IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR.JUSTICE ZIYAD RAHMAN A.A.

FRIDAY, THE 10TH DAY OF SEPTEMBER 2021 / 19TH BHADRA, 1943

CRL.A NO. 94 OF 2017

AGAINST THE JUDGMENT DATED 30.11.2016 IN SC 189/2014 OF SPECIAL COURT FOR TRIAL OF OFFENCES UNDER POCSO ACT & CHILDREN'S COURT (ADDITIONAL SESSIONS COURT-I), KALPETTA, WAYANAD

(CRIME NO.179/2014 OF Vythiri Police Station, Wayanad)

APPELLANT/S:

MANI BALAN,
S/O KAYAMA, CONVICT NO.1002/16
CENTRAL PRISON, KANNUR.

BY ADVS.
SRI.RISHIKESH SHENOY.M (LEGAL AID COUNSEL)
SRI.P.MOHAMED SABAH,
KUM.SAIPOOJA

RESPONDENT/S:

STATE OF KERALA

BY SMT.BINDU O.V., PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING COME UP FOR FINAL HEARING ON 09.09.2021, THE COURT ON 10.09.2021 DELIVERED THE FOLLOWING:

K.Vinod Chandran & Ziyad Rahman A.A., JJ.

Crl. Appeal No. 94 of 2017

Dated this the 10th September 2021

JUDGMENT

Vinod Chandran, J.

It is a shame that every other case we consider is sadly a rape of a minor. A minor child was pounced upon by a neighbour, when she was alone in her house and forcefully molested, which is the case of the prosecution.

2. Kum. Sai Pooja, learned Counsel for the appellant, vehemently argued in defence, claiming the improbability of the story and stressing upon the inconsistencies. Though in cases of rape, it is trite that a conviction can be based on the sole testimony of the prosecutrix; corroboration would be necessary if the evidence is found to be not of sterling quality. Discrepancies in the evidence of the victim, PW1 and her mother, PW9 are specifically highlighted. The incident is portrayed as a very violent one, but the injuries detected in medical examination are not commensurate with the violence alleged. It has been deposed that the victim was forcefully taken inside the room of her house and rape was carried out with equally violent penetration alleged. There were no visible injuries either on

the body or the genitals of the victim. The complaints of pain noticed by the Doctor can always be pretended. As for the evidence regarding penetration, an extract from the book 'Forensic Medicine for the Police'; by Dr.B.Umadethan, a celebrated Doctor of Forensic Medicine, has been placed on record. It is pointed out that the presence or absence of hymen does not indicate the virginity of a woman. Emphatically the statement *'Virginity can be proved; but cannot be disproved'* is pointed out. The mere finding that there was a hymen tear would not conclusively prove the sexual act of penetration.

3. PW1 and PW9 have stated the time differently; while PW9 says that the meeting which kept her away from home was at 5 O'clock, PW1 says it to be at 4.00 p.m and the incident as recorded in Ext.P2 certificate of medical examination is at 4.30. The house in which the crime is perpetrated is situated in a colony which is thickly populated. The scene of occurrence was not properly identified and the description of the scene does not reveal the space available; which is significant insofar as the violent act of dragging the victim inside the house, throwing her on a cot and forcefully penetrating her. The scene plan Ext.P5 and scene mahazar Ext.P6 does not show the measurements of the rooms. It also shows only one access

into the house. The evidence of PW1 is that when her mother came home, the accused ran away, in which event the mother would have definitely seen the accused, to which end PW9 does not depose. It is pointed out that while PW9, the mother admitted that there were issues with the family of the accused, PW13, the father of the victim, asserted that the accused was his friend. The evidence of PW1, the victim clearly shows that she was tutored and leading questions were put to her in the chief-examination. She is said to have failed in the 10th standard and also failed twice earlier. A 14-year-old, who failed twice cannot be in the 10th standard and PW1 does not remember when she stopped her studies, a deliberate falsehood. There is hence suppression of material facts and PW1 is not a witness of sterling quality. The entire incident as spoken of by the prosecutrix; in the thickly populated area is *prima facie* unnatural. There is no valid proof of date of birth since only a certified copy of the birth certificate was produced and it was not marked through the custodian of such a document.

4. The learned Counsel would argue that the defence was conducted shabbily and it clearly indicates that the accused did not have proper legal aid. Reliance is placed on *Varghese @ Biju v. State of Kerala, 2007 (2) KHC 310* to urge a remand. *Ganesan v. State represented by Inspector of*

Police, (2020) 10 SCC 573 is placed reliance on to urge this Court to seek corroboration to the testimony of the prosecutrix, who is not credible. ***Santosh Prasad @ Santosh Kumar v. State of Bihar, (2020) 3 SCC 443*** is also relied upon to seek acquittal of the accused. The learned Counsel also valiantly sought for mitigation in the sentence, even if the conviction is affirmed; since doubt lingers on all counts.

5. The learned Public Prosecutor Smt.Bindu O.V. argued for sustaining the impugned judgment. It is pointed out that PW9 has produced Ext.P9 certificate of date of birth, which is the certified copy of a public document. The evidence of the Headmaster (HM) (PW5) further corroborates the date of birth and establishes the child victim to be only 14 years of age when the alleged incident occurred. The evidence of PW1 is amply corroborated by that of the Doctor and the certificate of examination produced, Ext.P2. It clearly indicates the history of the incident, which is in tune with the FIS and the deposition of PW1 before court. The trial court has seen the demeanour of the witness, assessed her conduct and found her to be competent. The trial court was abundantly careful in recording the chief-examination, as question and answer and none of them are leading questions. The prosecutrix without any deviation, braved searching cross-examination and stood her ground. The suggestive

questions put to the victim in cross-examination indirectly is an admission of the incident having occurred. The accused had pounced on the victim knowing very well that there would be no person available in the house. The alleged incident would not necessarily cause any bodily injury as such. The absence of bodily injury cannot be the sole ground for an acquittal and in any event, the victim has complained of body pain as is evident from the deposition of the Doctor. *Johny C. v. State of Kerala, 2021 (4) KHC 296* is relied on to argue that the mother, immediately after the incident heard about the rape and the perpetrator from the victim, which can be treated as *res gestae* under Sec.6 of the Evidence Act.

6. We would first deal with the contention raised relying upon *Varghese @ Biju* (supra) regarding no effective legal aid having been received. A reading of the decision would indicate that in the cited case, the Legal Aid Counsel only had four years of experience and on the very next day of his engagement, he was required to cross-examine the important witnesses. There are no such facts brought before this Court on which alone there could be prejudice found by this Court; as has been found in the cited case. The learned Counsel, would emphasize how the case was conducted, to seek for a remand. We are however not inclined to so remand a matter merely for the reason of the defence having not been

conducted properly. We also notice that but for the suggestion put in cross-examination, which tends to be an indirect admission, there is no inefficiency discernible in the defence set-up. In fact, ***Ganesan*** (supra) found that merely because an appeal is disposed of within four days, it cannot be presumed that there was no fair and sufficient opportunity given to the accused to defend himself. In the present case, there is not even a ground urged of prejudice.

7. PW1, the victim deposed in tandem with the FIS given by her. We see that the court has recorded the chief-examination as questions and answers. But however, we do not find them to be leading questions. The prosecutrix deposed that on 04.05.2014 at around 5.00 p.m she was alone at her residence when her father's friend trespassed into her house and closed the door at the entrance. He removed his dress, caught hold of her and forcefully removed her *churidar*-pants. When she protested and tried to raise an alarm, the accused covered her mouth with his hand and caught her breasts. He threatened to cut off her breasts and removed her undergarment. The victim was then forcefully made to lie on the cot and subjected to penetrative sexual assault. After the incident, she cried and when her mother came home, the accused fled the scene. The victim was also told by the accused not to divulge the incident to anybody. However, she

spoke to her mother about the molestation and later on; the next day, Ext.P1 FIS was registered. She also spoke about having been examined at the Taluk Head Quarters Hospital, Vythiri and having surrendered MO1 to MO3 dresses before the I.O. She spoke of her date of birth as 14.03.1999. She withstood searching cross-examination and no inconsistency as such could be brought out. In fact, there was a more graphic description of the incident, on the suggestions made in cross. She also explained how the accused stifled her cries, physically and by threats levelled, negativing any possibility of the nearby residents coming to her rescue.

8. PW2 is a neighbour who went along with the mother to the *Kudumbasree* meeting. She had different versions about how she came to know of what happened to PW1. We do not place any reliance on that part of her evidence. PW9, the mother of the victim, spoke in tandem with what the victim said. She had been away for the *Kudumbasree* meeting, which at least receives corroboration from PW2, who was also present at the meeting. When she returned and saw her daughter crying, she enquired the reason with her daughter. Though she did not immediately say anything, later the victim disclosed what transpired in the absence of the mother. On the next day, they went to the Vanitha Helpline at Kalpetta to make the complaint. PW9 also affirmed that the birth of her

daughter was registered and a birth certificate, the original of which was with her, was produced. The same was marked as Ext.P9, which indicates the date of birth to be 14.03.1999. The original after perusal by the Court was given back and a copy placed in evidence. PW13 is the father, who was away on work. He was working at a slightly distant place, in a hotel. He confirmed that PW1 was alone in the house, since his wife had gone for *the Kudumbasree* meeting and his elder daughter was away at Palakkad. This fact was spoken of by PW1, PW2 and PW9 also. He was informed over the telephone about the rape committed on his daughter at around 9.00 clock at night and the next day morning he came home, after which the complaint was made.

9. We do not find any inconsistency in the evidence of PW1 and PW9 as to the time. PW1, in her cross-examination had only said that her mother had left for the *Kudumbasree* meeting at around 4 o'clock and PW9 spoke of her having gone for a meeting at around 5 o'clock. We do not think that the witnesses should be pinned down to the exact time and it is highly unlikely that every routine would be carried out by an individual looking at a clock. That the house was empty on the evening of the crucial day and that the offence was committed between 4 to 5 p.m is fairly clear from the evidence of PW1 and PW9. The learned Counsel has also

stressed the fact that, while PW9 speaks of some issues with the family of the accused, PW13 spoke of the accused being a friend. PW1 also deposed that she was acquainted with the accused since he and her father were friends. The attempt of the defence obviously was to allege a motive for raising a false allegation against the accused by the family of the victim. It is only natural that even between friends or family, there exist certain issues. But that alone cannot lead to such a false allegation and we find no credence in the contention raised on that count by the accused.

10. The learned Government Pleader has relied on *Johny (supra)* to urge *res gestae* under Sec.6. *Parbati Devi v. State, AIR 1952 SC 831* was relied on to raise the ground of relevance under Sec.8 of the Indian Evidence Act. We would not go into that, especially since the question put to PW9 in chief-examination was a leading question. PW9 in chief-examination, while narrating what transpired, spoke of her daughter having not first divulged the reason for weeping. She also said that, it was only later, when she persisted, the girl came out with the specific allegation of molestation. The prosecution before the trial court put a question as to whether PW1 had stated about the molestation when enquiries were made with her, to which an affirmative answer was given. We would not place any reliance on the same

and in that circumstance, we would not also consider the contention raised under Sec.6 and 8 of the Evidence Act.

11. PW3 is the Doctor who examined the victim at 7.45 p.m on 05.05.2014, the very next day. The certificate issued was marked as Ext.P2. The history relating to the incident is recorded as *'alleged H/O sexual assault by Balan (Mani Balan) on 4.5.2014 at abound 4.30 p.m …'* at the victim's residence. The details of position and degree of violence were also recorded. The victim was pinned down by the assailant and her panties and pants removed, after which penetration with the penis was attempted. The victim was unable to give any resistance since the accused was lying over her. The victim also stated that she was having pain while urinating and she had washed her genitals after the incident. Vaginal swabs, vaginal smears, nail clippings, hair samples, etc. were taken. On examination, her hymen was found to be torn at 7 o'clock position, but there were no injuries on the vagina. According to the Doctor, there was evidence of vaginal penetration since the hymen is torn at the 7 o'clock position and the vagina admits one finger loosely and two fingers tightly. The history of the incident as recorded in Ext.P2 corroborates the FIS and the deposition of the prosecutrix. It is argued by the learned Counsel, Ext.P17 FSL report does not reveal any evidence of sexual intercourse,

which normally leaves remnants for about 72 hours. This by itself cannot be conclusive to find no penetration. In the light of the credible and consistent evidence spoken of by the victim, which is in tune with the FIS and the history reported to the Doctor, we find no reason to interfere with the finding of the trial court that there was actual penetration and rape was committed.

12. The learned Counsel has placed before us an authoritative text by a celebrated Forensic Specialist, which indicates that even the presence or absence of hymen does not disprove virginity conclusively. We should understand that if the hymen is present and does not reveal any injury, virginity stands proved, but not otherwise. In the present case, the virginity is not proved and coupled with the evidence of the prosecutrix, with sufficient corroboration from other witnesses, we are inclined to find the molestation having occurred as spoken of by the prosecutrix.

13. The age of the victim is proved by Ext.P9 certificate of birth issued by the Registrar of Births & Deaths, though the same was not produced before the I.O. PW9, the mother produced it from her custody before court when she was examined. The date of birth as seen from Ext.P9 certificate is 14.03.1999. The Register of Births and Deaths is a public document as provided under Sec.74 and the

certified copy of the public document is one issued under Sec.76. There is a presumption insofar as the genuineness of the certified copies so declared to be admissible as evidence of any particular fact, duly certified, *interalia*, by a State Government Officer. We rely on the judgment of a Division Bench in *Rajan v. State of Kerala, 2021 (4) KLT 274*. We do not find any reason to doubt the certified copy nor is it inadmissible in evidence. Though no corroboration is necessary, the HM, PW5, produced the extract of the School register as Ext.P4, which also confirms the date of birth as spoken of by PW1, PW9 and revealed from Ext.P9. Significantly the mother of the victim also spoke of her age.

14. The official witnesses, including the I.O, have spoken of their role in the investigation, on which no dispute is raised. The scene plan is marked as Ext.P5 and the scene mahazar as Ext.P6. The residence of PW1 is a small one and has an asbestos roof. True, the description of the rooms are not given, but that is not a reason to assume that the alleged actions could not have been committed in the house. The allegation is also that the accused had entered the house, closed the door at the entrance and then molested the victim. She is also said to have been dragged to the bed where she was forced to lie down. We do not think there are any spatial constraints in the house, normally habituated by

four persons, the victim, her parents and her elder sister, all of whom, except the victim, were away at the time when the incident occurred.

15. We find no reason to interfere with the conviction entered under Sec.376(2)(i) of IPC and Sec.450 of IPC. There is ample evidence to find rape having been committed on the victim, who has also been proved to be below the age of 16 years. As far as the conviction under Sec.5(i) read with Sec.6, we agree with the learned Counsel for the appellant that there is no aggravated penetrative sexual assault. No separate sentence was awarded under the POCSO Act by the trial court noticing Sec.42 of the Act because of the sentence imposed under Sec.376(2)(i) of the IPC. An aggravated penetrative sexual assault arises *interalia* when it is committed on a child below 12 years. In the present case, the child is 14 years and hence there can be no conviction under Sec.5(m). The charge seems to be under Sec.5(i). However, there is no grievous hurt, bodily harm or injury on the body of the child or to the sexual organs. Be that as it may, the accused is found to have committed penetrative sexual assault under Sec.3, a lesser offence, for which the punishment varies from 10 years to imprisonment for life. We do not think that we should impose any sentence separately, especially since the Sessions Court has not

imposed it by virtue of Sec.42 and the sentence imposed under Sec.376(2)(i). We hence set aside the conviction under Sec.5(i) read with Sec.6 of the POCSO Act and confirm the conviction under Sec.376(2)(i) and Sec.450 of the IPC. The accused is also found guilty of the offence under Sec.3 read with Sec.4 of the POCSO Act, 2012. The sentence imposed by the Court below is affirmed *in toto*. The appeal hence stands partly allowed.

Sd/-

K.Vinod Chandran,
Judge

Sd/-

Ziyad Rahman A.A.,
Judge

dkr/-