CR

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN

THURSDAY, THE 1ST DAY OF SEPTEMBER 2022 / 10 TH BHADRA, 1944

CRL.A NO. 160 OF 2019

AGAINST THE ORDER/JUDGMENTSC 1216/2015 OF ADDITIONAL DISTRICT

COURT & SESSIONS COURT (ATROCITIES & SEXUAL VIOLENCE AG

APPELLANT/S:

SHAJU@SHAJU,AGED 44 YEARS
S/O. VISWAMBHARAN, C. NO.2809, CENTRAL PRISON AND CORRECTIONAL HOME, THIRUVANANTHAPURAM AND RESIDED AT SHJI BHAVAN, PARAYAMVILAKOM, THACHANCODE, MALAYADI, THOLICODE VILLAGE, THIRUVANANTHAPURAM.

BY ADVS.
RENJITH B.MARAR
LAKSHMI.N.KAIMAL
ARUN POOMULLI
AISWARYA THANKACHAN

RESPONDENTS:

1 STATE OF KERALA,REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA.

2 THE SUB INSPECTOR OF POLICE,
ARYANADU POLICE STATION.

OTHER PRESENT:

S.AMBIKA DEVI-SPL.GP FOR ATTROCITIES AGAINST WOMEN & CHILDREN, ASSISTED BY SMT. BINDU.O.V

AMBIKA DEVI-SPL.GP

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 16.08.2022, THE COURT ON 01.09.2022 DELIVERED THE FOLLOWING:

CR

K.VINOD CHANDRAN & C.JAYACHANDRAN, JJ

Crl.Appeal No.160 of 2019

Dated this the of 01st September, 2022

JUDGMENT

Vinod Chandran, J.

The charge in the above case is of the father of a minor girl having repeatedly committed rape on her, at times against the order of nature, threatened the girl with dire consequences if it was revealed. In addition to the offence under Sections 376 & 377 of the IPC, commission of aggravated penetrative sexual assault, under the Protection of Children From Sexual Offences Act, 2012 (for short 'POCSO Act') was also charged. The appellant is the accused, who stood trial in which the prosecution led evidence through 17 witnesses marked 18 documents and produced 5 material objects. The appellant stood convicted under Ss.376, 377 and 506(1)of the IPC and sentenced to undergo imprisonment for life under 376(2)(f)&(i) of IPC which is for the remainder of his natural life and a fine of Rs.1 lakh. Under S.377 IPC the appellant was sentenced to five years of

rigorous imprisonment (RI) and a fine of Rs.50000/-. A further RI for six months under S.506 of IPC was also imposed. The appellant was also sentenced to RI for three years and a fine of Rs.25,000/- under S.7 r/w S.8 POCSO Act. Appropriate default sentences were ordered and S. 42 of the POCSO Act was reckoned, to not impose a separate sentence under S.5(l)&(n) r/w S.6 of the POCSO Act.

2. Sri. Ranjith Marar, learned Counsel appearing for the appellant takes us through the charges which speaks of a particular instance on 26.07.2015 and before that for a continuous period of two years, which by itself is vague. It is pointed out from the decisions of this Court in *Rajan v. State of Kerala (2021) 4 KLT 274, Alex v. State of Kerala 2021 (4) KLT 480 & Raghavan v. State of Kerala 2021 (6) KLT 427* that there is no proof of date of birth and in such circumstance there cannot be any conviction under S. 376(i) and the various provisions under the POCSO Act. It is also pointed out that there is no *voir dire* carried out of the minor child and hence the testimony has to be approached with caution. It is also pointed out that there are glaring contradictions in the testimony of PW1 and PW2, about the affairs of their household. While PW1 speaks of her

parents having an amicable relationship, PW2 says that the relationship was strained and there were marital discords. Reading the entire testimony, it is pointed out that very clearly there was no effective defence offered and the accused was defended by a State Brief. It is pointed out that the omissions from the FIS were not put to the victim nor were the contradictions from the S.161 statement put to the witnesses. There is inadequate legal assistance; for the State Brief having not effectively defended the accused. PW4, the teacher does not speak of a like incident with respect to another girl, who became pregnant; which is offered as an explanation for the delay, by the victim. Last but not the least it is pointed out that on conviction both under 376(2)(f)&(i) only one sentence of life was imposed and in that circumstance when the charge under one of the two clauses is found to be not maintainable, then there should be mitigation insofar as the sentence is concerned. The learned Counsel would rely on a decision of the Supreme Court of the United States and one of the Court of Appeal (Criminal Division) of the United Kingdom to canvass the argument of ineffective legal assistance to defend and the caution to be exercised in evaluating the testimony of the prosecutrix

in a rape case, respectively.

3. Smt.O.V Bindu the learned Public Prosecutor argues for upholding the impugned judgment. PW1's testimony is of a sterling quality and PW2 and PW4 corroborates her on the aspects they were privy to. The *modus operandi* adopted by the father was to send out the mother on some errand, confirm that she has proceeded far and then molest the minor girl. PW1 specifically speaks of her father telephoning her mother to ensure that she is on her way, to then molest the child, which fact was corroborated by PW2, the mother. The medical evidence is clinching and the Doctor has demolished the suggestion made by the defence counsel in cross-examination, effectively and completely. There is no scope to find inadequate representation and the conviction was only because there was an air tight case for the prosecution. The delay is fully explained by the prosecutrix and reference is made to *State of Uttar Pradesh v. Chotey Lal (2011) 2 SCC 550.* It cannot be gainsaid that the charge is vague, especially when the molestation was carried on for a period of two years and there is no possibility of the victim remembering the exact dates on which she was repeatedly molested. She specifically

speaks of the last incident and the fear generated in her mind by reason of, hearing another minor girl's predicament from a like molestation. PW1 does not say that she heard it from the teacher and the argument of the learned Counsel for the appellant is frivolous. The last incident complained being just prior to the complaint, there was scientific evidence by way of presence of spermatozoa on the dress of the victim. The sterling testimony of the victim coupled with the corroboration of PW2 and PW4 as also the medical and scientific evidences unequivocally establish the crime committed on the poor girl by her own father. The learned Prosecutor urge for upholding the impugned verdict on all aspects.

4. PW1 is the prosecutrix who was studying in a Polytechnic, at the time of her examination before Court. *Voire dire* is a measure by which the Court satisfies itself about the competence of a witness to testify and the testimony cannot be totally eschewed merely for reason of its absence. The Court can be assured from the manner in which the witness testifies and in this case, a mere reading of the deposition reveals a very perceptive witness. She marked and proved the FIS, Ext.P1, which was in consonance with her testimony

before Court. During the time of the incident she was staying at Shaji Bhavan, in Thachancode; a house with one room, a hall, a sit-out and a kitchen. When she was studying in the 7th standard, she was first molested by her father. Her paternal grandmother was hospitalized for a surgery and her mother used to go in the early morning, to sit with her mother-in-law. Her father came near her when she was sleeping and removed her dress. He then kept his penis on her genitals. When she woke up and cried aloud, her father stifled her cries holding his hands over her mouth and later made her do fellatio on him , forcefully. She was threatened that if she divulged anything, herself and her mother would be killed. The acts of molestation continued when her mother was not at home. On Sundays, her mother was sent away to buy meat and after enquiring over the telephone that she had boarded the bus, he used to forcefully take PW1 inside the room and molest her after making her lie down, either on the floor or on a mat. He used to catch her breast and after undressing her, he used to lie on top of her and insert his penis into her genitals. On Saturdays also when her mother goes out, for participating in Kudumbasree or Ayalkoottam he used to again

molest her in a like manner. She also complained of her father having shown her lewd photographs of men and women in the mobile set owned by him and asked her to do the same thing. He repeatedly used her for oral sex, which even if she resisted he used to forcefully carry out. There were no contradictions worthy of being put to PW1, as seen from her statement recorded in the FIS. She had essentially spoken of the entire allegations in the FIS, but without the details. For example, in the FIS it was stated that the accused used to molest her when her mother goes out. In Court she elaborated that the accused used to send his wife out to purchase meat on Sundays, to molest her and also used to do it when her mother is out, attending Kudumbashree or Ayalkoottam. These are not embellishments which warrant a closer scrutiny of the testimony of the prosecutrix or put a cloak of suspicion over her testimony.

5. When she was studying in the 8th standard she told her aunt, PW4 that she is afraid to remain with her father which was conveyed by PW4 to the victims grandmother's sister. PW4 clarified that the victim had not divulged any details and merely said that she was afraid of her father; which was the testimony of PW1 also. Even

in the 8th standard, the molestation continued, the last incident of which was on 26.07.2015. In the meanwhile, a school mate, another minor girl, became pregnant due to sexual molestation. Hearing the same, her fears accentuated and she told her Chemistry teacher, PW7, who informed the Counselor at the school. The teacher called her mother and told her about the molestation by the father on the daughter. On the next day, on 29.07.2015 the child accompanied her mother and the teachers to the child-line and gave a statement. She also gave a statement before the Magistrate and subjected herself to a medical examination. She had specifically told the Doctor about the history of sexual abuse by her father. The mobile used by her father was marked as MO1, the mat on which she was at times molested, MO2 and her pink top and frock as MO3 and MO4. Her father's lunki was marked as MO5.

6. The victim withstood searching cross-examination with fortitude. Her refusal to inform her mother about the atrocity committed by her father was explained to be out of fear for her own life and her mother's, which was threatened by the father. She said that if she had divulged the fact, her mother would have definitely

questioned her father which would have led to the threats materializing. She denied any enmity with her father and spoke of her father having amicable relationship with his relatives. We cannot accept the contention of the appellant that the nature of the relationship of the parents as spoken of by the daughter and the mother is contradictory and would commend the Court to approach the testimony of the victim-daughter, with caution. The marital disharmony of the parents will not, often be perceived by the children. In this context we have to pertinently observe that according to the prosecutrix, she was threatened by her father against disclosure. Her father also used to purchase her the objects of her desire; which the mother fully corroborated, perceived by her as a symbol of his love and affection. Her subjugation, hence was not merely on the threats but also on appeasement by way of providing her with the objects of desire.

7. The victim's aunt had cautioned her mother not to leave her alone with her father. Hence her mother used to put her in the paternal grandmother's house when she went out. This was stated at the first instance in the FIS itself. In Court she said that, even then,

her father would call her on some pretext like fetching him water to bathe or drinking water. As soon as she enters the residence, her father used to follow her and subject her to molestation. She denied any enmity between the mother and the father and also said that even when she eventually divulged these facts to her mother, her mother was worried; but not angry with her. She stoutly denied her complaint to be out of any prior grouse against her father, for being a drunkard and a constant trouble maker.

8. PW2 fully corroborated the version of her daughter. According to her she was not aware of the atrocities committed, until she was summoned to the school and the facts narrated by PW7. She identified MO1 to MO5. In cross-examination she admitted that there were marital discords mainly because her husband was a drunkard, but that he had stopped drinking two years back. She spoke of the grandmothers brother's wife having warned her against leaving her daughter alone with her husband. She also spoke of the aunt having been informed by PW4. In cross-examination she elaborated the facts, regarding her husband having sent her out for buying meat on certain Sundays and also enquiring about her whereabouts over the

telephone. She admitted that her husband had always behaved with love and affection with the children and bought them a lot of things they desired. But she was not aware of the atrocity committed by him on his own daughter. She was shocked when she heard it from the teacher and had even purchased a bottle of acid to attack her husband with. However PW7, the teacher constantly consoled her over telephone and assured her that on the next day they will make a complaint before the child-line.

9. PW3 is a neighbour who admitted that she was not in good terms with the family of the victim. She spoke of having been suspicious about the relationship between the father and the daughter; but we do not place much reliance on her testimony. PW4 is the aunt to whom PW1 spoke of the fear of her father. She admitted that the child only spoke of being afraid of her father and did not divulge the details. PW7 is the teacher to whom the child confided. She fully corroborated the testimony of PW1 and spoke of the specific date, 27.07.2015 on which date, the mother of the child was summoned. She also spoke of the child having talked to the Counselor after which both of them accompanied the child and the mother to

the child-line.

10. PW5 is the Doctor who examined the victim and issued Ext.P2 certificate. She specifically spoke of PW1 having narrated the history as, molestation by her father. The victim had also spoken about the threat against the life of her mother, leveled by the father to make the girl succumb to his lascivious desires. The victim spoke of phonographic films being shown on the mobile and repeated sexual molestation for the last two years including oral sex. The last sexual act was also said to be on 26.07.2015. It was the testimony of the Doctor that the victim's hymen was torn and her vagina admits two fingers. The expert opinion was that there was evidence of past vaginal penetration. In cross-examination the Doctor asserted that there were several acts of sexual intercourse for reason of which the exact clock position of the tear cannot be identified. It was testified that the elasticity of the vagina is clear from the fact that it admitted two fingers. A suggestion was made that a vaginal tear can occur even with masturbation. The expert opinion was that the subject tear, could happen only if it was done with a large object and often in such instances the tear would be on the front of the hymen. In the instant

case according to her there was full penetration and hence there was complete tear of the hymen which is in consonance with the history given by the victim.

11. PW6 another Doctor certified the potency of the accused as per Ext.P3. PW8 witnessed Ext.P4 scene mahazar and PW9 witnessed Ext.P5 seizure mahazar of MO2 to MO5. PW10 the Headmistress of the School in which the victim studied produced Ext.P6 certificate which shows the date of birth as 01.10.2001. PW11, the Panchayath Secretary produced Ext.P7 certificate of ownership of the subject house in which the crime was committed and PW12 the Village Officer who prepared Ext.P8 scene plan. PW13 is the Sub Inspector manning the Vanitha Helpline who recorded Ext.P1, FIS and PW14 the Sub Inspector of Police Aryanad police station, who registered Ext.P9 FIR. PW15 is a woman CPO who took the statement of the victim at the 'Nirbhaya' and PW16 is the Sub Inspector of Thampanoor P.S who transmitted the complaint to PW14, the jurisdictional police officer. PW17 is the Investigating Officer who testified and proved various mahazars, the seizures, the arrest of the accused, and produced Ext.P17 report of the Forensic Science

Laboratory.

12. As we noticed there is nothing to doubt the veracity of the testimony of PW1 who is fully corroborated by her mother PW2, her aunt PW4 and her teacher PW7. We find the testimony of the victim to be truthful reliable and fully acceptable even without any corroboration, as held in *State of Uttar Pradesh v. Chotey Lal (2011) 2 SCC 550.* There has been repeated sexual molestation on the victim by her father and also forced oral sex. The medical evidence fully corroborates the testimony of PW1 and even the suggestion of the tear of hymen being caused by masturbation was effectively negatived by the expert Doctor. There is some delay in the registration of the FIR which has been properly explained by PW1, as held in *Chotey Lal* (supra). The atrocities on the victim was carried out by her father, for over two years after leveling threats against the life of herself and her mother. The victim obviously did not want to create marital discord and kept silent. She specifically speaks of having confided to her class teacher, on hearing of another girl turning pregnant in a like molestation. The FSL report also revealed, item numbers 1 & 2; the skirt & churidar top of the victim having seminal stains. The plastic

mat, item No.4 was detected with human spermatozoa. Considering the fact that the last act complained of was just prior to the complaint, the scientific evidence further corroborates the evidence of the victim. We find absolutely no reason to either interfere with the conviction or with the sentence imposed.

13. The date of birth proof produced unfortunately does not stand legal scrutiny since Ext. P6 produced by the Head Mistress (PW10) of the School in which the victim was studying, is just a certificate and not the extract of the register. *Rajan, Alex and Raghavan* (all supra) held that but for a certificate from school first attended as provided for in *Jarnail Singh v. State of Haryana [(2013) 7 SCC 263]* no other certificate can be accepted for the purpose of proving date of birth; which has to be in accordance with the Evidence Act. The register maintained in the school is not a public document and the certificate issued by the Headmistress cannot be considered to be a secondary evidence. We hence find that there is no proof of age as established by the prosecution.

14. In *R. v Neville Benson Henry & R. v Jeffrey Patrick Manning, (1969)53 Cr.App.R.150*, the Court of Appeal (Criminal

Division) was concerned with the appeal against conviction on rape. A girl of 16½ years willingly accompanied Henry to a house, followed by Manning. Though Henry had informed the girl that his parents were at the house, on reaching there she found only a number of men. Henry detained her at that house and both Henry and Manning were charged of having raped her. The issue arose as to the summing up on corroboration, which the learned trial Judge, directed at the members of the Jury. The principle restated by the Court of Appeal was almost akin to the principle laid down by our own Supreme Court, on corroboration in a charge of sexual offence. It was held that it is dangerous to convict on the evidence of the woman or girl alone, because human experience shows false stories being foisted for all sorts of reasons or for no reason at all; which, it is easy to fabricate, but extremely difficult to refute. However, it was cautioned that with the said warning in mind, the Jury also has to be instructed that, if they come to the conclusion that the victim of rape, without any real doubt, is speaking the truth, then there is no reason to look for corroboration.

15. Our own binding precedents declare that the

testimony of a victim in a rape case, is not akin to that of an accomplice and carries more weight, identical to that of an injured victim [*Chottey Lal (supra)*].In *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat (1983) 3 SCC 217* it was held that: *'In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury'(sic).* The reasoning was that in the conservative, tradition-bound, non-permissive society like that of ours, none would make a false accusation of rape; braving ostracism, loss of face, social stigma and shame. *State of Punjab v. Gurmit Singh (1996) 12 SCC 384* held that : *'If for some reason the court finds it difficult to place implicit reliance on her testimony, it should look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice'(sic).* Though at first blush the law set forth in both United Kingdom and India are the same, there is a semantic difference in so far as the rule and the exception; which is a subtle reflection of the societal conditions in the two Countries. Applying the essential principle we find the evidence of PW1 to be of a sterling quality which requires no corroboration. We are fortified in the above

case insofar as some of the material particulars having been corroborated by the testimonies of witnesses, expert medical opinion and result of chemical analysis; all lending more than sufficient assurances.

16. *STRICKLAND v. WASHINGTON [466 US 668(1984)] [MANU/USSC/0112/1984]* was placed before us to urge the ineffective assistance rendered by the Counsel for the defence, at the trial and in the sentencing. The decision dilated upon the principle enunciated in the Sixth Amendment of the Constitution (U.S.A), which *inter alia* guarantees the right of assistance of Counsel for the defence in all criminal proceedings; which had been interpreted to be the right to *effective* assistance of counsel. While the claim of ineffective assistance, in the cited case was negatived, by the majority, the principle laid down was that *'an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment' (sic)*. Enumerating instances like denial of attorney-client consultation, state interference with counsel's assistance, conflict of interest of counsel, suppression of exculpatory information &

testimonies; where ineffective assistance could be presumed, the Court emphasized on the two pronged test of '*cause & prejudice*'. The errors should be so serious that it frustrates the right of assistance of counsel in the Sixth Amendment and should result in prejudice to the extent of the verdict being different, but for the un-professional errors occasioned.

17. *Janardan Reddy v. State of Hyderabad AIR 1951 SC 217* was one of the earliest cases where vitiation of trial for non-assignment of counsel was raised. Holding that a decision cannot rest wholly on American precedents, based on the doctrine of due process of law, peculiar to the American Constitution, the Constitution Bench refused to lay down a rule of law that in every capital case where the accused is unrepresented, the trial should be held to be vitiated. All the same it was held that a court of appeal or revision is not powerless to interfere, if it is found that the accused was so handicapped for want of legal aid that the proceedings against him may be said to amount to negation of a fair trial. *Bashira v. State of U.P AIR 1968 SC 1313* distinguished the above decision in view of a statutory rule framed under the Cr.P.C, for the State of U.P, which provided that the

Court 'may' appoint a counsel for the defence in a charge which could lead to capital punishment; to hold it mandatory despite the use of the word 'may'. In *Ranchod Mathur Wasawa v. State of Gujarat [1974 3 SCC 581]* it was held that '*Indigence should never be a ground for denying fair trial or equal justice. Therefore particular attention should be paid to appoint competent advocates, equal to the handling of complex cases and not patronizing gestures to the raw entrants to the bar'(sic). Hussainara Khatoon v. Home Secretary (1980) 1 SCC 98 declared that right to free legal services is an essential ingredient of 'reasonable, fair and just' procedure implicit in the right to life and liberty conferred under Article 21 and implied in the mandate for equal justice under Article 14; which finds further articulation in Article 39-A of the Constitution.*

18. This High Court in *Gopalan Achari v. State of Kerala 1981 KLT 448* emphasized the requirement of providing legal aid to every person under threat of deprivation of liberty, especially in the context of the Hon'ble Supreme Court having repeatedly pointed out that, bereft of such representation being ensured, the proceedings itself will be vitiated. *Chandran v. State Of Kerala 1983 KLT 315* and

Unnikrishnan v. State of Kerala 1983 KLT 586 are cases in which the trial was held to be vitiated for reason of legal assistance having not been provided and while in the former case a fresh trial was ordered, in the latter, the accused was acquitted.

*19. A*dopting the dictum in *E. STRICKLAND (supra)* that *'Failure to make the required showing of either deficient or sufficient prejudice defeats the ineffectiveness claim'(sic)* the trial in the present case is not vitiated. There was a State Brief appointed and he has cross-examined the crucial witnesses PW1 to PW3 & PW5, and could discredit PW3. PW1 & PW2 proved upto it, in cross-examination, which is not due to any errors committed by Counsel, but only by reason of their perceptive testimonies. PW4, the aunt and PW7, the teacher were not cross examined; but little could have been achieved, looking at their brief, but, to the point, depositions. The Doctor, PW5 also proved her subtle expertise in demolishing a suggestion made by the defence. There is neither any counsel error, discernible or a demonstrable prejudice, argued. On the contrary the evidence led in the instant case, unequivocally establish the crime, having been committed by the accused, beyond all reasonable doubt.

20. Finding that there is no proof of date of birth, the conviction under the POCSO Act will have to be set aside and so would the conviction under S.376(2)(i) be set aside. However the conviction under S. 376(2)(f) is upheld with the sentence to undergo imprisonment for life, meaning imprisonment for the reminder of the natural life of the accused and pay a fine of Rs.1 lakh with default sentence of simple imprisonment for one year. The conviction and sentence under S.377 & S.506 IPC are upheld along with the fine imposed and the default sentence as imposed by the trial Court

The appeal is partly allowed.

Sd/-
K. VINOD CHANDRAN, JUDGE

Sd/-
C. JAYACHANDRAN, JUDGE

jma/uu/08/2022