001) 2 SCC 524, **Ramdeo Chauhan v. State of Assam**, (2001) 5 SCC 714, **Umesh Chandra v. State of Rajasthan**, (1982) 2 SCC 202 and **Bhoop Ram v. State of U.P.**, (1989) 3 SCC 1, the Apex Court held that determination of the date of birth of a person before a court of law, whether in a civil or criminal proceedings, would depend upon the facts and circumstances of each case. It was also held by the Apex Court in **Ravinder Singh Gorkhi** that in the absence of any statutory provision dealing with the manner in which the age has to be proved in a proceedings, the age has to be

proved by producing any document falling within the scope of Section 35 of the Indian Evidence Act. Paragraphs 21 and 23 of the judgment in the said case read thus:

> "**21.** Determination of the date of birth of a person before a court of law, whether in a civil proceeding or a criminal proceeding, would depend upon the facts and circumstances of each case. Such a date of birth has to be determined on the basis of the materials on records. It will be a matter of appreciation of evidence adduced by the parties. Different standards having regard to the provision of Section 35 of the Evidence Act cannot be applied in a civil case or a criminal case.
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> x x x x x x x
>
> **23.** Section 35 of the Evidence Act would be attracted both in civil and criminal proceedings. The Evidence Act does not make any distinction between a civil proceeding and a criminal proceeding. Unless specifically provided for, in terms of Section 35 of the Evidence Act, the register maintained in the ordinary course of business by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which, inter alia, such register is kept would be a relevant fact. Section 35, thus, requires the following conditions to be fulfilled before a document is held to be admissible thereunder: (*i*) it should be in the nature of the entry in any public or official register; (*ii*) it must state a fact

> in issue or relevant fact; (*iii*) entry must be made either by a public servant in the discharge of his official duty, or by any person in performance of a duty specially enjoined by the law of the country; and (*iv*) all persons concerned indisputably must have an access thereto."

Ext.P31 is an extract issued under Section 17(1)(b) of the Registration of Births and Deaths Act, 1969 and Rule 8 of the Kerala Registration of Births and Deaths Rules, 1999. Section 17 of the statute referred to above reads thus:

> "17. **Search of births and deaths register**.—(1) Subject to any rules made in this behalf by the State Government, including rules relating to the payment of fees and postal charges, any person may—
>
> (a) cause a search to be made by the Registrar for any entry in a register of births and deaths; and
>
> (b) obtain an extract from such register relating to any birth or death:
>
> Provided that no extract relating to any death, issued to any person, shall disclose the particulars regarding the cause of death as entered in the register.
>
> (2) All extracts given under this section shall be certified by the Registrar or any other officer authorised by the State Government to give such extracts as provided in section 76 of the Indian Evidence Act, 1872 (1 of 1872), and shall be admissible in evidence for the purpose of proving the birth or death to which the entry relates."

As evident from the extracted provision, any person can make a search of registers maintained under the statute and obtain an extract of the same and all extracts given under the said provision shall be admissible in evidence for the purpose of proving the birth or death to which the entry relates. In the circumstances, it can be concluded that Ext.P31 extract of the Register of Birth and the evidence tendered by PW25, the Registrar of Birth and Death attached to Kodungallur Municipality prove beyond doubt that the date of birth of the victim is 21.09.2000 and that she was a child in terms of the provisions contained in the POCSO Act during 2014 and 2015. The question is answered in the affirmative.

19. The next question is whether the prosecution has established beyond reasonable doubt that the first accused has committed rape on the victim as defined under Section 375 IPC and sexual assaults as also sexual harassments as defined in the POCSO Act. As seen from the evidence let in by the prosecution, in order to prove the allegation of rape, sexual

assault and sexual harassment, the prosecution relies on only the evidence tendered by the victim. Reliance is placed on the evidence of the remaining witnesses only for the purpose of corroborating the evidence tendered by the victim. There cannot be any doubt to the proposition that the evidence of a rape victim can be the sole basis of a conviction. But, it is trite that in order to base a conviction solely on the evidence of the rape victim, such evidence shall be of a sterling quality. In **Rai Sandeep v. State (NCT of Delhi)**, (2012) 8 SCC 21, the Apex Court had occasion to consider the question as to who can be said to be a sterling witness. Paragraph 22 of the judgment of the Apex Court in the said case reads thus:

> “In our considered opinion, the “sterling witness” should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and

ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a “sterling witness” whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.”

It is evident from the aforesaid decision that the evidence of a sterling witness is one that appears natural and consistent with the case of the prosecution *qua* the accused; that such witnesses, under no circumstances, shall give room for any doubt as to the factum of the occurrence and that the evidence shall have co-relation with each and everyone of other supporting materials including expert opinions. To put it differently, the version of such witnesses on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary, and material objects should match the said version in material particulars. The moot question therefore, is whether the victim in the case on hand can be said to be a sterling witness so as to justify the conviction of the first accused solely based on her evidence.

20. We have read the evidence tendered by PW1 meticulously and we do not find any reason, whatsoever, to disbelieve the evidence given by her as referred to in detail above. It is relevant in this context to note that even though it

was suggested to PW1 during cross-examination that she was deposing falsehood in court, which she denied emphatically, the cross-examination of the victim by the learned counsel for the first accused, especially her statement “എന്നെ ശാരീരികമായി അച്ഛൻ ബന്ധപ്പെട്ടുമ്പോൾ ഞാൻ ബഹളം വെച്ചിട്ടില്ല. ഞാൻ എവിടെയും പരാതിപ്പെട്ടിട്ടും ഇല്ല. എനിക്ക് അച്ഛനോട് ഭയങ്കര സ്നേഹമായിരുന്നു എന്നും അത് അച്ഛനോട് പറഞ്ഞപ്പോൾ അത് അച്ഛൻ നിരസിച്ചു എന്നും അതിനെ തുടർന്ന് അച്ഛനോടുള്ള ദേഷ്യം കാരണം കളവായി പോലീസിലും മറ്റും മൊഴി പറയാൻ ഇടയായതാണ് എന്നും പറഞ്ഞാൽ ശെരിയല്ല. അച്ഛൻ എന്നോട് പലപ്പോഴും എന്നെ ഇഷ്ടമാണോ എന്ന് ചോദിച്ചിട്ടും ഒരു പ്രാവശ്യം മാത്രമാണ് ഞാൻ ഇഷ്ടമാണ് എന്നു പറഞ്ഞത്.” indicates that the attempt of the first accused was to establish, in the alternative, that the physical relationship between him and the victim was consensual. Inasmuch as it is established that the victim was a child below the age of 16 years during 2014 and 2015, it is immaterial whether their physical relationship was consensual. Even though the part of the deposition of the victim as referred to above is not recorded as questions and answers, from the deposition, the questions put to the victim could certainly be inferred, and it appears to us that the first accused has in fact not disputed the fact that there was a physical relationship between him and the victim.

Be that as it may, even *de hors* the same, as already indicated, the evidence tendered by the victim establishes beyond reasonable doubt that it was the first accused who committed rape and sexual assaults on the victim and also harassed her sexually. We hold so as we find that the evidence tendered by the victim appeared to us to be very much real and natural and she has not given room for any doubt as to the factum of the occurrences, and the evidence tendered by her has co-relation with each and every other supporting materials including the expert opinion given by PW20, the doctor who conducted the medical examination of the victim. As noticed, it was deposed categorically by PW20 that she found evidence of sexual intercourse when the victim was examined. In other words, the evidence of the victim on the core spectrum of the crime remained intact and all other attendant materials, namely, oral, documentary, and material objects match the said version in material particulars. We hold so also in the light of the evidence tendered by PW5 and PW10 Catechism teachers, the evidence

tendered by PW2, the mother of the victim which, in turn, is corroborated by the evidence tendered by PW3 who gave food to the first accused on 28.03.2015, the evidence tendered by PW6, the Manager of the school where the victim was pursuing her studies during the relevant time, the evidence tendered by PW7 and PW9 parishioners, the evidence tendered by PW8, the grandaunt of the victim who is a nun, the evidence tendered by PW12, the Bishop of the Diocese and the evidence tendered by PW31 that MO9 towel belonging to the victim was seized from the presbytery. In other words, we are of the view that the findings rendered by the Special Court that the first accused has committed rape and sexual assaults on the victim and also that he harassed the victim sexually more than once are perfectly in order. The first accused has no case that the evidence tendered by PW1, if believed, the ingredients of the various offences for which he was found guilty would not be made out. If that be so, the findings rendered by the Special Court that the accused is guilty of the offences punishable

under Sections 376(2)(i) and 376(2)(n) IPC and Sections 4, 6, 10 and 12 of the POCSO Act are in order.

21. As regards the second accused, as noted, the allegation against him is that he had harboured the first accused from legal punishment. It was brought out in evidence that it is in the car owned by the second accused that the first accused left Thrissur on the night of 01.04.2015 for Bangalore and flew to Dubai on 02.04.2015. It was also brought out through the evidence let in by PW22, the Nodal Officer of the telecom company namely, Bharti Airtel and Ext.P24 call details that the second accused travelled with the first accused to Bangalore on 01.04.2015. It is on the basis of the said evidence that the Special Court found the second accused guilty of the offence punishable under Section 212 IPC. It is trite that in order to establish the offence under Section 212 IPC, it must be established that the person concerned has harboured or concealed the offender by providing shelter or otherwise with the knowledge that he is an offender or has reason to believe to

be an offender. The evidence tendered by PW22 indicates that the first accused travelled to Bangalore on the night of 01.04.2015. The crime in the case was registered only on that day, and there is nothing on record to indicate that the second accused knew the registration of the crime. The only material available to attribute knowledge to the second accused of the fact that the first accused was an offender or has reason to believe the first accused to be an offender is the evidence tendered by PW8, the grandaunt of the victim, who deposed that the second accused met the grandaunt and requested her to settle the case amicably. According to us, merely from the fact that the second accused met PW8 and requested her to settle the case, it cannot be inferred that the second accused had the knowledge that the first accused was an offender or has reason to believe that the first accused is an offender, especially since there was no crime registered against the first accused at that point of time. In the circumstances, according to us, conviction of the second accused under Section 212 IPC is

unsustainable. We take this view also for the reason that the possibility of the first accused giving to the second accused an entirely different picture about the allegations, and the possibility of the second accused believing the version of the first accused cannot be ruled out, especially since the first accused was a priest then commanding respect from the members of the community including his friends and relatives.

22. Let us now deal with the arguments advanced by the learned Senior Counsel for the first accused. It was argued vehemently by the learned Senior Counsel that going by the evidence tendered by PW2, she had no occasion whatsoever to know the particulars of the sexual assaults and sexual harassments committed by the first accused on the victim, but the crime is one registered based on Ext.P2 complaint lodged by her. It was pointed out by the learned Senior Counsel that serious allegations are seen made against the first accused in Ext.P2 complaint which is admittedly, one prepared by a lawyer and the allegations therein can be

considered, therefore, only as figments of imagination. It was argued by the learned Senior Counsel that inasmuch as a complaint in the nature of Ext.P2 has already been preferred, it can certainly be inferred that the victim was made to give evidence in the case in tune with the allegations in the complaint and the evidence tendered by PW2, therefore, cannot be believed at all. It was also argued by the learned Senior Counsel that even though several witnesses have been examined on the side of the prosecution to prove that PW2 had disclosed the occurrences to them, none deposed about the occurrences in court. It was also argued by the learned Senior Counsel that it has come out from the evidence of PW34 that the victim was taken to a Counsellor for counselling before the registration of the crime and that the said Counsellor was neither cited nor examined in the case. According to the learned Senior Counsel, inasmuch the victim was subjected to counselling before the registration of the crime, the non-examination of the Counsellor as a witness in the case is fatal to

the prosecution case. It was also argued by the learned Senior Counsel that there is no satisfactory evidence in the case to prove that the victim was a child under the POCSO Act during the relevant period during which she was allegedly subjected to sexual assaults and sexual harassments by the first accused. The argument advanced by the learned Senior Counsel in this regard is that in the light of the decision of the Apex Court in **Jarnail Singh v. State of Haryana**, (2013) 7 SCC 263, the age of the victim in a case of this nature is to be established in accordance with the provisions contained in Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015, and going by the provision contained in the said statute, the birth certificate issued by the competent authority cannot be accepted in evidence, if the date of birth of the child could be proved by producing a Date of Birth Certificate from the school or the matriculation or equivalent certificate from the concerned examination board, if available and only if the said documents are not available, a Birth Certificate could be

produced to prove the age of the victim. It was also argued alternatively by the learned Senior Counsel that even otherwise, there is no evidence in this case that Ext.P31 is the extract of the Register of Birth of the victim. Alternatively, it was argued by the learned Senior Counsel that the punishment imposed on the first accused is too harsh and disproportionate to the gravity of the offences alleged.

23. No doubt, the case which culminated in the final report is one registered based on Ext.P2 complaint lodged by PW2. But, while considering the argument advanced by the learned Senior Counsel for the first accused, it has to be kept in mind that PW2 had no direct knowledge about the acts of sexual assaults and sexual harassments committed by the first accused on the victim, and the information by PW2 regarding the same is only from the information furnished to her by her daughter, the victim. The fact that on 28.03.2015, PW2 went to the presbytery with the victim to ascertain from the first accused as to the purpose for which the victim had been there

after the prayers in the Church, is not disputed by the first accused. The version of PW2 in this regard was that the stand taken by the first accused then was that he has not done anything to the victim and that since PW2 was not convinced about the said stand of the first accused, she questioned the victim further and it was then that the victim disclosed to her that the first accused committed sexual assaults on her. It was also deposed by PW2 that when the victim gave a few indications about the sexual assaults, she did not ask anything further. One has to understand the limitations of a mother to obtain information of this nature from a minor daughter under the circumstances in which she is placed, as in the case on hand. As such, the allegations made in Ext.P2 complaint are to be understood as the inferences PW2 has drawn from the information furnished to her by the victim. True, the evidence let in by the victim is not exactly as stated by her mother in Ext.P2 complaint. But, the same, according to us, is not a reason to reject the evidence tendered by the victim as false as

the evidence tendered by the victim, in essence, cannot be said to be inconsistent with the Ext.P2 complaint, especially when the same is found to be real and natural and corroborated in material particulars by the evidence tendered by the other witnesses. It is too much, in the peculiar facts of this case, to contend that merely for the reason that PW2 lodged Ext.P2 complaint, the victim was made to give tutored evidence. Ext.P2 complaint need be considered only as a document, on the basis of which the criminal law was set in motion by a relative of the victim. Needless to say, the argument of the learned Senior Counsel that the evidence tendered by the victim has to be understood as one given in tune with the Ext.P2 complaint is only to be rejected and we do so.

24. There is no substance in the argument of the learned Senior Counsel that the witnesses examined on the side of the prosecution to prove that PW2 had disclosed to them, the particulars of the sexual assaults and sexual harassments committed by the first accused on the victim, did not disclose

anything regarding the same in their evidence. The contention aforesaid was taken by the learned Senior Counsel in the context of the evidence tendered by PW6, the Manager of the school, PW8, the nun who is the sister of the grandmother of the victim and PW12, the Bishop of the Diocese. The aforesaid witnesses are not witnesses examined by the prosecution for the purpose as alleged by the first accused, but are witnesses examined to prove the subsequent events, and their evidence cannot be ignored, merely for the reason that they have not tendered any evidence regarding the particulars of the sexual assaults and sexual harassments committed on the victim by the first accused. True, it has come out in evidence that the victim was taken to a Counsellor immediately after the incidents took place on 28.03.2015, and the Counsellor has not been cited or examined in the case. No doubt, the Counsellor could have been examined, but merely for the reason that the Counsellor was not examined, on the facts and circumstances of this case, it cannot be said that the prosecution has to fail.

25. In **Sunil v. State of Haryana**, (2010) 1 SCC 742, the Apex Court has refused to accept the school leaving certificate of the victim in a case of rape to prove the age of the prosecutrix, by observing thus:

> "25. The prosecution also failed to produce any admission form of the school which would have been primary evidence regarding the age of the prosecutrix. The school leaving certificate produced by the prosecution was also procured on 12-9-1996, six days after the incident and three days after the arrest of the appellant. As per that certificate also, she joined the school in the middle of the session and left the school in the middle of the session. The attendance in the school of 100 days is also not reliable. The prosecutrix was admitted in the school by Ashok Kumar, her brother. The said Ashok Kumar was not examined. The alleged school leaving certificate on the basis of which the age was entered in the school was not produced."

Jarnail Singh is a case involving rape of a minor, and the only evidence let in, in that case to prove the age of the victim was the school records indicating the date of birth of the victim, and the same was acted upon to convict the accused, and the conviction was affirmed in appeal by the High Court. It was, however, contended before the Apex Court in **Jarnail Singh**,

placing reliance on the decision of the Apex Court in **Sunil** that it was not established in **Jarnail Singh** that the victim was a minor. In the aforesaid factual background, it was held that even though the Rules framed under the Juvenile Justice (Care and Protection of Children), Act 2000 apply strictly only to determine the age of a child in conflict with law, the statutory provisions therein can certainly be the basis for determining the age, even of a child who is a victim of a 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 victim of a crime, and affirmed the conviction of the accused in the said case on that basis. The judgment in **Jarnail Singh,** according to us, cannot be understood as laying down a proposition that the age of the minor victims in cases of rape and sexual assaults, is hereafter to be established only in accordance with the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 or in terms of the subsequent legislation namely, the Juvenile Justice (Care and Protection of

Children) Act, 2015 which replaced the said legislation, notwithstanding the provisions contained in the Evidence Act and the various judgments of the Apex Court rendered prior to **Jarnail Singh,** as has been referred to herein-above in paragraph 18. The argument advanced by the learned Senior Counsel that the date of birth of the victim should have been proved by the prosecution in terms of Section 94 of the Juvenile Justice (Care ad Protection of Children) Act, 2015, is therefore only liable to be rejected.

26. PW37 is the police officer who concluded the investigation in the case. PW37 deposed in his evidence, among others, that it is he who collected the Birth Certificate of the victim (the extract of the Register of Birth) and produced the same before the Special Court. PW37 was not cross-examined on that part of the evidence tendered by him. The first accused has no case that Ext.P31 is not the extract of the Register of Birth in respect of which evidence was let in by PW37. That apart, as already noticed, the evidence tendered by PW25 has

not been challenged in cross-examination by the first accused on any aspect whatsoever. The argument that there is nothing to connect the victim with Ext.P31 extract of the Register of Birth, is also therefore without any substance.

27. No doubt, rape is a crime which has a severe effect on women and the society. A victim of rape suffers from trauma and has to live with it for the rest of her life. Rape is not only a physical offence, rather it is a psychological offence as well. It is an infringement of a person's right to live a dignified life. At the same time, the court cannot ignore the basic principle of sentencing viz, that the sentence imposed should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances. The purpose behind this principle is to strike down extremely harsh punishments which are disproportionate to the crime itself. Having regard to the fact that there would certainly be more heinous crimes than the one involved in this case to award the sentence of life imprisonment

for rape, we deem it appropriate to modify the sentence imposed on the first accused for the offence of rape, to rigorous imprisonment for a period of 20 years, instead of imprisonment for the remainder of the natural life imposed by the Special Court on the first accused.

In the result, Crl.A.No.1321 of 2016 is allowed, the conviction of the second accused is set aside and he is acquitted. Crl.Appeal No.160 of 2017 is allowed in part, affirming the conviction of the first accused and modifying the sentence for the offence of rape to rigorous imprisonment for a period of 20 years without remission, instead of imprisonment for the remainder of his natural life.

Sd/-

P.B.SURESH KUMAR, JUDGE.

Sd/-

JOHNSON JOHN, JUDGE.

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