

Dharmarajan Vs. State of Kerala

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SooperKanoon Citation : sooperkanoon.com/1136851

Court : Kerala

Decided On : Apr-04-2014

Judge : Honourable Mr.Justice K.T.Sankaran

Appellant : Dharmarajan

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALAAT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE K.T.SANKARAN & THE HONOURABLE MR.JUSTICE M.L.JOSEPH FRANCIS FRIDAY, THE 4TH DAY OF APRIL 2014 14TH CHAITHRA, 1936 CRL.A.No. 877 of 2002 FROM S.C. NO.241/2001 of the ADDITIONAL SESSIONS COURT (SPECIAL COURT), KOTTAYAM
APPELLANT/ACCUSED:: ----- DHARMARAJAN, S/O.SREEDHARAN PILLAI, CHITHRAM HOUSE, PONKUNNAM KARA, CHIRAKKADAVU VILLAGE KANJIRAPPALLY TALUK, KOTTAYAM DISTRICT. BY SENIOR ADVOCATE SRI.RAJU JOSEPH BY ADV. SRI.GEORGE KUTTY MATHEW
RESPONDENT/COMPLAINANT: ----- STATE OF KERALA REP. BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA. BY ADV. DIRECTOR GENERAL OF PROSECUTION SRI.T.ASAF ALI BY PUBLIC PROSECUTOR SRI.RANJITH BY PUBLIC PROSECUTOR SRI.BIJU MEENATTOOR BY ADV. SRI.K.GOPALAKRISHNA KURUP BY ADV. SRI.P.K.RAVISANKAR R VICTIM BY ADV. SRI.SURESH BABU THOMAS BY ADV. SRI.C.S.AJAYAN BY ADV. SRI.P.RAVINDRA BABU BY ADV.

SMT.K.V.BHADRA KUMARI BY ADV. SMT.ANILA GEORGE BY ADV. SRI.V.K.SUNIL BY ADV. SRI.S.NANDAGOPAL THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON0901-2014, THE COURT ON0404-2014 DELIVERED THE FOLLOWING: K.T.SANKARAN & M.L.JOSEPH FRANCIS, JJ.

----- Crl.A. NO. 877
OF2002----- Dated this 4th the day of April,
2014

JUDGMENT

K.T.Sankaran, J.

This Criminal Appeal reveals the sad story of a girl who was aged only sixteen years and four months at the relevant time and who was allegedly subjected to sexual abuse, rape and gang rape by more than forty persons at different places in the State of Kerala and in the State of Tamil Nadu. The name of the victim is withheld and she is described as 'the victim girl' in the judgment. The prosecution case in a nutshell is that the appellant (Dharmarajan), accused No.1 (Raju) and accused No.2 (Usha) hatched a criminal conspiracy to kidnap the victim girl from the lawful custody of her guardian and to subject her to sexual abuse and provide her to others for illicit sexual intercourse. In furtherance of the criminal conspiracy, the victim girl was kidnapped from the lawful custody on 16.1.1996, confined her secretly at several places in the State of Kerala and in Tamil Nadu and she was subjected to rape and gang Crl.A. NO. 877 OF2002::

2. :: rape by several persons by keeping the victim girl under illegal custody. It was also alleged that the appellant robbed her gold and silver ornaments during the period in which she was kept under illegal custody. The prosecution alleged that the victim girl was missing on 16.1.1996 and she came back to her father only on 26.2.1996 and the offences were committed during that period.

2. The victim girl was studying in the IXth standard at Little Flower Girls High School, a convent school, at Nallathanni, Munnar. Her father was the Postmaster of Munnar Post Office. The victim girl's mother was working as a Nurse in the hospital at Sooryanelli Estate. The father, mother and sister of the victim girl were

residing in the quarters allotted to her mother at Sooryanelli Estate. The victim girl was studying for VIIIth standard at Mount Carmal Girls High School, Kottayam during 1994-95. She was staying in the school hostel. Later she discontinued her stay in the hostel and started staying at the house of her uncle Robert at Mundakkayam. While the victim girl was staying with her parents at Sooryanelli Estate, she was attending tuition classes conducted by one Kuttiyamma teacher at Devikulam. The victim girl used to travel CrI.A. NO. 877 OF2002::

3. :: along with her father in a bus called "Companion", which was plying in Sooryanelli-Munnar- Devikulam route. The first accused Raju was working as the checker/conductor in the "Companion" bus. He got acquainted with the victim girl which gradually developed into a love affair. The prosecution alleged that the appellant (Dharmarajan), accused No.1 (Raju) and accused No.2 (Usha) hatched a criminal conspiracy to induce the victim girl to accompany Raju, her lover, and to take the victim girl out of lawful custody. Their idea was to take the victim girl to various places and to compel her for sexual intercourse with many persons.

3. The prosecution alleged that, during the relevant period, the victim girl used to travel in "Companion" bus from Sooryanelli to Devikulam for attending tuition classes. Her father used to travel in that bus from Sooryanelli to Munnar. Fathima, the victim girl's classmate in the tuition class, was her close friend. The victim girl had taken a photo album containing photos of her family members to the tuition class. The album was shown to Fathima as well. Fathima took the album for showing the same to her family members. However, when Fathima brought back the album to be CrI.A. NO. 877 OF2002::

4. :: given to the victim girl, she (Fathima) showed that album to her friends while travelling in the "Companion" bus. On seeing the album, accused No.1 (Raju) took that album and promised to Fathima that the album would be given to the victim girl. The album was kept by accused No.1 (Raju). The victim girl later joined Little Flower Girls High School at Nallathanni, Munnar for the next academic year. During that period, accused No.1 (Raju) used to meet her at the premises of the school compound during lunch interval on Fridays and also while travelling with her father from Sooryanelli to Munnar and from Munnar to Sooryanelli during

weekends. Raju induced the victim girl to accompany him and he promised to marry her. The victim girl was reluctant initially to go with Raju. Originally, Raju directed her to accompany him on 1.1.1996. However, the victim girl did not go with him on that day. Raju threatened her that he would make use of her photographs in the album, to make nude photos of her and her mother and paste the photographs on the walls of her school and at the Post Office where her father was working. Raju met the girl on 12.1.1996 during lunch break and compelled her to go with him on 16.1.1996. Raju requested her to take two or three sarees of her mother and CrI.A. NO. 877 OF2002::

5. :: available cash from the house. Raju also told the victim girl to state her name as Anjali, wherever required. The victim girl was directed to board Anjali bus in the evening on 16.1.1996 from Munnar bus stand and to get down at Adimaly. The prosecution alleged that due to the threat and inducement made by Raju and also believing the words of Raju to marry her, the victim girl took a few sarees of her mother and cash of 300/- and some of her dresses in a big shopper, while going to her hostel on 16.1.1996. On 16.1.1996, the victim girl got down at Munnar along with her father and she went to the hostel in an autorickshaw along with a friend of her mother who was also working as a nurse.

4. The prosecution alleged that at about 4.30 pm. on 16.1.1996, the victim girl, without the knowledge of the hostel authorities, came out of the hostel, went to Munnar bus stand and boarded Anjali bus to go to Adimaly as directed by accused No.1 (Raju). She got down at Jubilee bus stop at Adimaly, where Raju was waiting. As directed by Raju, she went to the bus stand at Adimaly and boarded P.P.K. Bus and proceeded to Kothamangalam. Raju also travelled in the same bus and took ticket for the victim girl. CrI.A. NO. 877 OF2002::

6. :: Raju stated that he would be sitting in the seat on the rear side. The girl saw accused No.2 (Usha) also in that bus. The victim girl got down at Kothamangalam bus stand at about 7 pm. To her surprise, she could not see Raju anywhere there. The victim girl was frightened. There was no bus to return to Munnar or to Sooryanelli. The victim girl decided to go to the house of her maternal aunt at Thazhathangadi, Kottayam. For that purpose, she got into a KSRTC bus, got down

near Muvattupuzha Bridge and took an autorickshaw and reached the KSRTC bus stand. From there, she boarded a bus going to Kottayam. In that bus also she saw accused No.2 (Usha). The victim girl got down at KSRTC bus stand, Kottayam. Usha also got down there. The victim girl could not find out the way to reach her maternal aunt's house at Thazhathangadi. Therefore, she decided to go to the house of her uncle Robert at Mundakkayam. She came to know that only during the early hours on the next day, bus would be available to Mundakkayam. Some persons in the bus stand were staring at her and she got frightened. At that time, accused No.2 (Usha) approached the victim girl and called her by her real name. The victim girl asked Usha as to how she knew her name. Usha stated that she knew her and her name. The victim girl Crl.A. NO. 877 OF2002::

7. :: felt some sort of security and comfort. Accused No.2 (Usha) could gain confidence of the victim girl. Usha asked the victim girl where she was going and the girl replied that she was going to Mundakkayam and that bus was available only in the morning hours. At that time, Usha went to see the appellant Dharmarajan who was standing nearby and talked to him. Usha returned and stated to the victim girl that she could only mention her name as Anjali and that she was studying in a college. Usha thereafter introduced the appellant (Dharmarajan) to the victim girl as Sreekumar. Usha told the victim girl that Sreekumar was also going to Mundakkayam, that he is a dependable person and the girl could consider him as her brother. The appellant mentioned the names of some of the neighbours of Robert, the uncle of the victim girl, and thus gained confidence of the girl. Believing the words of Usha that the appellant (who was introduced as Sreekumar) is a dependable person and that she could go with him to her uncle's house, the victim girl reposed full confidence in the appellant and followed him. The appellant (Dharmarajan) and accused No.6 (Unnikrishnan Nair) had taken a room in Metro Lodge near KSRTC bus stand, Kottayam. The appellant (Dharmarajan) made the victim girl believe that his Crl.A. NO. 877 OF2002::

8. :: mother is taking rest in a room in Metro Lodge and she could take rest there till the next day morning. The victim girl was taken to a room in Metro Lodge. The victim girl could not find the mother of the appellant (Dharmarajan) there. She

asked as to where his mother was. He stated that his mother was taking bath in the next room. Since the mother of Dharmarajan was not seen coming to the room, the victim girl enquired again about her. At that time, Dharmarajan locked the room from inside. He forcibly took the victim girl and made her lie on a cot. The victim girl resisted and wept. Dharmarajan caught hold of her throat, pressed on her throat and threatened to kill her. He stated that he is an advocate and that if the victim girl did not obey him, he would kill her and her parents. Dharmarajan stated that he knew how to tackle a case and escape. The victim girl pleaded for mercy, but Dharmarajan did not show any mercy towards her and promised to release her later if she obeyed him. Dharmarajan forcibly undressed her and committed rape. Later, the cot was pulled towards the door so that the victim girl could not open the door and escape.

5. The prosecution alleged that the victim girl was raped and CrI.A. NO. 877 OF2002::

9. :: gang raped by several persons inside and outside the State on various days ranging from 16.1.1996 to 26.2.1996. On 26.2.1996, the victim girl was released and she went to Munnar and met her father. The prosecution alleged that the victim girl was subjected to 67 rapes including gang rapes during that period.

6. Meanwhile, by about 7 pm on 16.1.1996, the father of the victim girl was told by his friend that the girl was found at Munnar town in the evening at about 4.45 pm. The father of the victim girl and his friend went to Munnar bus stand, but the victim girl was not found there. They decided to go to the Convent and enquire about the victim girl. Kulanthai Thressia, the Headmistress of Little Flower Girls High School had gone to Kattappana to attend a conference and she returned to Munnar only in the evening. The Headmistress was informed by the Boarding Warden of the Convent that the victim girl was missing from the Convent from 4.30 pm onwards. The Headmistress thought of informing the matter to the father of the victim girl and she proceeded to the post office in an autorickshaw. By that time, the father of the victim girl and his friend Mohanan came there and they were informed that the girl had gone CrI.A. NO. 877 OF2002::

10. :: out of the Convent without the knowledge of the Convent authorities. The father of the girl and his friend made hectic enquiries in the nearby places to find out the victim girl, but all their attempts were in vain. Immediately thereafter, the father of the victim girl went to Munnar Police Station. But, the police advised him to verify whether the victim girl had reached home at Sooryanelli. The father of the victim girl reached his house at Sooryanelli by about midnight and he came to know that the victim girl had not reached there. He went to Munnar Police Station in the morning on 17.1.1996 and furnished First Information Statement to the police and, accordingly, Crime No.6 of 1996 was registered at Munnar Police Station under the caption "man missing".

7. After the victim girl met her father on 26.2.1996, she was taken home. She was physically and mentally weak and she was not in a position to narrate the events. At home, the victim girl narrated the entire story. The father and mother of the victim girl took her to Munnar Police Station on 27.2.1996. The Assistant Sub Inspector of Police recorded the victim's statement. The offence was altered by deleting the caption "man missing" and adding offences CrI.A. NO. 877 OF2002::

11. :: under Sections 366A, 372, 373 and 376 read with Section 34 of the Indian Penal Code. The investigation of the case was conducted by several police officers, namely, Balakrishnan, Assistant Sub Inspector of Police (PW54); V.K.Mathew, Circle Inspector of Police, Munnar (PW49); K.M.Mathew, Circle Inspector of Police, Devikulam (PW53); A.T.Jose, Deputy Superintendent of Police, Munnar (DW2); K.Ittoop, Superintendent of Police, Narcotic Cell, Thiruvananthapuram (PW50) and Siby Mathew (PW57) as the head of the Special Investigation Team.

8. After completing the investigation, PW57 laid the charge against 41 accused persons including the appellant (Dharmarajan). The appellant was arrested on 10.3.1996. Later, he absconded and the case against him was split up. The case against the other accused was tried as S.C.No.187 of 1999. The learned Sessions Judge acquitted some of the accused and the other accused were found guilty and they were sentenced for different terms of imprisonment.

9. The case against the appellant (Dharmarajan) was committed to the Sessions Court in C.P.No.21 of 2000 on the file of Crl.A. NO. 877 OF2002::

12. :: the Court of the Judicial Magistrate of the First Class, Devikulam and it was taken on file as S.C.No.241 of 2001 on the file of the Court of Session, Kottayam Division. The appellant (Dharmarajan) was found guilty for the offences under Sections 120B, 363, 365, 366A, 368, 376, 376(2)(g), 372 and 392 of the Indian Penal Code. He was found not guilty for the offence under Section 109 of the Indian Penal Code. The appellant was sentenced to undergo imprisonment for life for the offence punishable under Section 376(2)(g) of the Indian Penal Code. No separate sentence was imposed on the appellant for the other offences for which he was convicted, on the ground that maximum punishment for the offence under Section 376(2)(g) of the Indian Penal Code was imposed on him.

10. The victim girl was examined as PW3 in S.C.No.187 of 1999, while she was examined as PW1 in S.C.No.241 of 2001. After deleting the name of Dharmarajan, there were 40 accused in S.C.No.187 of 1999. Dharmarajan was shown as the sole accused in S.C.No.241 of 2001.

11. Criminal Appeals were filed before the High Court by Crl.A. NO. 877 OF2002::

13. :: those accused who were convicted and sentenced. Dharmarajan filed Crl.A.No.877 of 2002. The Division Bench disposed of all the appeals by a common judgment and found the accused in S.C.No.187 of 1999 not guilty and they were acquitted. So far as Dharmarajan is concerned, the Division Bench held thus: "172. Going by the evidence of PW3 and by the admitted case of Dharmarajan, it is conclusive that Dharmarajan had taken PW3 from place to place and during that journey, it is clear that, she was subjected to sexual intercourse by others. That sexual intercourse is illicit intercourse as she was a minor at that time, and she was not related to any one by marriage. Even according to Dharmarajan, he did not have any relation with that girl. If as admitted by Dharmarajan the girl had followed him from Ernakulam to different places mentioned in his statement under Section 313 Cr.P.C., necessarily, it was on inducement by Dharmarajan. Dharmarajan has thus induced PW3 who was admittedly under the age of 18 years to go from place to place and she had been

subjected to illicit intercourse during that period. The irresistible conclusion, therefore, is that he has committed the offence punishable under Section 366A IPC. Crl.A. NO. 877 OF2002::

14. ::

173. It is also clear from the same evidence and the stand taken by Dharmarajan in his Section 313 statement that he had disposed of PW3 while she had been taken from place to place, to several other persons for immoral purpose. It is clear from the evidence of PW3 that she had been subjected to illicit intercourse by several of the accused in the first case during the period when Dharmarajan had admittedly taken her from place to place and at other places as spoken to by PW3. Of course, there is no specific evidence of collection of money to find him guilty of selling of the girl or letting her for hire.

184. Taking into account the nature of the offence committed and the plight of the victim, who had been subjected to such offence for about long 40 days, we feel that no leniency need be shown to such an accused. We are of the view that taking into account all circumstances, a sentence of rigorous imprisonment for 5 years with a fine of Rs.25,000/-, on each of the said two counts of offences shall meet the ends of justice in this case. In default of payment of fine as aforesaid, he shall undergo simple imprisonment for one year each on those two counts. Crl.A. NO. 877 OF2002::

15. ::

185. Accordingly, we allow Crl.A.No.877/02 as aforesaid, setting aside the conviction of the appellant therein on all the counts except under Sections 366A and 372 IPC and modify the sentence passed on him by the court below, as aforesaid, for the said two offences. We make it further clear that fine, if realised, shall be paid to the victim, PW1 in Sessions Case No.241 of 2001 leading to Crl.A.No.877/02. The substantive sentences of imprisonment shall run concurrently. He will also be entitled to set off under Section 428 Cr.P.C. The court below shall issue non-bailable warrant against him to execute the sentence." 12. The State as well as the victim girl filed Criminal Appeals before the Supreme

Court challenging the judgment of the Division Bench of this Court. The Supreme Court allowed the Criminal Appeals, set aside the judgment of the Division Bench of the High Court and remanded the Criminal Appeals for fresh disposal in accordance with law. The Supreme Court held thus: "After hearing learned senior counsel appearing for the parties, we find a lot of force in the submission of the learned counsel for the State of Kerala. By the impugned common judgment the High Court has acquitted the 35 respondents who had been convicted in Crl.A. NO. 877 OF2002::

16. :: Sessions Case No.187 of 1999 only on the basis of evidence led in Sessions Case No.241 of 2001 after arriving at a finding that the Prosecutrix may not have been an unwilling partner to the sexual intercourse with the accused and the High Court does not appear to have considered the evidence in Sessions Case No.187 of 1999. What the High Court has failed to appreciate is that a Prosecutrix may be a willing partner in an intercourse with the one accused in Sessions Case No.241 of 2001, but she may not be a willing partner in intercourse with the 35 other accused in Sessions Case No.187 of 1999. Whether she consented to an intercourse will ultimately depend on the facts of each case. The High Court ought to have considered the facts of each case and decided the appeals in accordance with law and in the absence of such consideration by the High Court, it will not be proper for us to decide on the culpability of each of the respondents-accused in these appeals. We, therefore, set aside the impugned common judgment of the High Court and remand the matters back to the High Court for fresh disposal in accordance with law." 13. After the judgment of the Supreme Court, we heard the appeals in the after lunch session on and from 2.4.2013 to 9.1.2014 Crl.A. NO. 877 OF2002::

17. :: on almost all working days except summer holidays and other holidays.

14. It is not much in dispute that the victim girl was missing from 16.1.1996, that she was taken to various places and that she was sexually abused by several persons at different places. Why did the victim girl leave her hostel and leave the station as per the direction of Raju? Was it her intention to marry Raju and live with him? Why did Raju disappear enroute? Why did Dharmarajan took her to

various places? Did she agree for having sex with several persons who are accused in the case? Was her consent obtained by them? Was it for love, lust, money or other advantage that she indulged in sex, or was it rape and gang rape? Or was it a child prostitution? Was there any informed consent? What did she ultimately gain from her trip from 16.1.1996 to 26.2.1996? Did she gain any money for lending her body to several persons? Or did she lose whatever she had in the form of ornaments and also lost her chastity and her future life? Was the victim girl is a deviant girl as alleged by the defence? Is the oral evidence of the victim girl reliable and acceptable and whether conviction of the accused can CrI.A. NO. 877 OF2002::

18. :: be had based on her evidence? These are all some of the questions which may arise for consideration in this appeal.

15. In S.C.No.241 of 2001 from which the above Criminal Appeal arose, PW1 to PW57 and DW1 to DW6 were examined, Exts.P1 to P102, D1 to D43, X1 to X14 and C1 were marked and MO1 to MO21 were identified. In this Criminal Appeal, additional Exhibits A1 to A10 were marked.

16. The victim girl was examined as PW1. She narrated all the incidents in detail. She was thoroughly cross-examined. Her evidence with respect to her leaving the hostel on 16.1.1996 upto her stay in Metro Lodge and the rape committed on her at Metro Lodge, her relationship with accused No.1 (Raju) and her journey from Munnar to Adimaly, Adimaly to Kothamangalam, then to Muvattupuzha and Kottayam, etc. have been stated above while dealing with the case of the prosecution.

17. The victim girl narrated in her evidence as PW1 the various events which took place from 16.1.1996 to 26.2.1996. As CrI.A. NO. 877 OF2002::

19. :: mentioned earlier, she was allegedly raped and gang raped by many of the accused during those days at different places. The evidence of the victim girl and other evidence in the case would disclose the following facts.

18. On 17.1.1996, the victim girl was taken by Dharmarajan to Ernakulam. After reaching Ernakulam, she was taken in an autorickshaw. The gold pendants of her ear-studs were sold by Dharmarajan in Star Jewellery. When the victim girl was reluctant to give the gold pendants, Dharmarajan stamped her on her foot and she was forced to give the gold pendants. The pendants were sold for a sum of 400/- in the Star Jewellery. Thereafter, she was taken to Anand Tourist Home at Chittoor Road, Ernakulam. During night, the victim girl was raped by Dharmarajan. Dharmarajan repeated that the victim girl should mention her name only as Anjali and that she would not be allowed to escape as he has persons at Ernakulam and Kottayam.

19. On the next day, the victim girl was taken by Dharmarajan to the Panchayat Rest House at Kumily. The victim girl was taken to Crl.A. NO. 877 OF2002::

20. :: room No.104 and confined her there till 20.1.1996. Dharmarajan locked her inside the room and left the place. After a while, he came along with accused No.5 (Cherian @ Cheriachan) and the absconding accused Devassiachan. Cherian @ Cheriachan was running the Rest House at Kumily on lease arrangement. Dharmarajan left Cherian @ Cheriachan (accused No.5) in room No.104 where the victim girl was kept and locked the room from outside. Cherian @ Cheriachan closed the room from inside and compelled the girl to lie down. The victim girl stated to him that she is the daughter of the Post Master, Munnar and that accused No.5 was having the age of his father. Accused No.5 used force and committed rape on the victim girl. Thereafter, Cherian @ Cheriachan left the room and locked the room from outside. Dharmarajan came to the room and threatened the victim girl not to try to escape. During the night on 19.1.1996, Dharmarajan raped the victim girl again.

20. On 20.1.1996, Dharmarajan brought accused No.4 (Reji) and accused No.7 (Advocate Jose Nedumthakidiyil) to room No.104 and showed the girl to them. Accused No.7 is a lawyer practicing at Crl.A. NO. 877 OF2002::

21. :: Pala, while accused No.4 is a businessman at Kottayam Railway Station. Dharmarajan told them that the victim girl was studying in school and that she was brought there without the knowledge of her parents. After leaving Adv.Jose

Nedumthakidiyil (accused No.7) in the room, Dharmarajan and accused No.4 (Reji) left the room. The victim girl pleaded to Adv.Jose Nedumthakidiyil to rescue her and disclosed her identity. Disregarding her protest, accused No.7 sexually exploited her and raped her. Accused No.7 even manhandled the victim girl. Thereafter, Adv.Jose Nedumthakidiyil left the room and Reji came to the room. The victim girl repeated to Reji that she was brought to the place by practicing fraud. In spite of her resistance, Reji also raped her. On 21.1.1996, the victim girl was taken by Dharmarajan to Hilax Lodge, Palakkad and confined her in room No.212. Dharmarajan raped her on 21.1.1996 also. On the next day morning, Dharmarajan took the victim girl to the rented building of accused No.16 (Thulaseedharan) at Vanimel Panchayat in Kozhikode District. On that night, Dharmarajan raped the victim girl. In the rented building, apart from Thulaseedharan (accused No.16) two school teachers were also there. Accused No.16 (Thulaseedharan) was working as a Clerk in Vanimel Panchayat Crl.A. NO. 877 OF2002::

22. :: Office. On 23.1.1996, in the morning, Dharmarajan left the girl at the rented building and left the place. The school teachers also went for school. Accused No.16 (Thulaseedharan) locked the victim girl in the room and went out. He came back after a while, went in the room where the victim girl was locked and raped her. On 24.1.1996 morning, Dharmarajan came to the rented house of Thulaseedharan . Both of them raped the victim girl. Dharmarajan and Thulaseedharan took the victim girl to the bus stand at Calicut. Dharmarajan took the girl to Saflas Jewellery, Kozhikode. By threat and force, Dharmarajan took the ear-studs of the victim girl and sold the same in the Jewellery, making a representation to the jeweller that he lost his purse and it necessitated the sale of gold.

21. Thereafter, the victim girl was taken by Dharmarajan to the Panchayat Rest House at Kumily. Accused No.3 (Jamal) was waiting there. They reached at Kumily in the early hours on 26.1.1996. They stayed at Kumily Rest House. On 26.1.1996 itself, Dharmarajan and Jamal took the girl to Cumbam in Tamil Nadu. Dharmarajan and the victim girl stayed at Indra Lodge, Cumbam on that day. During night, Dharmarajan raped her. On 27.1.1996, Crl.A. NO. 877 OF2002::

23. :: Dharmarajan and Jamal took the victim girl to Muvattupuzha and hired a room at Thottam Lodge near KSRTC bus stand, Muvattupuzha. The victim girl was kept locked in that room. Dharmarajan and Jamal went outside. They brought accused No.14 Muhammed Yoosaf. Dharmarajan, Jamal and Muhammed Yoosaf took the girl in the car of Muhammed Yoosaf to Aluva. They took rooms at Aroma Lodge, Aluva. Muhammed Yoosaf remained in one of the rooms. Dharmarajan and Jamal forcibly took the victim girl to the room of Muhammed Yoosaf. The victim girl disclosed to Muhammed Yoosaf about her identity and that she is the daughter of the Postmaster, Munnar. She also stated to him that he was of the age of her father. Though the victim girl pleaded to Muhammed Yoosaf to rescue her, he did not show mercy to her and he raped her. Thereafter, Dharmarajan and Jamal took the victim girl to the other room in Aroma Lodge and both of them raped her. Thereafter, Muhammed Yoosaf dropped the victim girl, Dharmarajan and Jamal at KSRTC bus stand. Dharmarajan and Jamal took the girl to Theni in a bus. At Theni, the victim girl was taken to the house of accused No.39 (Vilasini). Jamal and Dharmarajan threatened the victim girl that she should not disclose anything to Vilasini and if she did, she CrI.A. NO. 877 OF2002::

24. :: would be done away with. Before going to the house of Vilasini, the victim girl was forced to make a telephone call to her uncle Robert. She was directed to state to Robert that she was calling from Chalakkudy. The victim girl stated in evidence that her uncle Robert was weeping while talking. After some time, the telephone connection was cut by Dharmarajan and Jamal. Though uncle Robert asked the victim girl to cry aloud, she could not do so because of her fear towards Dharmarajan and Jamal. The victim girl was confined in the house of Vilasini at Theni on 28.1.1996 to 31.1.1996. On the next day, the victim girl disclosed to Vilasini that she was brought to the place by deceitful means and by using force. She also disclosed to Vilasini her identity and requested Vilasini to rescue her. However, Vilasini stated that she could not do so. The victim girl fell ill while she was in the house of Vilasini. She was suffering from urinary infection and pain at lower abdomen. She was finding it difficult even to pass urine.

22. On 1.2.1996, Dharmarajan and Jamal came to the house of Vilasini. They took the victim girl to the bus stop, where accused No.2 (Usha), PW8 (Maya) and

accused No.17 (Mohanana @ Ayyavu) CrI.A. NO. 877 OF2002::

25. :: were waiting. Usha introduced the victim girl to PW8 (Maya) as Anjali and stated that the victim girl wished to enter into the film field. Dharmarajan, Usha and Jamal took the victim girl and Maya to Kanyakumari. They lodged at Trisea Lodge, Kanyakumari. The victim girl stated that all of them stayed in one room and Dharmarajan raped her in the presence of others. When she resisted, Jamal threatened her. Thereafter, Dharmarajan and Jamal went outside, keeping the victim girl in the custody of Usha. After some time, they came back with accused No.4 (Reji). Reji took the victim girl, Maya and Usha to Hotel Samudra. Reji stated to the victim girl that film people had arrived at that hotel and they had been told about the case of Maya. The victim girl was taken to the room in Hotel Samudra where Reji was staying. Accused No.8 (Sreekumar) and a professor were available there. Reji took the girl to the room of Sreekumar. Maya was taken to the room of accused No.7 (Adv.Jose Nedumthakidiyil). Though the victim girl disclosed her identity to accused No.8 (Sreekumar) and sought his help and requested him to save her from the illegal custody, he did not respond to the request and raped her. The victim girl also stated that the professor also raped her in another room. Accused No.7 CrI.A. NO. 877 OF2002::

26. :: (Adv.Jose Nedumthakidiyil) also raped the victim girl. Accused No.4 (Reji) and accused No.7 (Adv.Jose Nedumthakidiyil) forced her to consume liquor.

23. On the next day, Usha, Maya, Reji, the professor and Sreekumar (accused No.8) took the victim girl to Thiruvananthapuram. Accused No.4 Reji took the victim girl to the business place of PW34 (Jacob Sait), while others went to Nandavanam Tourist Home. The victim girl was taken to Hotel Geeth. Accused No.4 (Reji) stayed with her. He committed rape on the victim girl during night. Accused No.4 (Reji) even manhandled the victim girl. The victim girl was not keeping well and she was having abdominal pain and infection. On 4.2.1996, accused No.4 locked the victim girl inside the room and threatened her not to try to escape. In the evening of 4.2.1996, Reji came back with accused No.9 (Rajendran Nair). Reji told Rajendran Nair that the victim girl was studying in school and she was brought without the knowledge of her parents. Reji told the victim that she

should co-operate with Rajendran Nair. Thereafter, accused No.4 left the room. Rajendran Nair locked the room from inside. Though the CrI.A. NO. 877 OF2002::

27. :: victim girl pleaded for mercy and requested not to disturb her, disregarding her protest, accused No.9 (Rajendran Nair) raped her. Reji came to the room thereafter and accused No.9 (Rajendran Nair) left the place. On that night, Reji raped the victim girl. On 5.2.1996, Reji took the victim girl to the room of a film producer. Reji talked to him for some time. Thereafter, the victim girl was taken to the room where she was kept earlier. After some time, accused No.29 (Vijayakumar) came to the room. Reji told Vijayakumar that the victim girl was brought without the knowledge of her parents and that she was studying in the school. Accused No.29 left the room and after some time, accused No.28 (Georgekutty) came to the room. At that time, Reji was also there in the room. Accused No.29 Vijayakumar also came to the room. Accused No.29 Vijayakumar remained in the room and in spite of the protest, he raped the victim girl. After some time, accused No.4 (Reji) and accused No.28 (Georgekutty) came back to the room, while accused No.29 (Vijayakumar) left the room. During night, accused Nos.4 and 28 raped her. The victim girl stated that when accused No.4 raped her, accused No.28 (Georgekutty) was also there in the room and the victim girl was placed in between accused No.4 (Reji) and accused CrI.A. NO. 877 OF2002::

28. :: No.28 (Georgekutty).

24. On the next day morning, accused No.4 (Reji) and accused No.28 (Georgekutty) took the victim girl in a car to Pala and Reji and the victim girl were dropped at Pala. Reji took the victim girl in an autorickshaw to the house of accused No.38 (Mary @ Ammini) at Kuravilangad. Reji talked to accused No.38 (Mary @ Ammini) something secretly. The victim girl was kept in the house of accused No.38 (Mary @ Ammini) and during that night, accused No.4 (Reji) raped her. On 7.2.1996, accused No.4 brought accused No.10 (Jacob Stephen @ Stephenji) and he also raped the victim girl in spite of her resistance. The victim girl stated that she wept and stated to accused No.10 that she was not keeping well and she was having pain. Still, she was raped by accused No.10. Accused No.7 later came to the room where the victim girl was kept in the house of accused

No.38. Accused No.7 (Adv.Jose Nedumthakidiyil) also raped her. The victim girl stated that though she disclosed her identity to accused No.38 (Mary @ Ammini) and sought for help to rescue her, accused No.38 stated that she could not rescue the victim girl since she was brought there by accused No.4 (Reji). CrI.A. NO. 877 OF2002::

29. ::

25. On the next day, accused No.4 (Reji) came to the house of accused No.38. Accused No.38 disclosed to Reji about what the victim girl stated to her. Thereupon, accused No.4 (Reji) threatened the victim girl that if she tried to escape, her father and mother would be done away with. The victim girl was also beaten by accused No.4.

26. On 9.2.1996 night, Dharmarajan and accused No.6 (Unnikrishnan Nair) came to the house of accused No.38 (Mary @ Ammini).

27. On the next day, Dharmarajan and accused No.6 (Unnikrishnan Nair) again came to the house of accused No.38 (Mary @ Ammini). They took the victim girl in a car. On their way, accused No.8 (Sreekumar) stopped the car and talked to them. The victim girl was taken to the Kottayam Railway Station premises. The victim girl, Dharmarajan and accused No.6 (Unnikrishnan Nair) were dropped there and accused No.4 (Reji) sent back the car. Reji hired an autorickshaw for Dharmarajan, accused No.6 (Unnikrishnan Nair) CrI.A. NO. 877 OF2002::

30. :: and the victim girl. The victim girl was taken to Hotel Floral Park, near Kottayam Medical College. Accused No.8 (Sreekumar) was waiting at Hotel Floral Park. The victim girl was taken to a room and accused No.8 (Sreekumar) raped her. She stated that her state of health was very bad at that time and she was suffering from acute pain.

28. On 10.2.1996 itself, Dharmarajan and accused No.6 (Unnikrishnan Nair) took the victim girl to the Kumily Panchayat Rest House. The victim girl was confined in a room in the Rest House and the room was locked from outside. After some time, accused No.6 (Unnikrishnan Nair) and accused No.4 (Reji) had brought accused

No.21 (Sunny @ George) and accused No.22 (Jiji) to the room where the victim girl was kept confined. Dharmarajan asked the victim girl to co-operate with accused Nos.21 and 22. The victim girl asked Dharmarajan why she was being killed like this. Dharmarajan threatened that she would be killed and thrown away. Dharmarajan put accused No.22 (Jiji) in the room. Jiji, in spite of the resistance and persuasion by the victim girl, raped her. After accused No.22 left, Dharmarajan brought accused No.21 (Sunny @ CrI.A. NO. 877 OF2002::

31. :: George), who also raped the victim girl. The victim girl stated that during that night Dharmarajan and accused No.6 (Unnikrishnan Nair) raped her.

29. On 11.2.1996, accused No.6 (Unnikrishnan Nair) and Dharmarajan took the victim girl to Muvattupuzha in a bus. At that place, accused No.11 (Aji) and accused No.15 (Davood) were waiting in a jeep. The victim girl was taken in that jeep by Dharmarajan and accused Nos.6, 11 and 15. The jeep was stopped near a house where a marriage function was going on. Accused Nos.11 and 15 (Aji and Davood) talked to a person at that place, came back and the jeep was sent away. The victim girl was thereafter taken in a car to the house of accused No.27 (Varghese). The victim girl stated that accused No.11 (Aji), accused No.15 (Davood) and accused No.27 (Varghese) raped her. The victim girl stated in evidence that before they raped her, she told them that she was suffering from severe pain and that her physical condition had worsened. She stated that there was discharge of pus from her vagina and she had acute abdominal pain. In spite of the resistance, accused Nos.11, 15 and 27 raped her at the residence of accused CrI.A. NO. 877 OF2002::

32. :: No.27. On 11.2.1996 itself, during night, Dharmarajan and accused No.6 (Unnikrishnan Nair) took the victim girl to the KSRTC bus stand, Muvattupuzha. From there, the victim girl was taken in a KSRTC bus to Kottayam. She was taken to Metro Lodge, Kottayam. Dharmarajan and accused No.6 (Unnikrishnan Nair) raped her at Metro Lodge. On that evening itself, Dharmarajan and accused No.6 (Unnikrishnan Nair) took the victim girl to Kanjirappally and from there, to the house of accused No.39 (Vilasini) at Theni. The victim was having her menses periods during that time and she was confined in the house of accused No.39

(Vilasini). After leaving the victim girl at the house of Vilasini, Dharmarajan and accused No.6 (Unnikrishnan Nair) left the place. The victim girl was finding it difficult to pass urine. There was pus formation. She was unable to walk. After two days, accused No.3 Jamal and Dharmarajan came to the house of Vilasini and took the victim girl to Kumily Rest House on 15.2.1996. The victim girl was confined at Kumily Rest House till 21.2.1996. On these days she was locked inside a room. When Jamal or Dharmarajan was not available, they used to entrust accused No.12 (Satheesan) to get an eye on the victim girl. During her stay at Kumily Rest House from 15.2.1996 to 20.2.1996, the CrI.A. NO. 877 OF2002::

33. :: victim girl was subjected to rape by several persons, namely, Dharmarajan, accused No.3 (Jamal), accused No.11 (Aji), accused No.12 (Satheesan), accused No.13 (Aliyar), accused No.15 (Davood), accused No.18 (Rajagopalan Nair), accused No.19 (Mathew Joseph @ Sunny), accused No.20 (Sreekumar @ Babu), accused No.24 (Joseph @ Baby), accused No.25 (Sabu), accused No.31 (Antony @ Baji), accused No.37 (Thankappan), accused No.40 (Salim), the absconding accused Devassiachan, accused No.26 (Joshy - who was acquitted by the trial court) and accused No.32 (Ajayakumar @ Babykuttan- who was acquitted by the trial court). The victim girl stated in evidence that the incidents which took place in Kumily Rest House were with the knowledge of accused No.5 (Cherian @ Cheriachan). She also stated that the other accused persons were brought to her room at Kumily Rest House by Dharmarajan and, at that time, accused No.5 (Cherian @ Cheriachan) had also come. She was provided with food by accused No.5 (Cherian @ Cheriachan). Several accused were brought to the room of the victim girl by Dharmarajan and accused No.3 (Jamal). She stated that all of them raped her in spite of her protest and while she was not having the required physical health for CrI.A. NO. 877 OF2002::

34. :: any type of sexual cohabitation.

30. On 21.2.1996, the victim girl was totally bedridden. She had acute lower abdominal pain, back pain as well as fever. She had no motion for about one week. Dharmarajan requested accused No.2 (Usha) and her husband accused No.17 (Mohanam @ Ayyavu) to take the victim girl to Periyar Hospital at Kumily.

The victim girl was directed by Dharmarajan and accused No.3 (Jamal) to mention only about her throat pain. She was also threatened to be done away with, if she did not obey their directions. She stated that her name and address was given at the hospital by accused No.2 (Usha). The victim girl's name was stated as Anjali at the hospital. Accused No.2 (Usha) and accused No.17 (Mohanan @ Ayyavu) were standing near the victim girl at the time when she was at the hospital. Dharmarajan and accused No.3 (Jamal) came to the hospital in a jeep and took the victim girl to Cumbam during night. She was taken to Anand Lodge, Cumbam. Two rooms were hired at Anand Lodge. The victim girl was directed to stay in the room of Dharmarajan and Jamal. Usha and Mohanan @ Ayyavu stayed in another room. On the next day, i.e. on 22.2.1996, accused No.35 CrI.A. NO. 877 OF2002::

35. :: (Babu Mathew) and another man were brought to the room by Jamal. Jamal showed the victim girl to accused No.35 and the other man and they raped the victim girl in spite of her protest. In the afternoon of 22.2.1996, Dharmarajan and Jamal brought the victim girl to Kumily from Cumbam. The victim girl was entrusted to accused No.2 (Usha) and accused No.17 (Mohanan @ Ayyavu), who took the girl to the house of the sister of Mohanan @ Ayyavu at Peerumed for two days. On 23.2.1996, there was a bundh call. Dharmarajan and Jamal came to the house of the sister of Mohanan @ Ayyavu at Peerumed in the evening of 23.2.1996. PW26 (Christudas), the husband of the sister of Mohanan @ Ayyavu, had some suspicion about the dealings of Dharmarajan and Jamal with Usha and Mohanan @ Ayyavu. Christudas insisted that they should leave the house on the next day morning. Accused No.2 (Usha) and accused No.17 (Mohanan @ Ayyavu) took the victim girl to Kumily bus stand where Dharmarajan and accused No.3 were waiting. Accused No.3 (Jamal) and Dharmarajan took the victim girl to the house of a relative of Jamal. An old lady and two other ladies were there in that house. The victim girl was kept in that house describing the victim girl as the sister of Dharmarajan. The illness of the victim CrI.A. NO. 877 OF2002::

36. :: girl got aggravated. She had acute pain and there was no motion. There was discharge of pus from her private parts. There were injuries also there. She could not even lie down. The inmates in the house called Jamal and Dharmarajan, who came there during night itself. The victim girl was taken in a jeep to Anpu Hospital

at Elappara. The victim girl was admitted in the hospital. She was specifically directed to mention to the doctor only about the pain and lack of motion. The victim girl was given injection and she was administered enema. The victim girl was discharged from the hospital on the next day morning at about 4.30 a.m.. Even then the victim girl was not well and there was only some relief from pain. The victim girl was thereafter taken to Muvattupuzha in a bus. Accused No.14 (Muhammed Yoosaf), accused No.30 (Ashraf) and accused No.33 (Shaji @ Jimmi) were waiting there. Accused No.3 (Jamal) took the victim girl and accused Nos.14, 30 and 33 in a car and took them to hotel Floral Park at Kottayam. Two rooms were hired. In one of the two rooms, the victim girl was locked. At Floral Park, the victim girl was raped by accused No.14 (Muhammed Yoosaf), accused No.30 (Ashraf), accused No.33 (Shaji @ Jimmi), Dharmarajan and accused No.3 (Jamal). (The learned counsel for Crl.A. NO. 877 OF2002::

37. :: the accused submitted that though the victim stated about the rape on 25.2.1996 at Floral Park, it was included in the charge sheet only in S.C.No.187 of 1999 and not in S.C.No.241 of 2001 from which this appeal arose.) 31. On 26.2.1996, the victim girl was taken by Dharmarajan, accused No.3 (Jamal), accused No.14 (Muhammed Yoosaf), accused No.30 (Ashraf) and accused No.33 (Shaji @ Jimmi) in a Maruthi car to the house of accused No.34 (Anil). Accused No.34 (Anil) raped the victim girl at his house.

32. On 26.2.1996, the victim girl was taken to Muvattupuzha private bus stand, by accused No.3 (Jamal) and Dharmarajan and boarded her in a bus going to Kothamangalam and thus she was released from the illegal custody of Dharmarajan and others. She was given only 100/- as bus fare by accused No.3. The victim girl alighted at Kothamangalam bus stand and from there, boarded the bus to Munnar. At Munnar, the victim girl went to the post office and met her father. Her father hugged her and wept. The victim girl was taken home by her father. She disclosed to her mother about her ill- Crl.A. NO. 877 OF2002::

38. :: fated experiences during the last about 40 days. On the next day (27.2.1996), the victim girl was taken to the police station and she gave a statement to the Assistant Sub Inspector of Police, Sri.Balakrishnan (PW54). On

28.2.1996 also she went to Munnar Police Station and thereafter she was taken to the Taluk Head Quarters Hospital, Adimali where she was examined by Dr.V.K.Bhaskaran (PW41), who issued Ext.P47 "Report of Medical Examination of Female in sexual offences".

33. In Ext.P47, the history of the case is shown thus: "16.1.1996 NaDW252.1996 UfxOaU5\O{U_W \O^ {a5Z \XmE\B{ _ fU:nm L\N^O_ h"7_5 gU]m:n H?Ja5Oa" M`WC_fM?aJa5Oa" l`B_M_Aa5Oa" f:Oqa." Ext.P47 shows that examination of the victim girl was highly painful to her. The injuries noted in Ext.P47 are the following: "Healed nail marks of about 10 days old on either breasts. Multiple circumscribed ulcers on the vulva." It is also noted in Ext.P47 that the hymen showed multiple fresh tears which were ulcerated and the vulva showed multiple ulcers. The vulva and vagina were oedematus. CrI.A. NO. 877 OF2002::

39. :: The patient had severe pelvic infection. With reference to the injuries noted in Ext.P47, PW41 stated in evidence that the ailments noted in Ext.P47, like purulent discharge from vagina, Oedema of vulva and vagina, pubic infection, ulcers are evidence of violent sexual act on the victim. He stated that there was evidence of infection following violent and repeated sexual act. The doctor also stated that if the victim was not treated and further subjected to such sexual acts, then the infection would have spread upwards involving peritonitis which would be fatal. PW41 also stated that if during the period of infection she was subjected to further sexual act, she could have suffered severe pain. According to PW41, pelvic infection noted by him and constipation could be caused due to continuous violent sexual intercourse. To a question as to what was the victim girl's mental condition while the doctor examined her, PW41 stated that she was panic. PW41 stated that the victim girl was not hospitalised since the Circle Inspector of Police directed him to handover the victim girl for questioning and taking statement.

34. The victim girl stated in evidence thus: "(X"MU" 5^xC" 'gM^Z .fa `U_D" HV_:na. CrI.A. NO. 877 OF2002::

40. :: 'gM^Z U`G_Z H_Km layJ_yB^X5_OaK_\o.e&{a5Z5x BZ lyOaKa.eDay_:na gH^AaKa.eIU_O_g^\ LtaA{af? U`?a5{g^\ gl^5aK_\o.eH^CgA?a 5^x CN^ .e^Ha" IMOa" NN_OafN^fA &vYDc f:OnaU^X Ufx dVN_:n_Galm. g::n_fO3Jm %Da

f:On^fD `U_Aa5O^ m.eSexgH^?m 5aG_AaU 'gM^]fJ attitude .L^ m (Question).e.H_Am fUyaM^ m (Answer)." 35. Dharmarajan filed a detailed written statement after he was questioned under Section 313 of the Code of Criminal Procedure. The gist of the statement is the following: Dharmarajan's maternal aunt was admitted in the District Hospital, Kottayam and to attend to her, he had taken room in Metro Lodge, Kottayam for the period till 11.1.1996. He did not take the victim girl to Metro Lodge on 16.1.1996. On 17.1.1996, he went to Ernakulam to meet an Advocate for the purpose of his client. Dharmarajan's friend Sreekumar was also with him. He decided to spend time and went to the part situated near the Lower Court. The victim girl sat in the park almost near him. He acquainted himself with her. She stated that she was alone. Dharmarajan asked her whether she was prepared to go with him. She agreed. Though he went to the High Court to see the Advocate, he could not see him. CrI.A. NO. 877 OF2002::

41. :: Dharmarajan, Sreekumar and the victim girl went to Anand Lodge and took room in the name of Sreekumar. Dharmarajan and the victim girl went for a movie. During that night Dharmarajan and the victim girl stayed in a room. On 18.1.1996, Dharmarajan and the victim girl went to Kottayam and thereafter to Kumily. He took a room in Kumily Rest House. On the next day, they went to Tamil Nadu. They reached Palakkad via Palani and stayed at Hilax Lodge. The victim girl exhibited eagerness in having sexual intercourse. On the next day, Dharmarajan and the victim girl went to the house of his friend Thulasi (Thulaseedharan - accused No.16) at Vanimel. While returning from Vanimel, the victim girl was left at Kumily on her request. Dharmarajan returned to his house. Dharmarajan gave 2,100/-, gold covering ornaments and two churidars to the victim girl. After two days, the victim girl contacted Dharmarajan over phone. She requested Dharmarajan to meet her on the next day at Kumily bus stand. He went there. The victim girl stated that she had left home and that she wanted a place to stay and a job. Though Dharmarajan persuaded her to go home, she refused. At last, Dharmarajan took the victim girl to the house of Vilasini (accused No.39). After three days, when Dharmarajan contacted Vilasini over CrI.A. NO. 877 OF2002::

42. :: phone, she stated that the victim girl left the house of Vilasini. On 25.2.1996, the victim girl contacted Dharmarajan over phone and stated that she wanted

some money. Dharmarajan met her at the bus stand at Moovattupuzha. She demanded for 3,000/-. Dharmarajan paid 1,500/- to her. When she again asked for money, 100/- was also given. After one week, Dharmarajan was arrested. He stated that he had sexual intercourse with the victim girl only with her consent. He never had presented the victim girl to anybody.

36. It is true that the accused need not put forward any specific case and he is entitled to keep mum. But, when the appellant put forward a story of his own, which, to some extent, tallies with the stay of the victim girl at different places, the statement of the appellant (Dharmarajan) under Section 313 of the Code of Criminal Procedure can be adverted to in the process of finding out the truth of the case and for appreciating the evidence of the victim girl.

37. Sri.Raju Joseph, the learned senior counsel appearing for Crl.A. NO. 877 OF2002::

43. :: the appellant, submitted that in this case there is no proper First Information Report. Ext.P18(a), which was registered on the basis of the information supplied by the father of the victim girl and which was registered under the caption "man missing", is not a First Information Statement as contemplated under Section 154 of the Code of Criminal Procedure. The counsel submitted that the first statement of the victim girl was recorded on 27.2.1996, which alone discloses commission of a cognizable offence. Therefore, a First Information Report should have been registered on the basis of the information supplied by the victim girl, which was not done in the case. According to the counsel, if such a First Information Report was registered there would have been no room for manipulating the records, which took place, according to the accused, after Sri.Siby Mathew (PW57) took over investigation. The appellant/accused has also a case that the statement dated 27.1.1996 recorded by the Assistant Sub Inspector of Police, Sri.Balakrishnan (PW54) is also a manipulated statement. According to the accused, the victim girl gave a statement on 27.2.1996 to the Assistant Sub Inspector of Police, Sri.Balakrishnan, which was recorded by G.S.Hari (DW6), who was a Police Constable in the office of the Circle Inspector of Crl.A. NO. 877 OF2002::

44. :: Police, Munnar. That statement in the handwriting of Hari was suppressed by the prosecution. The learned counsel submitted that the grievance of the accused is not about the delay in registering the First Information Report but his contention is that no FIR was registered in the case.

38. Sri.Asaf Ali, the learned Director General of Prosecution, submitted that under Section 154 of the Code of Criminal Procedure what is required is information relating to the commission of a cognizable offence. The information need not disclose a cognizable offence. Therefore, even in a 'man missing' case, FIR has to be registered, which was done in the present case. The learned Director General of Prosecution also pointed out that Ext.P90 report was submitted to the Court on 27.2.1996 to incorporate the offence alleged against the accused. It is pointed out that on 10.3.1996, the appellant was arrested and he was remanded to judicial custody. If Ext.P90 report did not reach the Court and the Court was not satisfied that a cognizable offence was committed, the learned Magistrate would not have remanded the appellant to judicial custody. According to the learned Director General of Prosecution, Crl.A. NO. 877 OF2002::

45. :: the Kerala Police Manual 1970 Vol II paragraph 306 provides for "registering in First Information Register Book". Paragraph 306 provides that information coming under any of the headings in the paragraph received at a police station shall be registered in the First Information Register Book. Clause (c) thereof reads thus: "306. (1) (a) (b) (c) Suicides and accidental or suspicious deaths, fires, missing of persons, missing of cattle and all other occurrences where there is reason to suspect the commission of a cognizable offence." 39. It is submitted by the Director General of Prosecution that the procedure adopted by the police was perfectly legal. The First Information Report should have been registered on the report that the girl was missing. That was done. On 26.2.1996, the victim girl came back to Munnar. On 27.2.1996, she gave her first statement to the Assistant Sub Inspector of Police, Sri.Balakrishnan, who recorded the same and submitted Ext.P90 report to the court on the same day. The learned Director General of Prosecution submitted Crl.A. NO. 877 OF2002::

46. :: that if from the information received or otherwise an officer in charge of the police station has reason to suspect the commission of an offence which he is empowered under Section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report. The investigation commences thereafter as provided under Section 157 (1) of the Code of Criminal Procedure. The learned Director General of Prosecution submitted that Ext.P90 report would indicate that proper offences were included. The defence pointed out that the victim girl gave an entirely different statement to the Assistant Sub Inspector of Police, Sri.Balakrishnan on 27.2.1996 which was recorded in the handwriting of Sri.G.S.Hari. Learned Director General of Prosecution submitted that the offences mentioned in Ext.P90 report would not be available if the statement in the handwriting of Sri.G.S.Hari as allegedly made by the victim girl was there. He submitted that the statement of the victim girl was recorded in the handwriting of Assistant Sub Inspector of Police, Sri.Balakrishnan and not in the handwriting of Sri.G.S.Hari.

40. The learned senior counsel appearing for the appellant CrI.A. NO. 877 OF2002::

47. :: relied on the decisions in Mani Mohan Ghose v. Emperor (AIR1931 Calcutta 745), The State of Assam v. Upendra Nath Rajkhowa (1975 CrI.L.J.354), State of Haryana v. Bhajan Lal (1992 Supp. (1) SCC335, Ramesh Kumari v. State (NCT of Delhi) ((2006) 2 SCC677, Lallan Chaudhary and others v. State of Bihar and another ((2006) 12 SCC229, Prakash Singh Badal v. State of Punjab ((2007) 1 SCC1, Lalita Kumari v. Government of Uttar Pradesh and others ((2012) 4 SCC1 and Lalita Kumari v. Government of Andhra Pradesh (2013 (4) KLT632(SC)). The learned Director General of Prosecution relied on the decisions in Yeshodharan v. State of Kerala (2004 (2) KLT231, Valsala v. State of Kerala (2012 (4) KLT760 and Superintendent of Police, C.B.I and others v. Tapan Kr. Singh (AIR 2003 SC4140.

41. In the Constitution Bench decision of the Supreme Court in Lalita Kumari v. Government of Andhra Pradesh (2013 (4) KLT632(SC)), the Supreme Court held that it is mandatory to register an F.I.R. if the information given to the Police discloses the commission of a cognizable offence. The Supreme Court held thus:

Crl.A. NO. 877 OF2002::

48. :: "39. Consequently, the condition that is sine qua non for recording an F.I.R. under S.154 of the Code is that there must be information and that information must disclose a cognizable offence. If any information disclosing a cognizable offence is led before an officer in charge of the police station satisfying the requirement of S.154(1), the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information. The provision of S.154 of the Code is mandatory and the concerned officer is duty bound to register the case on the basis of information disclosing a cognizable offence. Thus, the plain words of S.154(1) of the Code have to be given their literal meaning.

40. The use of the word "shall" in S.154(1) of the Code clearly shows the legislative intent that it is mandatory to register an F.I.R. if the information given to the police discloses the commission of a cognizable offence.

43. Investigation of offences and prosecution of offenders are the duties of the State. For "cognizable offences", a duty has been cast upon the police to
Crl.A. NO. 877 OF2002::

49. :: register F.I.R. and to conduct investigation except as otherwise permitted specifically under S.157 of the Code. If a discretion, option or latitude is allowed to the police in the matter of registration of F.I.R.s, it can have serious consequences on the public order situation and can also adversely affect the rights of the victims including violating their fundamental right to equality.

44. Therefore, the context in which the word "shall" appears in S.154(1) of the Code, the object for which it has been used and the consequences that will follow from the infringement of the direction to register F.I.R.s, all these factors clearly show that the word "shall" used in S.154(1) needs to be given its ordinary meaning of being of "mandatory" character. The provisions of S.154(1) of the Code, read in the light of the statutory scheme, do not admit of conferring any discretion on the officer-in-charge of the police station for embarking upon a preliminary inquiry prior to the registration of an F.I.R. It is settled position of law that if the provision is

unambiguous and the legislative intent is clear, the court need not call into it any other rules of construction.

63. It is thus unequivocally clear that registration of F.I.R. is mandatory and also that it is to be recorded CrI.A. NO. 877 OF2002::

50. :: in the F.I.R. Book by giving a unique annual number to each F.I.R. to enable strict tracking of each and every registered F.I.R. by the superior police officers as well as by the competent court to which copies of each F.I.R. are required to be sent.

73. In terms of the language used in S.154 of the Code, the police is duty bound to proceed to conduct investigation into a cognizable offence even without receiving information (i.e. F.I.R.) about commission of such an offence, if the officer in charge of the police station otherwise suspects the commission of such an offence. The legislative intent is therefore quite clear, i.e., to ensure that every cognizable offence is promptly investigated in accordance with law. This being the legal position, there is no reason that there should be any discretion or option left with the police to register or not to register an F.I.R. when information is given about the commission of a cognizable offence. Every cognizable offence must be investigated promptly in accordance with law and all information provided under S.154 of the Code about the commission of a cognizable offence must be registered as an F.I.R. so as to initiate an offence. The requirement of S.154 of the Code is only that the report must disclose the commission of a cognizable offence and that is CrI.A. NO. 877 OF2002::

51. :: sufficient to set the investigating machinery into action." 42. Most of the decisions cited by the learned counsel for the appellant have been referred to in the Constitution Bench decision in Lalita Kumari v. Government of Andhra Pradesh (2013 (4) KLT632(SC)).

43. In Valsala v. State of Kerala (2012 (4) KLT760, a learned single Judge of the Kerala High Court had occasion to consider whether F.I.R. can be registered in other circumstances as well and it was held: "4. True, S.154 of the Code contemplates registration of an F.I.R. only where a cognizable offence is

disclosed, and not in other cases. However, for practical purposes, and to serve the ends of justice, there may arise situations which demand registration of a crime by the police, even when no cognizable offence is disclosed on the information supplied. Where a person loses his credit card, passport or other valuable document, issuing authority thereof may insist for intimation to be given and registration of a case thereof by the police to enable them to take further steps for issue of a fresh document/card etc., as the case may CrI.A. NO. 877 OF2002::

52. :: be. Previously, there was no statutory recognition for registering a crime when a man was reported to be missing, to proceed with enquiry/investigation. This court had occasion to consider that question; and, it has been observed that registration of a crime under the caption "man missing" by the police in such a situation is not only advisable, but has to be done to serve the ends of justice. Similar is the situation in the registration of crime under S.174 of the Code by the police where information is received that a person has committed suicide or a dead body is found under suspicious circumstance though at that stage no reasonable suspicion of commission of any offence over the death of that person is disclosed as such. So, it cannot be concluded that the police can register a crime only when information received disclose commission of a cognizable offence, and that alone." 44. In Superintendent of Police, C.B.I and others v. Tapan Kr. Singh (AIR 2003 SC4140, it was held thus: "20. It is well settled that a First Information Report is not an encyclopedia, which must disclose all facts and details relating to the offence reported. An informant may lodge a report about the commission of CrI.A. NO. 877 OF2002::

53. :: an offence though he may not know the name of the victim or his assailant. He may not even know how the occurrence took place. A first informant need not necessarily be an eye-witness so as to be able to disclose in great details all aspects of the offence committed. What is of significance is that the information given must disclose the commission of a cognizable offence and the information so lodged must provide a basis for the police officer to suspect the commission of a cognizable offence. At this stage it is enough if the police officer on the basis of the information given suspects the commission of a cognizable offence, and not that he must be convinced or satisfied that a cognizable offence has been

committed. If he has reasons to suspect on the basis of information received, that a cognizable offence may have been committed, he is bound to record the information and conduct an investigation. At this stage it is also not necessary for him to satisfy himself about the truthfulness of the information. It is only after a complete investigation that he may be able to report on the truthfulness or otherwise of the information. Similarly, even if the information does not furnish all the details, he must find out those details in the course of investigation and collect all the necessary evidence. The information given disclosing the commission of a cognizable offence only sets in CrI.A. NO. 877 OF2002::

54. :: motion the investigative machinery, with a view to collect all necessary evidence, and thereafter to take action in accordance with law. The true test is whether the information furnished provides a reason to suspect the commission of an offence, which the concerned police officer is empowered under Section 156 of the Code to investigate. If it does, he has no option but to record the information and proceed to investigate the case either himself or depute any other competent officer to conduct the investigation. The question as to whether the report is true, whether it discloses full details regarding the manner of occurrence, whether the accused is named, and whether there is sufficient evidence to support the allegations are all matters which are alien to the consideration of the question whether the report discloses the commission of a cognizable offence. Even if the information does not give full details regarding these matters, the investigating officer is not absolved of his duty to investigate the case and discover the true facts, if he can." 45. In the present case, Ext.P18(a) FIR was registered under the caption "man missing" on getting Ext.P18 information given by the father of the victim girl. Applying the principles laid down in Superintendent of Police, C.B.I and others v. Tapan Kr. Singh CrI.A. NO. 877 OF2002::

55. :: (AIR 2003 SC4140, it cannot be said that the police committed a grave mistake in registering the FIR on the basis of Ext.P18 information. To register FIR, it was sufficient if the information furnished provided a reason to suspect the commission of an offence which the police officer was empowered to investigate under Section 156 of the Code of Criminal Procedure. The prevailing practice and the provisions of the Kerala Police Manual justified the police to register the FIR on

17.1.1996 itself. It cannot be said that the accused suffered any prejudice due to registration of Ext.P18(a) FIR on 17.1.1996 itself. Then the further question is whether it was necessary for the police to register another FIR on the victim girl giving a statement to the police on 27.2.1996. Had the police registered another FIR, it would have invited great criticism that in respect of one incident the police registered two FIRs. The accused could very well say that prejudice was caused to them by registration of two FIRs. The practice of registering different FIRs in respect of one and the same incident was deprecated by the Supreme Court in various cases. (See Yanob Sheikh v. State of W.B. ((2013) 6 SCC428; Anju Chaudhary v. State of U.P. ((2013) 6 SCC384. The contention of the appellant that had the police registered the Crl.A. NO. 877 OF2002::

56. :: information given by the victim girl on 27.2.1996 as FIR manipulations could have been avoided, is really without any substance. Ext.P90 report incorporating the offence alleged by the prosecution against the appellant was sent to the Magistrate on 27.2.1996 itself and it was received by the Magistrate on the same date. The allegations levelled against the appellant were disclosed in Ext.P90 report. Therefore, manipulation was not possible on the part of the police to change any allegation against the appellant. (The learned counsel for the appellant referred to another statement dated 27.2.1996 recorded in the handwriting of Hari, which will be referred to later in this judgment.) In fact, by not registering another FIR on the basis of the statement given by the victim girl on 27.2.1996, we do not think that the police committed any error. Had the police registered FIR on the basis of that statement, it would have been alleged that there was delay in registering the FIR and that by registering two FIRs prejudice was caused to the accused. We are of the view that by the non-registration of FIR on the basis of the statement given by the victim girl, neither the investigation nor the trial is vitiated. Since the case of the prosecution with respect to the offence of rape, gang rape, kidnapping etc. form part of the Crl.A. NO. 877 OF2002::

57. :: missing of the victim girl, it was not at all necessary to register another FIR on the basis of the statement given by the victim girl on her appearance after the incident. We are not inclined to accept the contentions put forward by the learned senior counsel for the appellant in this regard.

46. Now we will discuss the points under different heads for the sake of convenience. Criminal Conspiracy:

47. The prosecution case is that Dharmarajan, Raju (accused No.1 in S.C.No.187 of 1999) and Usha (accused No.2 in S.C.No.187 of 1999) hatched a criminal conspiracy to kidnap the victim girl so as to force her to illicit intercourse with others, to sell her to others and to commit rape on her at different stages of the incident. It has come out in evidence that the victim girl was in love with Raju and that he offered to marry her. Raju requested her to come out of the hostel and to accompany him. The evidence shows that an attempt was made earlier, but the attempt was fructified only on 16.1.1996. It is proved in the case, by the evidence of the Principal of Little Flower CrI.A. NO. 877 OF2002::

58. :: Girls High School, Munnar (PW9), that the victim girl attended her classes on 16.1.1996. It is also proved that after 16.1.1996, the victim girl did not attend the classes or come back to the hostel. It is not in dispute that the victim girl was missing from the hostel in the evening of 16.1.1996. The missing of the victim girl was reported to the Assistant Sub Inspector of Police, Munnar (PW54), as per Ext.P18 information, on the basis of which Ext.P18(a) FIR was registered. The victim girl came back to Munnar on 26.2.1996 and the matter was reported to the police on 27.2.1996. The statement of the girl was recorded on 27.2.1996.

48. The evidence of the victim girl would disclose that though Raju compelled her to accompany him on an earlier occasion, she was reluctant to go with him. Raju threatened her that the photo album would be made use of to make nude photographs of the victim girl and her mother. She was threatened that the nude photographs would be pasted in the walls of the school and her image and the image of her family would be tarnished. It was due to that threat that she left the hostel on 16.1.1996 as compelled by Raju. She took her dresses and some dresses of her mother as CrI.A. NO. 877 OF2002::

59. :: directed by Raju. In the evening of 16.1.1996, she came to Munnar bus stand, boarded Anjali bus and reached Adimaly. Raju was waiting there for her. It has also come out in evidence that the victim girl boarded P.P.K. bus from Adimaly believing the words of Raju that he would be with her. Raju took tickets and

handed over the same to the victim girl. Usha was there in that bus. The prosecution alleged that Raju vanished from the scene and directed Usha to deal with the victim girl. According to the prosecution, originally the conspiracy was by Dharmarajan, Raju and Usha to take away the victim girl from the legal guardianship. The evidence would disclose that there was such a conspiracy to kidnap the victim girl. The girl was moved from the hostel only because of the role played by Raju. After the girl boarded in P.P.K. bus from Adimaly, Raju vanished from the scene. The evidence also would disclose that Usha insisted that the girl should disclose her name as Anjali. In fact, Usha had called the victim girl by her real name at the bus stand and told that she knew the victim girl and her family. In the helpless situation, the victim girl had to believe the words of Usha. On a careful analysis of the evidence, it can be seen that things were stage managed in such a way that the victim girl had no other

Crl.A. NO. 877 OF2002::

60. :: alternative but to obey the commands of Usha. The evidence of Kuttiyamma teacher (PW25) and Fathima (PW24) would show that Raju had acquaintance with the victim girl. The evidence of Fathima would prove that they were travelling in the same bus on many occasions, that the victim girl gave MO1 album to Fathima and that accused No.1 (Raju) took the album from Fathima assuring that he would handover the same to the victim girl. The evidence of Fathima would also show that Raju was in love with the victim girl. There was no specific cross examination of Fathima (PW24) with respect to the handing over of the album to her and giving of the album by her to Raju. There is nothing to disbelieve the evidence of Kuttiyamma teacher (PW25) and Fathima (PW24).

49. It is also in evidence that the album was subsequently produced before the Assistant Sub Inspector of Police, Sri.Balakrishnan (PW54), and that Ext.P89 mahzar was prepared with respect to the same.

50. When the victim girl reached at Kothamangalam, it was noticed by her that Raju was missing and she had a doubt that she

Crl.A. NO. 877 OF2002::

61. :: was cheated by Raju. The victim girl then thought of going to Kottayam, to the house of her maternal aunt. She boarded in a bus going to Muvattupuzha and from there, she went to Kottayam. Usha was following the victim girl. When the girl

found that she could not go to her maternal aunt's house at Thazhathangadi, she changed her plan and decided to go to Mundakkayam, to the house of her uncle (Robert - PW11). But, the bus to Mundakkayam was available only in the early hours on the next day. The girl was frightened on account of the staring made by the persons in the bus stand. The situation was very cleverly utilised by Usha who approached the victim girl, called her by her real name and consoled her. She talked to Dharmarajan, came back to the victim girl and later introduced Dharmarajan to the victim girl as Sreekumar. Usha told the victim girl that Sreekumar could be believed and that the girl could consider Sreekumar as her brother. The girl was taken to Metro Lodge by Dharmarajan stating that his mother was taking rest in that hotel. At Metro Lodge, Dharmarajan committed rape on the victim girl.

51. The sequence of events as disclosed in the evidence of CrI.A. NO. 877 OF2002::

62. :: the victim girl and other evidence would show that but for a conspiracy among Raju, Usha and Dharmarajan, the events starting from the victim girl leaving the hostel would not have happened. The evidence would disclose that it was not an accident that Raju vanished, Usha acquainted herself with the victim girl and later Dharmarajan got custody of her. It was a concerted effort by all the three to make use of the love affair between Raju and the victim girl. If there was a real love affair between Raju and the victim girl, why should Raju disappear on the way? The evidence would disclose that Raju had promised to marry the victim girl and on that promise he had taken the victim girl from Munnar. Naturally, one would expect Raju to take her with him even if he had no intention to marry her. But, Raju disappeared and the victim girl was placed in the hands of Usha. Usha succeeded in entrusting the victim girl to Dharmarajan. But for a conspiracy among Dharmarajan, Raju and Usha, these events would not have happened.

52. The evidence would also disclose that when the victim girl was taken to Kanyakumari by Dharmarajan and Jamal, Usha was also with them. The presence of Usha on different occasions CrI.A. NO. 877 OF2002::

63. :: has been brought out in evidence. Usha was present when Dharmarajan and Jamal (accused No.3) came to the house of Vilasini (accused No.39). Usha was also present when the victim girl was taken to Trisea Lodge, Kanyakumari and to Hotel Samudra and while the victim girl was taken to Thiruvananthapuram. While the victim girl was confined at Panchayat Rest House, Kumily, Usha came there along with her husband (accused No.17) and took the victim girl with them on 21.2.1996. When the victim girl was taken to Periyar Hospital, Usha was present with her. The presence of Usha at various other stages is also disclosed in evidence.

53. Section 120A of the Indian Penal Code defines 'criminal conspiracy' as follows: "120A.- Definition of criminal conspiracy.-- When two or more persons agree to do, or cause to be done,-- (1) an illegal act, or (2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy: Crl.A. NO. 877 OF2002::

64. :: Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof. Explanation.-- It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object." 54. Section 120B(1) of the Indian Penal Code provides that whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in the Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

55. Generally, a conspiracy is hatched in secrecy. It is difficult to adduce direct evidence of the same. Reliance on the evidence pertaining to the acts of various parties can be made to infer that the acts were done with reference to their common intention. It is also Crl.A. NO. 877 OF2002::

65. :: possible for the prosecution to rely on circumstantial evidence. The conspiracy can be proved by direct or circumstantial evidence. It is essential that the offence of conspiracy requires some kind of physical manifestation of

agreement. However, express agreement need not be proved. Nor actual meeting of two persons is necessary. Nor it is necessary to prove the actual words of communication. The evidence as to transmission of thoughts, sharing the unlawful design may be sufficient. The law does not require that the act of agreement take any particular form and the fact of agreement may be communicated by words or conduct.

56. Under Section 120A of the Indian Penal Code, an offence of criminal conspiracy is committed when two or more persons agree to do or cause to be done an illegal act or legal act by illegal means. When it is a legal act by illegal means, overt act is necessary. Offence of criminal conspiracy is an exception to the general law where intent alone does not constitute a crime.

57. In State through Superintendent of Police, CBI/SIT v. Crl.A. NO. 877 OF2002::

66. :: Nalini and others ((1999) 5 SCC253, the Supreme Court held: "583. Some of the broad principles governing the law of conspiracy may be summarized though, as the name implies, a summary cannot be exhaustive of the principles.

1. Under Section 120-A, IPC offence of criminal conspiracy is committed when two or more persons agree to do or cause to be done an illegal act or legal act by illegal means. When it is a legal act by illegal means over act is necessary. Offence of criminal conspiracy is an exception to the general law where intent alone does not constitute crime. It is intention to commit crime and joining hands with persons having the same intention. Not only the intention but there has to be agreement to carry out the object of the intention, which is an offence. The question for consideration in a case is did all the accused have the intention and did they agree that the crime be committed it would not be enough for the offence of conspiracy when some of the accused merely entertained a wish, howsoever horrendous it may be, that offence be committed.

2. Acts subsequent to the achieving of the object of conspiracy may tend to prove that a particular Crl.A. NO. 877 OF2002::

67. :: accused was party to the conspiracy. Once the object of conspiracy has been achieved, any subsequent act, which may be unlawful, would not make the accused a part of the conspiracy like giving shelter to an absconder.

3. Conspiracy is hatched in private or in secrecy. It is rarely possible to establish a conspiracy by direct evidence. Usually, both the existence of the conspiracy and its objects have to be inferred from the circumstances and the conduct of the accused.

4. Conspirators may for example, be enrolled in a chain - A enrolling B, B enrolling C, and so on; and all will be members of a single conspiracy if they so intend and agree, even though each member knows only the person who enrolled him and the person whom he enrolls. There may be a kind of umbrella-spoke enrolment, where a single person at the center does the enrolling and all the other members are unknown to each other, though - they know that there are to be other members. These are theories and in practice it may be difficult to tell which conspiracy in a particular case falls into which category. It may however even overlap. But then there has to be present mutual interest. Persons CrI.A. NO. 877 OF2002::

68. :: may be members of single conspiracy even though each is ignorant of the identity of many others who may have diverse roles to play. It is not a part of the crime of conspiracy that all the conspirators need to agree to play the same or an active role.

5. When two or more persons agree to commit a crime of conspiracy, then regardless of making or considering any plans for its commission, and despite the fact that no step is taken by any such person to carry out their common purpose, a crime is committed by each and every one who joins in the agreement. There has thus to be two conspirators and there may be more than that. To prove the charge of conspiracy it is not necessary that intended crime was committed or not. If committed it may further help prosecution to prove the charge of conspiracy.

6. It is not necessary that all conspirators should agree to the common purpose at the same time. They may join with other conspirators at any time before the

consummation of the intended objective, and all are equally responsible. What part each conspirator is to play may not be known to everyone or the fact as to when a conspirator joined the conspiracy and when he left." CrI.A. NO. 877 OF2002::

69. ::

58. "The gist of the offence of conspiracy then lies, not in doing the act, or effecting the purpose for which the conspiracy is formed, nor in attempting to do then, nor in inciting others to the parties. Agreement is essential. Mere knowledge, or even discussion, of the plan is not, per se, enough." (A passage from Russel on Crime, 12th Edition, quoted with approval in AIR 2001 SC3488(Firozuddin Basheeruddin and others v. State of Kerala)).

59. In Firozuddin Basheeruddin and others v. State of Kerala (AIR 2001 SC3488, it was held thus: "23. Like most crimes, conspiracy requires an act (actus reus) and an accompanying mental state (mens rea). The agreement constitutes that act, and the intention to achieve the unlawful objective of that agreement constitutes the required mental state. In the face of modern organized crime, complex business arrangements in restraint of trade, and subversive political activity, conspiracy law has witnessed expansion in many forms. Conspiracy criminalizes in agreement to commit a crime. All conspirators are liable for crimes CrI.A. NO. 877 OF2002::

70. :: committed in furtherance of the conspiracy by any member of the group, regardless of whether liability would be established by the law of complicity. To put it differently, the law punishes conduct that threatens to produce the harm, as well as conduct that has actually produced it. Contrary to the usual rule that an attempt to commit a crime merges with the complete offence, conspirators may be tried and punished for both the conspiracy and the completed crime. The rationale of conspiracy is that the required objective manifestation of disposition to criminality is provided by the act of agreement. Conspiracy is a clandestine activity. Persons generally do not form illegal covenants openly. In the interests of security, a person may carry out his part of a conspiracy without even being informed of the identity of his co-conspirators. Since an agreement of this kind can rarely be shown by direct proof, it must be inferred from circumstantial evidence of co-

operation between the accused. What people do is, of course, evidence of what lies in their minds. To convict a person of conspiracy, the prosecution must show that he agreed with others that together they would accomplish the unlawful object of the conspiracy.

24. Another major problem which arises in connection with the requirement of an agreement is that Crl.A. NO. 877 OF2002::

71. :: of determining the scope of a conspiracy - who are the parties and what are their objectives. The determination is critical, since it defines the potential liability of each accused. The law has developed several different models with which to approach the question of scope. One such model is that of a chain, where each party performs a role that aids succeeding parties in accomplishing the criminal objectives of the conspiracy. No matter how diverse the goals of a large criminal organization, there is but one objective; to promote the furtherance of the enterprise. So far as the mental state is concerned, two elements required by conspiracy are the intent to agree and the intent to promote the unlawful objective of the conspiracy. It is the intention to promote a crime that lends conspiracy its criminal cast.

25. Conspiracy is not only a substantive crime. It also serves as a basis for holding one person liable for the crimes of others in cases where application of the usual doctrines of complicity would render that person liable. Thus, one who enters into conspiratorial relationship is liable for every reasonably foreseeable crime committed by every other member of the conspiracy in furtherance of its objectives, whether or not he knew of the crimes or aided in their commission. The rationale is that criminal acts done in furtherance Crl.A. NO. 877 OF2002::

72. :: of a conspiracy may be sufficiently dependent upon the encouragement and support of the group as a whole to warrant treating each member as a causal agent to each act. Under this view, which of the conspirators committed the substantive offence would be less significant in determining the defendant's liability than the fact that the crime was performed as a part of a larger division of labour to which the accused had also contributed his efforts." 60. In Noor Mohammad Mohd. Yoosaf Momin v. The State of Maharashtra (AIR 1971 SC885, a Three Judge

Bench of the Supreme Court considered the distinction among Sections 34, 109 and 120B of the Indian Penal Code and held thus: "7. So far as S. 34, Indian Penal Code is concerned, it embodies the principle of joint liability in the doing of a criminal act, the essence of that liability being the existence of a common intention. Participation in the commission of the offence in furtherance of the common intention invites its application. Section 109, Indian Penal Code on the other hand may be attracted even if the abettor is not present when the offence abetted is committed provided that he has instigated the CrI.A. NO. 877 OF2002::

73. :: commission of the offence or has engaged with one or more other persons in a conspiracy to commit an offence and pursuant to that conspiracy some act or illegal omission takes place or has intentionally aided the commission of an offence by an act or illegal omission. Turning to the charge under Section 120-B, Indian Penal Code criminal conspiracy was made a substantive offence in 1913 by the introduction of Chapter V-A in the Indian Penal Code. Criminal conspiracy postulates an agreement between two or more persons to do, or cause to be done, an illegal act or an act which is not illegal, by illegal means. It differs from other offences in that mere agreement is made an offence even if no step is taken to carry out that agreement. Though there is close association of conspiracy with incitement and abetment the substantive offence of criminal conspiracy is somewhat wider in amplitude than abetment by conspiracy as contemplated by Sec. 107, I. P. C. A conspiracy from its very nature is generally hatched in secret. It is, therefore, extremely rare that direct evidence in proof of conspiracy can be forthcoming from wholly disinterested quarters or from utter strangers. But, like other offences, criminal conspiracy can be proved by circumstantial evidence. Indeed in most cases proof of conspiracy is largely inferential though the inference must be founded CrI.A. NO. 877 OF2002::

74. :: on solid facts. Surrounding circumstances and antecedent and subsequent conduct, among other factors, constitute relevant material. In fact because of the difficulties in having direct evidence of criminal conspiracy, once reasonable ground is shown for believing that two or more persons have conspired to commit an offence then anything done by anyone of them in reference to their common intention after the same is entertained becomes, according to the law of evidence,

relevant for proving both conspiracy and the offences committed pursuant thereto...." 61. In Mohamad Usman Mohammad Hussaim Masniyar and another v. The State of Maharashtra (AIR 1981 SC1062(1)), the Supreme Court held: "For an offence under Section 120B the prosecution need not necessarily prove that the perpetrators expressly agreed to do or cause to be done the illegal act: the agreement may be proved by necessary implication. " 62. In Kehar Singh and others v. The State (Delhi Admn.) (AIR 1988 SC1883, it was held that the most important ingredient of the offence of conspiracy is the agreement between two or more Crl.A. NO. 877 OF2002::

75. :: persons to do an illegal act. The illegal act may or may not be done in pursuance of agreement, but the very agreement is an offence and is punishable.

63. It is relevant to note that the victim girl was enticed away from the hostel in the evening of 16.1.1996. As directed by Raju, the girl travelled in two buses. By that time it was night. She was trapped in such a situation where she would not escape. The presence of Dharmarajan and Usha at Kottayam bus stand at odd hours, the presence of Usha in the bus from Adimaly to Kothamangalam, from Kothamangalam to Muvattupuzha and from Muvattupuzha to Kottayam and the vanishing of Raju on the way from Adimaly to Kothamangalam, in our view, were all part of the conspiracy. Usha and Dharmarajan belong to Ponkunnam. Usha introduced Dharmarajan to the victim girl. The facts and circumstances proved in the case would lead to the irresistible conclusion that Dharmarajan, Raju and Usha were members of a criminal conspiracy and the object of the criminal conspiracy was to kidnap the victim girl from her lawful guardianship. Crl.A. NO. 877 OF2002::

76. :: Kidnapping of the victim girl, her wrongful concealment and confinement:

64. It is established in the case that the victim girl was studying in the IXth standard at Little Flower Girls High School, Convent School, Nallathanni at Munnar, at the time of occurrence. Her date of birth is 23.9.1979, as proved by Ext.P11 - the entry in the Register of Birth of Kottayam Municipality, proved by PW15, the Registrar of Birth and Deaths. The victim girl also stated that her date of birth is 23.9.1979. Her father (PW23) also stated so. The vicar of CSI Church, Munnar (PW37) deposed with reference to Ext.P43 Baptism Register that the date

of birth of the victim girl as entered in the Register is 23.9.1979. Thus it is clear that as on 16.1.1996, the victim girl had attained the age of 16 years 3 months and 23 days. The offences under Sections 363, 365, 366A and 378 were alleged against the appellant.

65. Section 359 of the Indian Penal Code states that kidnapping is of two types: kidnapping from India, and kidnapping from lawful guardianship. In the present case, the allegation is that the girl was kidnapped from the lawful guardianship. Section 361 CrI.A. NO. 877 OF2002::

77. :: states what is kidnapping from lawful guardianship. Section 361 reads as follows: "361. Kidnapping from lawful guardianship.-- Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship. Explanation.-- The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person. Exception.-- This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to lawful custody of such child, unless such act is committed for an immoral or unlawful purpose." 66. Section 365 provides that whoever kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined, shall be punished with imprisonment of either CrI.A. NO. 877 OF2002::

78. :: description for a term which may extend to seven years, and shall also be liable to fine. Section 366A states that whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine. Section 368 provides that whoever, knowing that any person has been kidnapped or has been abducted, wrongfully conceals or confines such person, shall be punished in the same manner as if he had kidnapped or abducted such person

with the same intention or knowledge, or for the same purpose as that with or for which he conceals or detains such person in confinement.

67. As stated above, the father of the victim girl was working as a Postmaster and her mother was working as a nurse. Their two children, the victim girl and her sister, were studying in boarding schools. Normally, one would not expect such a girl to run away from the hostel and go to various places and indulge in indiscriminate sexual activities for gain. There is no evidence that Crl.A. NO. 877 OF2002::

79. :: she has gained anything in terms of money or other amenities. It cannot be also said that a girl who has just completed sixteen years of age would go with several persons during the course of 41 days to gain any pleasure. Then why did she leave the convent school? The evidence would disclose that it was on the inducement of Raju that she left the place. She thought of leading a happy life with Raju after marrying him. But, things went out of her control and she landed in trouble with no way to escape. That was how she got into the trap of Dharmarajan and Usha. The learned senior counsel appearing for the appellant submitted that Ext.X13 report and the evidence of DW3 would show that the victim girl left the place on her own volition. Ext.X13 is a report dated 14.3.1996 submitted by the Deputy Superintendent of Police, Munnar to the Superintendent of Police, Idukki with respect to the investigation of the crime in the present case (Crime No.6 of 1996 of Munnar Police Station). In the said report, it is stated thus: "A.S.I. also questioned Joy to whom the missing girl entrusted a letter to be handed over to Kochumon, driver of Companion bus. Kochumon has admitted to Crl.A. NO. 877 OF2002::

80. :: have received the letter. The letter states that she is going away without telling home and requests Kochumon Chettan not to tell home." 68. DW3, the witness examined on the side of the defence, is George Varghese, who is also called Kochumon. DW3 was the driver in the "Companion" bus during the relevant period. He knew the victim girl and her father. DW3 stated that one Joy @ Aliyan Joy, who was the driver in Anjali bus, hand over a letter to DW3 and he entrusted the same to the Munnar Police on the next day. DW3 stated that he got the letter

from Aliyan Joy on the next day of the missing of the victim girl. Anjali bus was being plied from Adimaly to Munnar and Munnar to Adimaly. DW3 stated that the letter was handed over to him by the driver of Anjali bus after stopping "Companion" bus. It was addressed to DW3, but he did not open the letter. He opened the letter on that night after reaching Sooryanelli. DW3 stated that on the next day he entrusted the letter at Munnar Police Station. In cross examination, DW3 stated that he and the first accused (Raju) are friends. DW3 stated that he does not wish that Raju should escape from the case. DW3 also stated that the victim girl was behaving like an innocent little girl. To a question in CrI.A. NO. 877 OF2002::

81. :: cross examination, DW3 stated that he did not ask Aliyan Joy whether the letter was written by the victim girl. He also stated that he does not know whether the victim girl was present in Anjali bus at the time when the letter was handed over to him. He came to know that the letter was given by the victim girl, when Aliyan Joy told him on the next day.

69. The learned Director General of Prosecution submitted that no letter was produced by DW3 before police. He explained Ext.X13 and submitted that Ext.X13 does not indicate that the letter was produced in the case. A reading of Ext.X13 report would not indicate that the letter was produced before the police at all.

70. DW3 stated in evidence that in the letter given to him by Joy @ Aliyan Joy as a letter written by the victim girl, it was stated as follows: "X gl^Ua5O^ .e.H_OmAm U`G_W H_WA^H_Wm?N_\o.eU`G_W &gx^?a" ly OI." Assuming that the victim girl had written such a letter, the question is CrI.A. NO. 877 OF2002::

82. :: whether it would affect the case of prosecution that the victim girl was kidnapped. The contents of the letter as stated by DW3, even if taken as true, would only show that the victim girl had written a letter that she was going. The case of the prosecution is that Raju feigned love towards the victim girl and allured her to go away with him. The letter is not incompatible with such a story of the prosecution. The statement in the letter allegedly written by the victim girl that she did not like to stay in her house would not also prove that she left the convent school on her own accord. The victim girl was staying in the school hostel and she

did not say anything that she did not like her stay in the hostel. Moreover, during the cross examination of the victim girl, she was never asked about such a letter having been written by her. Therefore, we are of the view that even if the case of the defence that a letter was written as stated by DW3 is taken as true, that would not affect the prosecution case at all. It is also relevant to note that the case of such a letter having been handed over to DW3 was not put forward when the trial of the other accused took place in S.C.No.187 of 1999.

71. Sri. Raju Joseph, the learned senior counsel appearing for CrI.A. NO. 877 OF2002::

83. :: the defence submitted that there is no case for the prosecution that Dharmarajan induced the victim girl to leave the hostel. The court below found that Dharmarajan is not guilty of the offence under Section 109 of the Indian Penal Code and therefore, he cannot be punished for the offence of kidnapping and abducting. The learned counsel also submitted, with reference to the evidence of the victim girl, that she came from Kothamangalam to Kottayam on her own volition. We have carefully gone through that part of the evidence of the victim girl. She stated that since there was no bus to go back, she came to Kottayam and it was her decision. The statement would not go against the case of the prosecution at all. The prosecution has no case that either Dharmarajan or Usha induced the victim girl to go to Kottayam. The victim girl stated about her helplessness and her plan to go to her maternal aunt's house since she could not go back to Munnar or to Sooryanelli as there was no bus.

72. The learned counsel submitted that the victim girl was free to take her own decision to return home while she reached at Kothamangalam and that it would indicate that there was no kidnapping. We are not inclined to accept this contention. Usha CrI.A. NO. 877 OF2002::

84. :: was discreetly following the victim girl. Raju vanished from the scene before the victim girl reached Kothamagalam. The evidence of the victim girl would clearly show that when she alighted at Kothamangalam, Raju was not found. It was about 7 pm. There was no bus to go back to Munnar or to Sooryanelli. She got frightened. She decided to go to her maternal aunt's house at Kottayam. For that

purpose, she left Kothamangalam to Muvattupuzha and from Muvattupuzha to Kottayam. All through out Usha was following her. At Kottayam bus stand, Usha got acquainted with the victim girl, consoled her and introduced her to Dharmarajan and, according to the prosecution, the further incidents took place.

73. When we consider the question of kidnapping from lawful guardianship, the question whether the victim girl could escape after some time is not relevant. The offence of kidnapping would be complete the moment the minor girl under eighteen years of age is taken or enticed out of the keeping of the lawful guardian of such minor without the consent of such guardian. In the case on hand, since the victim girl was in the convent school, the lawful guardian CrI.A. NO. 877 OF2002::

85. :: was the person who was lawfully entrusted with the care and custody of the minor girl, going by the the explanation. The offence was complete when the girl left the convent school and boarded the bus from Munnar to Adimaly, as instructed or commanded by the first accused (Raju). Even assuming that the victim girl could escape thereafter, that would not exonerate the accused from the offence of kidnapping from lawful guardianship.

74. The contention put forward by the learned counsel for the defence that since Dharmarajan was found not guilty under Section 109 of the Indian Penal Code, he cannot be found guilty for the offence under Section 363, is also unsustainable. The trial court found Dharmarajan guilty of the substantive offence under Section 120B of the Indian Penal Code and it was held that no separate finding under Section 109 was necessary. As held in Noor Mohammad Mohd. Yoosaf Momin v. The State of Maharashtra (AIR 1971 SC885, though there is close association of conspiracy with incitement and abetment the substantive offence of criminal conspiracy is some what wider in amplitude than abetment by conspiracy as contemplated in Sec. 107 of the Indian Penal Code. CrI.A. NO. 877 OF2002::

86. ::

75. Sri.Raju Joseph, the learned senior counsel appearing for the appellant submitted that even if the prosecution case is taken as true, the offence of kidnapping was complete by the time the victim girl reached Adimaly and when

she met accused No.1 Raju. Thereafter, Raju was not in the scene. The prosecution has no case that Raju entrusted the victim girl to either Dharmarajan or Usha. The learned counsel submitted that, in these circumstances, Dharmarajan cannot be said to have committed any offence of kidnapping under Section 363 of the Indian Penal Code. The case of the prosecution is that the offence of kidnapping was committed in furtherance of a criminal conspiracy among Raju, Usha and Dharmarajan and the prosecution was able to prove that there was such a criminal conspiracy. Moreover, the offence under Section 366A of the Indian Penal Code would be attracted even if it is found that Dharmarajan was not guilty of kidnapping of the minor girl. To attract Section 366A, it is not necessary for the prosecution to prove that the person who is alleged to have committed the offence under Section 366A was a party to the offence of kidnapping of the minor girl out of her lawful guardianship. CrI.A. NO. 877 OF2002::

87. ::

76. To attract Section 368 of the Indian Penal Code also, it is not necessary that the person who is alleged to have committed the said offence was a party to the offence of kidnapping. Section 368 would be attracted if the accused wrongfully conceals or confines a person with the knowledge that such person has been kidnapped or has been abducted.

77. The learned senior counsel appearing for the appellant relied on the decisions in *Shyam and another v. State of Maharashtra* (1995 SCC (Crl) 851) and in *Gabbu v. State of M.P.* ((2006) 5 SCC740).

78. In *Shyam and another v. State of Maharashtra* (1995 SCC (Crl) 851), accused No.1 wanted to marry the prosecutrix. He made a proposal to her two or three months prior to the occurrence. On the date of occurrence, when she came to the common water tap for washing clothes and to fetch water, the accused persons came to that place on two bicycles. On their demand, the prosecutrix sat on the carrier of the bicycle of accused No.2. Accused No.1 followed CrI.A. NO. 877 OF2002::

88. :: that bicycle as if he was escorting. The prosecutrix was taken to the house of someone and she was made to perform a ritual signifying marriage between her and accused No.1. The mother of the girl reported to the police about the missing of the girl. The police found out the prosecutrix and the accused. On these facts, the Supreme Court held that the girl was a willing party to go with the accused. It was held that the offence of kidnapping was not sustainable. The facts and circumstances in *Shyam and another v. State of Maharashtra* (1995 SCC (Cri) 851) are quite different from the facts and circumstances of the present case.

79. In *Gabru v. State of M.P.* ((2006) 5 SCC740, it was held that to constitute an offence under Section 366 of the Indian Penal Code, mere abduction is not enough, it must further be proved that the accused abducted the woman with the intent that she may be compelled, or knowing it to be likely that she will be compelled to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse. Unless the prosecution proves that the abduction is for the purposes mentioned in Section CrI.A. NO. 877 OF2002::

89. ::

366. of the Indian Penal Code, the Court cannot hold the accused guilty and punish him for the said offence. In the present case, the offence under Section 366 of the Indian Penal Code is not alleged. The offence alleged is under Section 366A, for which, the ingredients to be established are quite different.

80. The learned Director General of Prosecution relied on the decisions in *State of Haryana v. Raja Ram* (AIR 1973 SC819, *Thakorlal D.Vadgama v. The State of Gujarat* (AIR 1973 SC2313 and *Parkash v. State of Haryana* (AIR 2004 SC227. In *State of Haryana v. Raja Ram* (AIR 1973 SC819, the Supreme Court, while dealing with an offence under Section 366 of the Indian Penal Code, considered the scope and ambit of Section 361 and held thus: "8. The object of this section seems as much to protect the minor children from being seduced for improper purposes as to protect the rights and privileges of guardians having the lawful charge or custody of their minor wards. The gravamen of this offence lies in the taking or enticing of a minor under the ages specified in CrI.A. NO. 877

OF2002::

90. :: this section, out of the keeping of the lawful guardian without the consent of such guardian. The words "takes or entices any minor.....out of the keeping of the lawful guardian of such minor" in S. 361, are significant. The use of the word "keeping" in the context connotes the idea of charge, protection, maintenance and control : further the guardian's charge and control appears to be compatible with the independence of action and movement in the minor, the guardian's protection and control of the minor being available, whenever necessity arises. On plain reading of this section the consent of the minor who is taken or enticed is wholly immaterial : it is only the guardian's consent which takes the case out of its purview. Nor is it necessary that the taking or enticing must be shown to have been by means of force or fraud. Persuasion by the accused person which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardian would be sufficient to attract the section." 81. In *Thakorlal D.Vadgama v. The State of Gujarat* (AIR 1973 SC2313, it was held thus: "9. Broadly, the same seems to us to be the position under our law. The expression used in Section 361, I.P.C. is "whoever takes or entices any minor". The CrI.A. NO. 877 OF2002::

91. :: word "takes" does not necessarily connote taking by force and it is not confined only to use of force, actual or constructive. This word merely means, "to cause to go", "to escort" or "to get into possession". No doubt it does mean physical taking, but not necessarily by use of force or fraud. The word "entice" seems to involve the idea of inducement or allurement by giving rise to hope or desire in the other. This can take many forms, difficult to visualise and describe exhaustively; some of them may be quite subtle, depending for their success on the mental state of the person at the time when the inducement is intended to operate. This may work immediately or it may create continuous and gradual but imperceptible impression culminating after some time, in achieving its ultimate purpose of successful inducement. The two words "takes" and "entices", as used in Section 361, I. P.C. are, in our opinion, intended to be read together so that each takes to some extent its colour and content from the other. The statutory language suggests that if the minor leaves her parental home completely

uninfluenced by any promise, offer or inducement emanating from the guilty party, then the latter cannot be considered to have committed the offence as defined in Section 361, I. P.C. But if the guilty party has laid a foundation by inducement, allurements or threat, etc. and if this can be considered to have Crl.A. NO. 877 OF2002::

92. :: influenced the minor or weighed with her in leaving her guardian's custody or keeping and going to the guilty party, then prima facie it would be difficult for him to plead innocence on the ground that the minor had voluntarily come to him. If he had at an earlier stage solicited or induced her in any manner to leave her father's protection, by conveying or indicating an encouraging suggestion that he would give her shelter, then the mere circumstance that his act was not the immediate cause of her leaving her parental home or guardian's custody would constitute no valid defence and would not absolve him.. The question truly falls for determination on the facts and circumstances of each case." In Parkash v. State of Haryana (AIR 2004 SC227, the decisions in State of Haryana v. Raja Ram (AIR 1973 SC819 and Thakorlal D.Vadgama v. The State of Gujarat (AIR 1973 SC2313 were relied on.

82. The evidence would disclose that the appellant intended to conceal and confine the victim girl and to keep her in his illegal custody. The intention of the appellant is evident from the incidents which took place on the subsequent days covering over a period of Crl.A. NO. 877 OF2002::

93. ::

41. days. The evidence of the victim girl would also show that a few days before her release, she was allowed to talk a few words to her uncle Robert. Though Robert asked her to cry aloud and try to escape, she could not do so. The evidence of the victim as well as her uncle Robert (PW11) would show that even after several days of kidnapping of the victim girl, she was not free.

83. The court below rightly held that in pursuance of the criminal conspiracy hatched out by Dharmarajan, Raju and Usha, the victim girl was kidnapped from the lawful guardianship and she was concealed and wrongfully confined at several

places from 16.1.1996 to 26.2.1996 and she was subjected to illicit sexual intercourse by several persons and thus the appellant committed the offences under Sections 120B, 363, 365, 366A and 368 of the Indian Penal Code. Rape and gang rape:

84. The case of the prosecution is that pursuant to the criminal conspiracy mentioned above, Dharmarajan obtained illegal custody of the victim girl at KSRTC bus stand, Kottayam on Crl.A. NO. 877 OF2002::

94. ::

16. 1.1996. Dharmarajan took the victim girl to Metro Lodge, Kottayam and committed rape on the victim girl. She was taken to the room by Dharmarajan by making her believe that the mother of Dharmarajan was available in that lodge. She was made to believe that Dharmarajan's mother was taking bath in the next room. Since the victim did not see the mother of Dharmarajan coming after taking bath, she enquired about the same to Dharmarajan. At that time, Dharmarajan locked the room from inside and forcibly put her on a cot. Though the victim girl wept and sought for mercy, Dharmarajan threatened her to death after pressing on her throat. He stated that he was an Advocate and that he could tackle any case and escape. Dharmarajan also threatened the victim girl that her parents would be done away with. Dharmarajan forcibly undressed her and in spite of her resistance, had forcible sex with her. The prosecution examined PW35, the Manager of Metro Lodge, Kottayam, who produced Ext.P34 Visitors' Register, which would show that Dharmarajan stayed in that lodge from 2.1.1996 to 17.1.1996 and he vacated the room at 7 a.m. on 17.1.1996.

85. The learned counsel for the accused submitted that the Crl.A. NO. 877 OF2002::

95. :: specific charge against the appellant is that on 16.1.1996, he committed the offence of rape in room No.32 of Metro Lodge. Ext.P34 Visitors' Register shows that on 16.1.1996 room No.32 was not occupied by Dharmarajan but by some other person. It is seen from Ext.P34 that Dharmarajan was in occupation of room Nos.31 and 21 at Metro Lodge. The evidence of PW35 also shows that

Dharmarajan stayed in Metro Lodge till 17.1.1996 and that on the previous night a girl was found with him. The evidence of PW35 shows that he insisted for taking a double room since a girl was with him. The room boy was directed to provide a double room for Dharmarajan. PW35 stated that he had already identified the victim girl in the main case.

86. The prosecution alleged that on 17.1.1996 the victim girl was taken to Anand Tourist Home at Chittoor Road, Ernakulam and during that night the girl was raped by Dharmarajan. PW28 Dinesan, the Supervisor of Anand Tourist Home, proved Ext.P22. Ext.P22 shows that room No.113 was taken in the name of Sreekumar and family. The address of Sreekumar was mentioned as Advocate, Sreebhavan, Ponkunnam, Kottayam District. It is Crl.A. NO. 877 OF2002::

96. :: relevant to note here that Dharmarajan was introduced to the victim girl as Sreekumar by accused No.2 Usha. PW28 stated that the room was taken and the address was written by Dharmarajan showing his name as Sreekumar.

87. The victim girl was taken to the Rest House, Kumily thereafter. The Rest House, Kumily belongs to Kumily Panchayat and it was run by accused No.5 Cherian @ Cheriachan. The prosecution alleged that on 19.1.1996 Dharmarajan and Cherian @ Cheriachan gang raped the victim girl and on 20.1.1996, accused No.4 Reji and accused No.7 Advocate Jose Nedumthakidiyil gang raped her. S.D.Gopakumar (PW3), the Secretary of Kumily Grama Panchayat stated that he was the Secretary from 1991 to February, 1996. He was residing in the Panchayat Rest House. Accused No.5 Cherian @ Cheriachan had taken the Rest House in auction for running it on rent. He proved Ext.P3, copy of the notice sent by him to Cherian @ Cheriachan. PW3 stated that Ext.P3 notice was sent to Cherian @ Cheriachan since information was gathered that immoral activities were going on in the Rest House. Since Cherian @ Cheriachan gave an apology letter, further action was dropped. Crl.A. NO. 877 OF2002::

97. :: PW3 stated that Dharmarajan met him in February, 1996 and stated that he was ready to run the Rest House for higher rental.

88. PW52, who was the Sub Inspector of Police, Munnar, arrested accused No.5 Cherian @ Cheriachan on 10.3.1996. He produced the Register of Kumily Rest House as per Ext.P77 mahzar. PW36, the Assistant Director, State Forensic Laboratory, Thiruvananthapuram, compared the handwriting and signature in various registers produced before him for comparison along with the admitted handwriting and signature.

89. On 21.1.1996, the victim girl was taken to Hilax Lodge, Palakkad, where the victim girl was confined and Dharmarajan raped her. PW27, a room boy of Hilax Lodge, identified Dharmarajan. The witness stated that Dharmarajan had taken a room in that lodge and the girl was with him. The girl was identified by the witness when he was examined in S.C.No.187 of 1999. Certified copy of the Register of Hilax Lodge (Ext.P19) shows that room No.212 was taken by Dharmarajan. The witness stated that Dharmarajan made the entries in the Register in his own handwriting and the room was CrI.A. NO. 877 OF2002::

98. :: vacated on 22.1.1996 at about 9.50 a.m. The Register of the lodge was produced by the accountant before the investigating officer who prepared Ext.P20 mahzar in which PW27 also signed as a witness. The mahzar in respect of room No.212 was also prepared as Ext.P21.

90. On 22.1.1996, Dharmarajan took the victim girl to Vanimel in Kozhikode District. She was taken to the rented building of accused No.16 Thulaseedharan. On 22.1.1996, Dharmarajan raped the victim girl. The prosecution also alleged that accused No.16 Thulaseedharan is a close associate of Dharmarajan. The girl was kept in that house from 22.1.1996 to 24.1.1996. On 23.1.1996, the girl was raped by Thulaseedharan. It was also alleged that on the next day, Dharmarajan and Thulaseedharan gang raped her. The investigating officer (PW50 K.Ittoop) prepared Ext.P69 mahzar after inspecting the house at Vanimel in which the girl was illegally kept.

91. Again the victim girl was taken to Kumily Rest House in the early hours of 26.1.1996 and Dharmarajan and the victim girl stayed there. On that day itself, Dharmarajan and accused No.3 Jamal took the victim girl to Cumbam where they lodged at Indra CrI.A. NO. 877 OF2002::

99. :: Lodge. Dharmarajan raped the victim girl at Indra Lodge. The original of Ext.P28 Register was produced by PW31, the receptionist of Indra Lodge, to the investigating officer, as per Ext.P82 mahzar. PW31, the receptionist of Indra Lodge, deposed that along with Dharmarajan, a man and a woman were there. Two rooms (one double room and a single room) were taken in the lodge. The address was written by Dharmarajan. His address was shown as S.S.Dharmarajan, Advocate, Chaithram, Kottayam, Kerala. PW31 stated that in room No.103, Dharmarajan and the victim girl stayed.

92. The victim girl was, thereafter, taken to Thottam Lodge, Muvattupuzha, where she was locked in a room by Dharmarajan and Jamal. They went outside and accused No.14 Yoosaf came with them. The victim girl was taken by all of them in a car to Aluva and they stayed at Aroma Lodge. It was alleged that at Aroma Lodge, Aluva, Dharmarajan, Jamal and Yoosaf raped the victim girl.

93. PW32, the Manager of Thottam Lodge, identified Dharmarajan before Court and stated that he had come to the lodge along with the victim girl. The victim girl was identified by PW32 in Crl.A. NO. 877 OF2002::

100. :: S.C.No.187 of 1999. The certified copy of the Guest Arrival and Departure Register (Ext.P30) was shown to the witness. He stated that on 27.1.1996 at 5.15 p.m., Dharmarajan had taken a room in the lodge. His address was shown as S.S.Dharmarajan and Anjali, Advocate, Chaithram, Kottayam. The witness stated that the address and details were written by Dharmarajan in his own handwriting. The witness also stated that on the same day by about 7.45 p.m., the room was vacated.

94. PW48, who assisted the investigating officer and who was a member of the investigating team, seized the Register of Thottam Lodge (Ext.P30), as per Ext.P57 mahzar.

95. PW33 Ganesan, the receptionist of Aroma Tourist Home, stated in evidence that Dharmarajan had stayed in the Aroma Tourist Home. At that time, accused No.3 Jamal, accused No.14 Yoosaf and a girl were there with Dharmarajan. He stated that he had identified Jamal, Yoosaf and the victim girl in Court. The

witness stated that the victim girl was introduced as the daughter of Yoosaf. Dharmarajan stated that he is the son-in-law of Beeder Jain, who CrI.A. NO. 877 OF2002::

101. :: was an inmate in the Tourist Home. Room Nos.102 and 103 were given to Dharmarajan and others. Ext.P31 Register of Aroma Tourist Home shows that room No.102 was taken in the name of Dharmarajan and room No.103 was taken in the name of Jamal .P.K. PW50 (Ittoop.K.), the investigating officer, prepared Ext.P64 mahzar in respect of room Nos.102 and 103 of Aroma Tourist Home and Ext.P65 mahzar in respect of the seizure of the Arrival Register produced by the receptionist (PW33).

96. Thereafter, the victim girl was taken to the house of accused No.39 Vilasini at Theni, where the victim girl was confined for about four days. During that period, the victim girl had urinary infection and pain at lower abdomen.

97. On 1.2.1996, the victim girl was taken from the house of Vilasini by Dharmarajan and Jamal. They took the victim girl along with accused No.2 Usha and PW8 Maya. The victim girl was kept in room No.9 of Trisea Lodge at Kanyakumari, where Dharmarajan raped her in the presence of others . PW38, who was the Manager of Trisea Lodge, Kanyakumari at the relevant time, stated in CrI.A. NO. 877 OF2002::

102. :: evidence that room No.9 was allotted in the name of P.K.Jamal, Puthuparambil, Ponkunnam, Kottayam. It is recorded in the Register that two males and three females occupied that room. PW38 identified Dharmarajan. PW38 stated that he had identified the victim girl while he was examined in S.C.No.187 of 1999. Ext.P40 is the certified copy of the Register kept at Trisea Lodge. That Register was seized by the investigating officer as per Ext.P44 mahzar.

98. Thereafter, accused No.4 Reji took the victim girl to Hotel Samudra stating that the film people had arrived there. The prosecution alleged that at Hotel Samudra, accused No.4 Reji, accused No.7 Advocate Jose Nedumthakidiyil, accused No.8 Sreekumar and accused No.23 Jacob Mathew raped the victim girl. PW39, who

was the Manager of Hotel Samudra, deposed with reference to the Arrival and Departure Register maintained during the relevant period, that room Nos.402, 404 and 406 were allotted to Jose Manuel, Advocate and he put his signature at the relevant column. Total number of seven persons including two ladies and a girl occupied the rooms. The witness stated that he had identified CrI.A. NO. 877 OF2002::

103. :: the victim girl while he was examined in S.C.No.187 of 1999. PW53, the investigating officer (K.M.Mathew), stated that he inspected room No.404 of Hotel Samudra and prepared Ext.P45 mahzar. He also prepared Ext.P83 mahzar while taking into custody of the originals of Exts.P41 and P42 Registers of Hotel Samudra.

99. On 3.2.1996, the victim girl was taken to Thiruvananthapuram by Reji and Usha along with Maya. The victim girl was taken to the business place of Jacob Sait (PW34) while the others were lodged at Hotel Nandavanam. The victim girl was thereafter taken to Hotel Geeth by accused No.4 Reji. At Hotel Geeth, Reji raped the victim girl. It was also alleged that on 4.2.1996, Reji facilitated accused No.9 Rajendran Nair to sexually exploit the victim girl by using force. Reji also committed rape on the victim girl on 4.2.1996. On 5.2.1996, Reji facilitated accused No.28 Georgekutty and accused No.29 Vijayakumar to rape the victim girl. PW34 Jacob Sait stated in evidence that he was doing sanitary business at Thiruvananthapuram for the last fifteen years and that he knew accused No.4 Reji for the last several years. The witness had identified the victim girl while he was examined in S.C.No.187 of CrI.A. NO. 877 OF2002::

104. ::

1999. Jacob Sait stated that on 3.2.1996, Reji and the victim girl came to his shop. Reji introduced the girl as his niece. Jacob Sait was busy at that time and he requested them to come later. By about 6.30 p.m., Reji and the victim girl came to the shop of Jacob Sait in a taxi. Reji requested Jacob Sait to pay the taxi fare of 300/-. Jacob Sait became free by about 8 'o clock. Reji requested to provide food for them. They went to Hotel Keerthi in the car of Jacob Sait for taking food. Reji requested to provide an accommodation at Hotel Geeth for them. Jacob Sait

arranged for their accommodation at Hotel Geeth. The witness stated that the registration card at Hotel Geeth (Ext.P33) was filled up by him and the details were furnished by Reji. Reji put his signature in the presence of PW34. Jacob Sait went home. As requested by Reji, on the next day, Reji and his friends were taken to Poovar. They came back by about 4 p.m. Jacob Sait came to Hotel Geeth by 8 p.m. and went to Reji's room. At that time, Reji, Rajendran Nair (accused No.9) and the victim girl were there in Reji's room. Reji and Rajendran Nair were taking liquor. After some time, Reji and Rajendran Nair went out. Jacob Sait talked to the victim girl. While talking, the victim girl wept. At that time, Jacob Sait went out of the room. Within a few minutes, Reji CrI.A. NO. 877 OF2002::

105. :: and Rajendran Nair came back and Jacob Sait returned to his house.

100. PW8 Maya stated that on January 30, 1996, she met Usha and Dharmarajan at the private bus stand at Ponkunnam. Usha introduced Dharmarajan to Maya. Usha stated that Dharmarajan had contacts with film people and a chance could be provided to Maya as a singer in films. Usha assured her that Maya would get a chance as film people were to come to Kanyakumari. Dharmarajan stated that Maya should undergo sound test at Kanyakumari. For that purpose, she was directed to wait near High Range Hotel at Kanjirappally on 1.2.1996. Usha also promised to go with her. On 1.2.1996, Maya waited near High Range Hotel, Kanjirappally. Usha, Dharmarajan and Maya came to Kumily. Dharmarajan told Maya that a girl who expected a chance in film was at Theni and she also should be taken to Kanyakumari. They went to Theni. Dharmarajan and Jamal brought a girl and introduced the girl to Maya as Anjali. All of them went to Nagarkovil and from there, in a taxi went to Kanyakumari. They lodged in a room at Hotel Trisea, in which Maya, Dharmarajan, Jamal, Usha and the victim girl stayed. In that room, Dharmarajan forcibly undressed the victim girl CrI.A. NO. 877 OF2002::

106. :: and she was threatened by Dharmarajan with dire consequences. The victim girl was raped by Dharmarajan in the presence of others. Maya also narrated the incidents which took place on the following days and about the events which took place at Hotel Samudra. Usha told Maya that she had to make some adjustments for getting a chance in cinema. She stated that hoping to get a

chance in film, she had to agree for sex with Adv. Jose Nedumthakidiyil. Maya stated in evidence that the victim girl told her about the love affair with Raju. Maya stated that the victim told her about how she came to the hands of Usha and Dharmarajan and how she was subjected to forcible sex by Dharmarajan and, at his instance, by others. Maya also stated in evidence that while they went for shopping, the victim girl was locked in a room in the hotel. Maya also narrated about the dispute between Reji and Dharmarajan when Dharmarajan demanded 5,000/-. Reji told Dharmarajan that he had already paid 7,000/-. Reji and Dharmarajan had push and pull. Maya also stated that Reji took the victim girl as if they were to meet the film people. Later, Maya realised that the whole episode was fraud and that the promise to give a chance in film was false. Later, Usha and Maya were taken to Thampanoor bus stand and they were sent in a Crl.A. NO. 877 OF2002::

107. :: bus. Maya stated in evidence that the victim girl was found afraid of somebody. She never was in a jovial mood.

101. On the next day, Reji and Georgekutty (accused No.28) took the victim girl to Pala to the house of accused No.38 Mary @ Ammini. The prosecution alleged that during the victim's stay at the house of Mary @ Ammini, Reji, accused No.10 Jacob Stephen @ Stephenji and accused No.7 Adv. Jose Nedumthakidiyil raped the victim girl.

102. On 10.2.1996, the victim girl was taken to Hotel Floral Park, Kottayam, where accused No.8 Sreekumar raped the victim girl. PW29, the receptionist of Hotel Floral Park, Kottayam proved Ext.P23, copy of the Visitors' Register. He stated that Sreekumar (accused No.8 - a police personnel) stayed in room No.401 and the address shown was a different address stating that it was the address of his cousin who had reached that place to go to a hospital. After some time, Sreekumar came with a girl. The girl was identified by PW29 in S.C.No.187 of 1999. After one hour, Sreekumar went out of the room. After some time, he came back with another man. Crl.A. NO. 877 OF2002::

108. :: PW29 did not allow the stranger to go to the room and stated to Sreekumar that such things could not be done in the lodge. Thereafter, Sreekumar vacated

the room.

103. On 10.2.1996, Dharmarajan and accused No.6 Unnikrishnan Nair took the victim girl to Kumily Panchayat Rest House, where the victim girl was confined in a room locking the room from outside. The prosecution alleged that Dharmarajan, accused No.6 Unnikrishnan Nair, accused No.21 Sunny George and accused No.22 Jiji raped the victim girl at Kumily Rest House.

104. On 11.2.1996, the victim girl was taken to the house of accused No.27 Varghese, where accused No.11 Aji, accused No.15 Davood and accused No.27 Varghese gang raped her. The victim girl was suffering from severe abdominal pain. She had discharge of CrI.A. NO. 877 OF2002::

109. :: pus from her vagina. Still, the girl was gang raped by the aforesaid persons.

105. During the night of 11.2.1996, the victim girl was taken to Muvattupuzha and from there to Kottayam. On 12.2.1996, the victim girl was taken to Metro Lodge, Kottayam, where Dharmarajan and accused No.6 Unnikrishnan Nair gang raped her. PW35, the Manager of Metro Lodge, stated that on 12.2.1996 at about 8.45 a.m., Dharmarajan, the victim girl and Unnikrishnan Nair came to the lodge and took a room in the name of Unnikrishnan Nair, as evidenced by the entries in Ext.P35. They vacated the room at 6.25 p.m., on the same day.

106. From 12.2.1996 to 14.2.1996, the victim girl was confined at the house of accused No.39 Vilasini at Theni. Dharmarajan and accused No.6 Unnikrishnan Nair left the place. The victim girl was suffering from severe pain and it was difficult for her even to pass urine.

107. On 15.2.1996, the victim girl was again taken to CrI.A. NO. 877 OF2002::

110. :: Panchayat Rest House, Kumily, where she was confined till 20.2.1996. During that period, the victim girl was subjected to rape and gang rape by accused No.11 Aji, accused No.13 Aliyar, accused No.15 Davood, accused No.20 Sreekumar, accused No.25 Sabu, accused No.12 Satheesan, accused No.24 Joseph @ Baby, accused No.31 Antony @ Baji, Dharmarajan, Jamal, accused No.40 T.H.Salim and the absconding accused Devassiachan.

108. On 21.2.1996, the illness of the victim girl aggravated and she was taken to Periyar Hospital, Kumily, where her name was given as Anjali. PW20 Dr.Grace Kuruvilla, Gynaecologist working in Periyar Hospital, stated with reference to Ext.P16 O.P.Ticket, that a patient named Anjali was examined by her on 21.2.1996 at 11.15 pm. at Periyar Hospital. In Ext.P16, the patient's address was given as Anjali, Kunnath, Ponkunnam. The witness stated that the girl was brought to the hospital by a few people among whom there was a lady. When the patient was examined, those people were also present. The illness was stated as "sore throat for one day and mild cough". The prosecution case is that the victim girl was threatened by the accused not to mention any other illness other than throat pain. Crl.A. NO. 877 OF2002::

111. ::

109. From the Periyar Hospital, the victim girl was taken to Cumbam during night. The victim girl was taken to Anand Lodge, Cumbam. Dharmarajan, Jamal and the victim girl stayed in one room. The prosecution alleged that at Anand Lodge, Cumbam, the victim girl was raped by accused No.35 Babu Mathew and accused No.36 Mathew @ Pappachan. (Mathew @ Pappachan was acquitted by the trial court as he was not identified.) 110. Later, the victim girl was taken to the house of Christudas at Peerumed and confined her there for two days. PW26 Christudas stated that Usha, accused No.17 Mohanan @ Ayyuavu and a girl came to his house. On the next day, there was a Harthal. Usha introduced the girl as her sister. The victim girl was identified by PW26 while he was examined in S.C.No.187 of 1999. On the next night, two persons came to his house, one among whom was Dharmarajan and the other man was later identified as accused No.3 Jamal. After they came to the house of the witness, Usha, Dharmarajan, Mohanan @ Ayyavu and the other man had some secret talk outside the house. PW26 stated to them that no secret talk was necessary. Dharmarajan and the other person who was Crl.A. NO. 877 OF2002::

112. :: introduced as the driver, stated that they wanted to stay in the house of PW26, which was refused by PW26. They went out of the house. On the next day morning, the victim girl was taken from the house. The witness also stated that the

victim girl was lying down as she was quite unwell. The witness also stated that he assessed the age of the girl as 17 years.

111. Thereafter, the victim girl was taken to the house of Latheef, a close relative of accused No.3 Jamal. Three ladies including an old lady were there in that house. The victim girl was introduced as the sister of Dharmarajan. When the illness of the victim girl got aggravated, she was taken to Anpu Hospital at Elappara, where she was admitted. She had no motion for several days. The victim girl was given injection. Enema was administered to her. Later, the victim girl was discharged from the hospital on the next day morning by about 4.30 a.m.

112. PW21 Dr.Murukesan was working in Anpu Hospital at Elappara during the relevant period. PW22 Esther Mary was a nurse in that hospital. PW21 stated that the victim girl was examined by CrI.A. NO. 877 OF2002::

113. :: him on 25.2.1996 at about 4.30 a.m.. The name of the patient was given as Anjali, D/o.Narayanan, Elappara. The patient was having complaint of back pain. She had also complained that there was no motion for one week. PW26 prescribed pain killer, injection and enema. The patient was brought to the Doctor by Latheef, his mother and two others. The witness stated that it is possible to have constipation due to continuous sexual intercourse. PW22 Esther Mary stated that the victim girl was brought to the hospital, holding her by others.

113. The learned senior counsel appearing for the appellant submitted that the oral evidence of the victim girl is not believable and reliable and unless there is corroboration of her evidence, it is unsafe to find the appellant guilty. He also submitted that the appellant/accused is entitled to at least the benefit of doubt in the absence of such corroboration. The learned Director General of Prosecution submitted that the oral evidence of the victim girl is reliable and a conviction can be based on the same even if there is no corroboration. He also submitted that the evidence of the victim girl is corroborated on material particulars. CrI.A. NO. 877 OF2002::

114. ::

114. In Rameshwar S/o.Kalyan Singh v. The State of Rajasthan (AIR 1952 SC54, the accused was charged with the offence of raping a girl below eight years of age. The Supreme Court held that the High Court was right in holding that the guilt of the accused was proved by the evidence of the victim which was legally corroborated by the girl's statement to her mother. The Supreme Court held thus: "16. Now a woman who has been raped is not an accomplice. If she was ravished she is the victim of an outrage. If she consented there is no offence unless she is a married woman, in which case questions of adultery may arise.

17.

18. That, in my opinion, is exactly the law in India so far as accomplices are concerned and it is certainly not any higher in the case of sexual offences. The only clarification necessary for purposes of this country is where this class of offence is sometimes tried by a judge without the aid of jury. In these cases, it is necessary that the judge should give some indication in CrI.A. NO. 877 OF2002::

115. :: his judgment that he has had this rule of caution in mind and should proceed to give reasons for considering it unnecessary to require corroboration on the facts of the particular case before him and show why he considers it safe to convict without corroboration in that particular case. I am of opinion that the learned High Court Judges were wrong to thinking that they could not, as a matter of law, convict without corroboration.

19.

20. I turn next to the nature and extent of the corroboration required when it is not considered safe to dispense with it. Here, again, the rules are lucidly expounded by Lord Reading in Baskerville's case,(1916) 2, K. B. 658 at p. 664 to 669. It would be impossible, indeed it would be dangerous, to formulate the kind of evidence which should, or would, be regarded as corroboration. Its nature and extent must necessarily vary with the circumstances of each case and also according to the particular circumstances of the offence charged. But to this extent the rules are clear.

21. First, it is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant or the CrI.A. NO. 877 OF2002::

116. :: accomplice, should in itself be sufficient to sustain conviction. As Lord Reading says: "Indeed, if it were required that that the accomplice should be confirmed in every detail of the crime, his evidence would not be essential to the case, it would be merely confirmatory of other and independent testimony." All that is required is that there must be "some additional evidence rendering it probable that the story of the accomplice (or complainant) is true and that it is reasonably safe to act upon it." 22. Secondly, the independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice or complainant that the accused committed the crime. This does not mean the corroboration as to identity must extend to all the circumstances necessary to identify the accused with the offence." 115. The decision in Rameshwar S/o.Kalyan Singh v. The State of Rajasthan (AIR 1952 SC54, was quoted with approval by CrI.A. NO. 877 OF2002::

117. :: a Constitution Bench of the Supreme Court in State of Bihar v. Basawan Singh (AIR 1958 SC500 and also in Madho Ram and another v. State of U.P. (AIR 1973 SC469, Sidheswar Ganguly v. State of West Bengal (AIR 1958 SC143, Gurcharan Singh v. State of Haryana (AIR 1972 SC2661, Bharwada Bhoginbhai Hirjibhai v. State of Gujarat (AIR 1983 SC753 and Wahid Khan v. State of M.P. (AIR 2010 SC1.

116. In Bhajan Singh alias Harbhajan Singh and others v. State of Haryana (AIR 2011 SC2552, it was held: "21.The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present at the time of occurrence. Thus, the testimony of an injured witness is accorded a special status in law. Such a witness comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured

witness". Thus, the evidence of an injured witness should be relied upon unless there are grounds for the Crl.A. NO. 877 OF2002::

118. :: rejection of his evidence on the basis of major contradictions and discrepancies therein." 117. In *Gurcharan Singh v. State of Haryana* (AIR 1972 SC2661, the Supreme Court held: "10. The basic question which, therefore, arises is as to how far the testimony of the prosecutrix before us can form the basis of the appellant's conviction. It is well settled that the prosecutrix cannot be considered as an accomplice and, therefore, her testimony cannot be equated with that of an accomplice in an offence. As a rule of prudence, however; court normally looks for some corroboration of her testimony so as to satisfy its conscience that she is telling the truth and that the person accused of rape on her has not been falsely implicated. The matter is not *res integra* and this Court has, on more occasions than one, considered and enunciated the legal position." 118. In *Madho Ram and another v. State of U.P.* (AIR 1973 SC469, the Supreme Court held thus: Crl.A. NO. 877 OF2002::

119. :: "11. The principles that have to be borne in mind by courts when considering evidence of the prosecutrix, have been clearly laid down by several decisions of this Court. It has been held that the prosecutrix cannot be considered to be an accomplice. As a rule of prudence, however, it has been emphasised that Courts should normally look for some corroboration of her testimony in order to satisfy itself that the prosecutrix is telling the truth and that a person, accused of abduction or rape, has not been falsely implicated. The view that, as a matter of law, no conviction without corroboration was possible has not been accepted. The only rule of law is the rule of prudence namely the advisability of corroboration should be present in the mind of the Judge or the Jury, as the case may be. There is no rule of practice that there must in every case, be corroboration before a conviction can be allowed to stand. As to what type of corroboration may be required when the court is of the opinion that it is not safe to dispense with that requirement, it has also been laid down that the type of corroboration required must necessarily vary with the circumstances of each case and also according to the particular circumstances of the offence with which a person is charged.(See *Rameshwar v. The State of Rajasthan*, 1952 SCr 377 = (AIR 1952 SC54;

Sidheswar Ganguly v. The State of West Bengal, 1958 CrI.A. NO. 877 OF2002::

120. :: SCR749= (AIR 1958 SC143.) These principles have also been reiterated in the recent judgment of this Court in Gurcharan Singh v. State of Haryana, AIR 1972 SC2661" 119. In Krishan Lal v. State of Haryana (AIR 1980 SC1252, it was held thus: "3. It is true that old English cases, followed in British Indian courts, had led to a tendency on the part of judge-made law that the advisability of corroboration should be present to the mind of the Judge "except where the circumstances make it safe to dispenses with it". Case-law, even in those days, had clearly spelt out the following propositions : "The tender years of the child, coupled with other circumstances appearing in the case, such, for example as its demeanour, unlikelihood of tutoring and so forth, may render corroboration unnecessary but that is a question of fact in every case. The only rule of law is that this rule of prudence must be present to the mind of the Judge or the Jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed, to stand." CrI.A. NO. 877 OF2002::

121. :: "It would be impossible, indeed it would be dangerous to formulate the kind of evidence which should, or would, be regarded as corroboration. Its nature and extent must necessarily vary with circumstances of each case and also according to the particular circumstances of the offence charged." Observations on probative force of circumstances are not universal laws of nature but guidelines and good counsel.

4. We must bear in mind human psychology and behavioural probability when assessing the testimonial potency of the victim's version. What girl would foist a rape charge on a stranger unless a remarkable set of facts or clearest motives were made out The inherent bashfulness, the innocent naivete_and the feminine tendency to conceal the outrage of masculine sexual aggression are factors which are relevant to improbabilities the hypothesis of false implication." 120. In Rafiq v. State of U.P.(AIR 1981 SC559, it was held: "5. Corroboration as a condition for judicial reliance on the testimony of a prosecutrix is not a matter CrI.A. NO. 877 OF2002::

122. :: of law, but a guidance of prudence under given circumstances. Indeed, from place to place, from age to age, from varying life-styles and behavioural complexes, inferences from a given set of facts, oral and circumstantial, may have to be drawn not with dead uniformity but realistic diversity lest rigidity in the shape of rule of law in this area be introduced through a new type of precedential tyranny. The same observation holds good regarding the presence or absence of injuries on the person of the aggressor or the aggressed." 121. In *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat* (AIR 1983 SC753, after referring to *Rameshwar's case* (AIR 1952 SC54, it was held as follows: "8. And whilst the sands were running out in the time-glass, the crime graph of offences against women in India has been scaling new peaks from day to day. That is why an elaborate rescanning of the jurisprudential sky through the lenses of 'logos' and 'ethos', has been necessitated.

9. 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. Why CrI.A. NO. 877 OF2002::

123. :: should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyze the argument in support of the need for corroboration and subject it to relentless and remorseless cross-examination. And we must do so with a logical, and not an opinionated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focussed on the Indian horizon. We must not be swept off the feet by the approach made in the western world which has its own social milieu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the western world. It is wholly unnecessary to import the said concept on a turnkey basis and to transplant it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian society, and its profile. The identities of the two worlds are different. The solution of problems cannot therefore be identical. It is conceivable in the western society that

a female may level false accusation as regards sexual molestation against a male for several reasons such as :- CrI.A. NO. 877 OF2002::

124. :: (1) The female may be a 'gold digger' and may well have an economic motive- to extract money by holding out the gun of prosecution or public exposure. (2) She may be suffering from psychological neurosis and may see an escape from the neurotic prison by phantasizing or imagining a situation where she is desired, wanted, and chased by males. (3) She may want to wreak vengeance on the male for real or imaginary wrongs. She may have a grudge against a particular male, or males in general, and may have the design to square the account. (4) She may have been induced to do so in consideration of economic rewards, by a person interested in placing the accused in a compromising or embarrassing position, on account of personal or political vendetta. (5) She may do so to gain notoriety or publicity or to appease her own ego or to satisfy her feeling of self-importance in the context of her inferiority complex. (6) She may do so on account of jealousy. CrI.A. NO. 877 OF2002::

125. :: (7) She may do so to win sympathy of others. (8) She may do so upon being repulsed.

10. By and large these factors are not relevant to India, and the Indian conditions. Without the fear of making too wide a statement, or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural society. It is also by and large true in the context of the sophisticated not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because :- (1) A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred, (2) She would be conscious of the danger of being ostracized by the Society or being looked down by the society including by her own family members, relatives, friends, and neighbours, (3) She would have to brave the whole world. (4) She would face the risk of losing the love and respect of

her own Crl.A. NO. 877 OF2002::

126. :: husband and near relatives, and of her matrimonial home and happiness being shattered. (5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely embarrassed in relating the incident to others being overpowered by a feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo. (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy. (10) The parents of an unmarried girl as also the husband and members of the husbands' family of a married woman, would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocent. (12) The reluctance to face interrogation by the investigating agency, to face the Court, to face the cross-examination by counsel for the culprit, and the-risk of being disbelieved, act as a deterrent." Crl.A. NO. 877 OF2002::

127. ::

122. In *State of Maharashtra v. Chandraprakash Kewalchand Jain* (AIR 1990 SC658, it was held thus: "16. A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under S. 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the Court keeps this in mind and feels

satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to S. 114 which requires it to look for corroboration. If for some reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must CrI.A. NO. 877 OF2002::

128. :: necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the Court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the Court should ordinarily have no hesitation in accepting her evidence. We have, therefore, no doubt in our minds that ordinarily the evidence of a prosecutrix who does not lack understanding must be accepted. The degree of proof required must not be higher than is expected of an injured witness. For the above reasons we think that exception has rightly been taken to the approach of the High Court as is reflected in the following passage: "It is only in the rarest of rare cases if the Court finds that the testimony of the prosecutrix is so trustworthy, truthful and reliable that other corroboration may not be necessary." With respect, the law is not correctly stated. If we may say so, it is just the reverse. Ordinarily the evidence of a prosecutrix must carry the same weight as is attached to an injured person who is a victim of violence, unless CrI.A. NO. 877 OF2002::

129. :: there are special circumstances which call for greater caution, in which case it would be safe to act on her testimony if there is independent evidence lending assurance to her accusation.

17. We think it proper, having regard to the increase in the number of sex-violation cases in the recent past, particularly cases of molestation and rape in custody, to remove the notion, if it persists, that the testimony of a woman who is a victim of sexual violence must ordinarily be corroborated in material particulars except in the rarest of rare cases. To insist on corroboration except in the rarest of rare

cases is to equate a woman who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her story of woe will not be believed unless it is corroborated in material particulars as in the case of an accomplice to a crime. Ours is a conservative society where it concerns sexual behaviour. Ours is not a permissive society as in some of the Western and European countries. Our standard of decency and morality in public life is not the same as in those countries. It is, however, unfortunate that respect for womanhood in our country is on the decline and cases of molestation and rape are steadily growing. An Indian Crl.A. NO. 877 OF2002::

130. :: woman is now required to suffer indignities in different forms, from lewd remarks to eve-teasing, from molestation to rape. Decency and morality in public life can be promoted and protected only if we deal strictly with those who violate the societal norms. The standard of proof to be expected by the Court in such cases must take into account the fact that such crimes are generally committed on the sly and very rarely direct evidence of a person other than the prosecutrix is available. Courts must also realise that ordinarily a woman, more so a young girl, will not stake her reputation by levelling a false charge concerning her chastity."

123. In State of Punjab v. Gurmit Singh and others (AIR 1996 SC1393, the Supreme Court held: "The Courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a Court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies Crl.A. NO. 877 OF2002::

131. :: are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Courts should find no difficulty to act on the testimony of a victim of

sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion The Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even more reliable, Just as a witness who has sustained some injury in the occurrence, which is not CrI.A. NO. 877 OF2002::

132. :: found to be self inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a Victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity least that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable." 124. In Aman Kumar and another v. State of Haryana (AIR 2004 SC1497, the Supreme Court held: CrI.A. NO. 877 OF2002::

133. :: "5. It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars.

She stands at a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the Court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice would suffice." 125. In State of Himachal Pradesh v. Asha Ram (AIR 2006 SC381, the Supreme Court held: "5. We record our displeasure and dismay, the way the High Court dealt casually with the offence so grave, as in the case at hand, overlooking the alarming and shocking increase of sexual assault on the minor girls. The High Court was swayed by sheer insensitivity totally oblivious of growing menace of sex violence Crl.A. NO. 877 OF2002::

134. :: against the minors much less by the father. The High Court also totally overlooked the prosecution evidence, which inspired confidence and merited acceptance. It is now well settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of a prosecutrix is more reliable than that of an injured witness. The testimony of the victim of sexual assault is vital unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. It is also well settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. The evidence of the prosecutrix is more reliable than that of an injured witness. Even minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case." 126. In S.Ramakrishna v. State (AIR 2009 SC885, it was held: Crl.A. NO. 877 OF2002::

135. :: "10. A prosecutrix of a sex offence cannot be put on a par with an accomplice. She is in fact a victim of the crime. The Indian Evidence Act, 1872 (in short "the Evidence Act") nowhere says that her evidence cannot be accepted

unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of CrI.A. NO. 877 OF2002::

136. :: each case. But if a prosecutrix is an adult and of full understanding, the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case discloses that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence." In State of M.P. v. Dayal Sahu (AIR 2005 SC3570, the Supreme Court held that non examination of doctor and non production of doctor's report would not be fatal to the prosecution case, if the statement of the prosecutrix and other prosecution witnesses inspire confidence.

127. The Supreme Court in Vijay alias Chinee v State of Madhya Pradesh (2010) 8 SCC191held, after referring to various decisions, that "the law that emerges on the issue is to the effect that statement of prosecutrix, if found to be worthy of credence and reliable, requires no corroboration. The Court may convict the accused on the sole testimony of the prosecutrix. CrI.A. NO. 877 OF2002::

137. ::

128. The learned Director General of Prosecution submitted that though the victim girl narrated the various incidents of rape, there was no cross examination on the material aspects of rape, in spite of the fact that the girl was cross examined for days together. He relied on the decisions of the Supreme Court in *Ranjit Hazarika v. State of Assam* ((1998) 8 SCC635 and *Pandharinath v. State of Maharashtra* ((2009) 14 SCC537 in support of this submission.

129. In *Ranjit Hazarika v. State of Assam* ((1998) 8 SCC635, it was held: "5. The prosecutrix deposed about the performance of sexual intercourse by the appellant and her statement has remained unchallenged in the cross-examination. Neither the non-rupture of the hymen nor the absence of injuries on her private parts, therefore, belies the testimony of the prosecutrix particularly when we find that in the cross examination of the prosecutrix, nothing has been brought out to doubt her veracity or to suggest as to why she would falsely implicate the appellant and put her own reputation at stake." Crl.A. NO. 877 OF2002::

138. ::

130. In *Pandharinath v. State of Maharashtra* ((2009) 14 SCC537, it was held: "15. The prosecutrix has clearly stated in her examination in chief that on waking up she found the appellant-accused sitting near her legs and the appellant-accused removed her under garments and gagged her mouth. Subsequently, the appellant-accused felt sorry for the incident and also apologized for the same.

16. There is no suggestion in the cross- examination on the part of the accused to the aforesaid statement of the prosecutrix that the accused did not remove her cloth. She had categorically stated in her examination-in-chief that the accused had removed her clothes. The appellant-accused had also stated that the prosecutrix should forgive him for his acts against which no suggestion was put to the effect that he did not seek such an apology." 131. Sri.Raju Joseph, the learned Senior Counsel for the appellant submitted that several statements made by the victim girl in cross examination were proved to be not stated to the investigating officers except PW57 (Siby Mathew); and some of such Crl.A. NO. 877 OF2002::

139. :: statements were not given to any of the investigating officers. He submitted that the victim girl was tutored by the police before giving evidence and embellishments were made in the evidence of the victim girl.

132. The learned Director General of Prosecution submitted that in the statements given to the investigating officers, the victim girl had stated about all the incidents of rape and the finer details were given in her evidence and it would not amount to embellishment.

133. It is true that in cross examination of the victim girl, it was brought out that some of the details regarding the incidents of rape were not stated to the investigating officers except PW57 while some other details were not mentioned in the statements given to any of the investigating officers. It is to be noted that those omissions were not in respect of any of the incidents of rape over the period of 41 days, but those were in respect of finer details of the same. Moreover, when the victim girl had stated the details in question to any of the investigating officers, it cannot be said that there was any CrI.A. NO. 877 OF2002::

140. :: omission. When several police officers conducted the investigation one after the other, it cannot be said that the victim girl should give the details to all such police officers. There were complaints that the investigation of the case was not properly done by some of the investigating officers. Finally, a special investigation team was constituted under the leadership of PW57 Siby Mathew. Most of the so called omissions were those allegedly not stated to the investigating officers other than Siby Mathew. It could even be said that when proper investigation was conducted, the necessary details regarding the incidents were recorded in the statements of the victim under Section 161 of the Code of Criminal Procedure. As regards the details which were not given to any of the investigating officers, we are of the view that those details are finer details of the incidents and they would not really constitute omission. When the factual foundation is available in the statements under Section 161 CrI.P.C., the minute details of the same could very well be given in evidence. It would not amount to embellishment. We do not think that the alleged omissions would make the evidence of the victim girl untrustworthy. In a case of this nature, it is humanly impossible to expect the

victim girl to narrate all the details with regard to the CrI.A. NO. 877 OF2002::

141. :: incident in the statements given by her under Section 161 of the Code of Criminal Procedure. It was sufficient if the incidents as such were mentioned in the statements given to the investigating officers. The Explanation to Section 161 of the Code of Criminal Procedure states that an omission to state a fact or circumstance in the statement made to the police may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be question of fact. Omission with respect to insignificant details cannot be treated as contradictions. It is also relevant to note that the evidence of the victim girl runs to 590 pages and she had narrated about several incidents of rape which took place at different places during a period of more than one month.

134. In *Rajinder alias Raju v. State of H.P.* (AIR 2009 SC3022, the Supreme Court considered the effect of such omissions and held thus: "9. The prosecutrix in her deposition has been categorical, clear and unequivocal that the accused CrI.A. NO. 877 OF2002::

142. :: committed forcible sexual intercourse with her. She testified : "While going, the accused stopped the scooter at a lonely place on the road and thereafter he dragged me by holding me from my arm at some distance from the road and gagged my mouth and after placing 'pattu' on the ground, he untied my salwar and committed the sexual intercourse with me. I had felt a pain in my private part and the blood started oozing." 10. It is true that in her cross-examination she stated that the accused had threatened her with a dagger before Jablu when she refused to go with him and this aspect was neither stated in her statement under Section 161, Cr. P.C. nor in the FIR but does this contradiction make her evidence unreliable. We do not think so. The trial court as well as High Court has accepted her evidence. We find no justifiable reason to take a different view." 135. In *State of Uttar Pradesh v. Krishna Master and others* ((2010) 12 SCC324, the Supreme Court held: "15. Before appreciating evidence of the witnesses examined in the case, it would be instructive to refer to CrI.A. NO. 877 OF2002::

143. :: the criteria for appreciation of oral evidence. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is found, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.

16. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of the evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the Trial Court and unless the reasons are weighty and formidable, it would not be proper for the appellate court CrI.A. NO. 877 OF2002::

144. :: to reject the evidence on the ground of variations or infirmities in the matter of trivial details. Minor omissions in the police statements are never considered to be fatal. The statements given by the witnesses before the Police are meant to be brief statements and could not take place of evidence in the court. Small/trivial omissions would not justify a finding by court that the witnesses concerned are liars. The prosecution evidence may suffer from inconsistencies here and discrepancies there, but that is a short-coming from which no criminal case is free. The main thing to be seen is whether those inconsistencies go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of incongruities obtaining in the evidence. In the latter, however, no such benefit may be available to it." The same was taken in State of U.P. v. M.K. Anthony (AIR 1985 SC48.

136. In *Brahm Swaroop and another v. State of Uttar Pradesh* ((2011) 6 SCC288, it was held: "32. It is a settled legal proposition that while appreciating the evidence of a witness, minor CrI.A. NO. 877 OF2002::

145. :: discrepancies on trivial matters, which do not affect the core of the prosecution's case, may not prompt the Court to reject the evidence in its entirety. "Irrelevant details which do not in any way corrode the credibility of a witness cannot be labelled as omissions or contradictions." Difference in some minor details, which does not otherwise affect the core of the prosecution case, even if present, would not itself prompt the court to reject the evidence on minor variations and discrepancies. After exercising care and caution and sifting through the evidence to separate truth from untruth, exaggeration and improvements, the court comes to a conclusion as to whether the residuary evidence is sufficient to convict the accused. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution witness. As the mental capabilities of a human being cannot be expected to be attuned to absorb all the details, minor discrepancies are bound to occur in the statements of witnesses. (See: *State of U.P. v. M.K. Anthony*, AIR 1985 SC48 and *State of Rajasthan v. Om Prakash*, AIR 2007 SC2257 *State v. Saravanan and Anr.*, AIR 2009 SC152 and *Prithu v. State of Himachal Pradesh*, (2009) 11 SCC588" CrI.A. NO. 877 OF2002::

146. ::

137. In *Bhajan Singh and others v. State of Haryana* (AIR 2011 SC2552, the Supreme Court quoted with approval the decision in *Brahm Swaroop and another v. State of Uttar Pradesh* ((2011) 6 SCC288.

138. In *Matadin and others v. State of U.P.* (AIR 1979 SC1234, it was held that the statements given by the witnesses before the police are meant to be brief statements and could not take the place of evidence in Court. Where the omissions are vital, they merit consideration, but mere small omissions will not justify a finding by a court that the witnesses concerned are self contained liars.

139. On a reading of the evidence of the victim girl (PW1), we are of the view that her evidence is reliable and acceptable. There is a ring of truth in her evidence. There is no reason why she should falsely implicate the appellant and the other accused persons. There is no case for the defence that the victim girl had any axe to grind with the accused persons. Even if the evidence of the victim girl is not corroborated in any material particular by the evidence of other witnesses, we think that it would be safe to rely on her CrI.A. NO. 877 OF2002::

147. :: evidence alone in order to find the appellant guilty of the offence alleged against him.

140. In the present case, the evidence of the victim girl is not the solitary piece of evidence to connect the appellant with the crime. The evidence of the victim girl is corroborated in material particulars by the other materials in the case. The actual act of rape normally would not be witnessed by any person. Therefore, it is unthinkable that there would be corroboration of the evidence of the victim girl on that aspect. According to the victim, after she left Munnar, she was taken to various places. There are materials to indicate that this case put forward by the victim girl is true. That the victim girl was taken to various places does not appear to have been challenged by the accused. That the victim girl was lodged in various lodges is proved by documentary and oral evidence as discussed above. PW36, the Assistant Director, State Forensic Laboratory, Thiruvananthapuram compared the handwriting and signature in various registers produced before him for comparison along with the admitted handwriting and signature. PW36 submitted Ext.P36 report and Ext.P36(a) "reasons for report". Ext.P36 and P36(a) would CrI.A. NO. 877 OF2002::

148. :: disclose that the entries and signatures in the registers kept in the following lodges were in the handwriting of Dharmarajan: (a) Anand Tourist Home, Ernakulam, (b) Metro Lodge, Kottayam, (c) Aroma Tourist Home, Aluva, (d) Hotel Hilex, Palakkad, (e) Hotel Indra, Cumbam, (f) Trisea Lodge, Kanyakumari, (g) Thottam Lodge, Muvattupuzha and (h) Panchayat Rest House, Kumily. Exts.P36 and P36(a) would also disclose that the handwriting and signatures of the following accused persons were found in the registers of the respective lodges: (i)

Joseph @ Baby at Panchayat Rest House, Kumily, (ii) Davood at Panchayat Rest House, Kumily, (c) Jose Manuel at Panchayat Rest House, Kumily and (iv) Sreekumar at Hotel Samudra.

141. The statement given by Dharmarajan under Section 313 of the Code of Criminal Procedure shows that he stayed at Anand Tourist Home, Ernakulam, Panchayat Rest House, Kumily, Hilex Lodge, Palakkad and in the house of Thulaseedharan at Vanimel. Dharmarajan also stated in the Section 313 statement that he had taken the victim girl to the house of accused No.39 Vilasini. Dharmarajan stated in the said statement that the victim girl stated CrI.A. NO. 877 OF2002::

149. :: her name as Anjali. The prosecution case is that Raju and Usha had asked her to state her name as Anjali.

142. In State of U.P. v. Lakshmi ((1998) 4 SCC336, a three Judge Bench of the Supreme Court considered the question as to the value or utility of the answers given by the accused under Section 313 of the Code of Criminal Procedure and held thus: "8. As a legal proposition we cannot agree with the High Court that statement of an accused recorded under Section 313 of the Code does not deserve any value of utility if it contains inculpatory admissions. The need of law for examining the accused with reference to incriminating circumstances appearing against him in prosecution evidence is not for observance of a ritual in a trial, nor is it a mere formality. It has a salutary purpose. It enables the Court to be apprised of what the indicted person has to say about the circumstances pitted against him by the prosecution. Answers to the questions may sometimes be flat denial or outright repudiation of those circumstances. In certain cases the accused would offer some explanations to incriminative circumstances. In very rare instances the accused may even admit or own incriminating circumstances adduced CrI.A. NO. 877 OF2002::

150. :: against him, perhaps for the purpose of adopting legally recognised defences. In all such cases the Court gets the advantage of knowing his version about those aspects and it helps the Court to effectively appreciate and evaluate the evidence in the case. If an accused admits any incriminating circumstance

appearing in evidence against him there is no warrant that those admissions should altogether be ignored merely on the ground that such admissions were advanced as a defence strategy.

9. Sub-section (4) of Section 313 of the Code contains necessary support to the legal position that answers given by the accused during such examination are intended to be considered by the Court. The words "may be taken into consideration in such enquiry or trial" in sub-section (4) would amount to a legislative guideline for the Court to give due weight to such answers, though it does not mean that such answers could be made the sole basis of any finding.

10. Time and again, this Court has pointed out that such answers of the accused can well be taken into consideration in deciding whether the prosecution evidence can be relied on, and whether the accused is liable to be convicted of the offence charged against CrI.A. NO. 877 OF2002::

151. :: him; vide : Sampath Singh v. State of Rajasthan, (1969) 1 SCC367: (AIR 1969 SC956; Jethamal Pithaji v. Assistant Collector of Customs (1974) 3 SCC393; Rattan Singh v. State of Himachal Pradesh, (1997) 4 SCC161.

11. We make it clear that answers of the accused, when they contain admission of circumstances against him are not by themselves, delinked from the evidence, be used for arriving at a finding that the accused had committed the offence." 143. In Raj Kumar Singh v. State of Rajasthan (2013 (2) KLT SN133C.NO.169) SC, a two Judge Bench of the Supreme Court held: "Statement under S.313 Cr.P.C. is recorded to meet the requirement of the principles of the principles of natural justice as it requires that an accused may be given an opportunity to furnish explanation of the incriminating material which had come against him in the trial. However, his statement cannot be made a basis for his conviction. His answers to the questions put to him under S.313 Cr.P.C. cannot be used to fill up the gaps left by the prosecution witnesses in their depositions. Thus, the statement of the accused is not a substantive piece of evidence and therefore, it can be CrI.A. NO. 877 OF2002::

152. :: used only for appreciating the evidence led by the prosecution, though it cannot be a substitute for the evidence of the prosecution. In case the prosecution's evidence is not found sufficient to sustain conviction of the accused, the inculpatory part of his statement cannot be made the sole basis of his conviction. The statement under S.313 Cr.P.C. is not recorded after administering oath to the accused. Therefore, it cannot be treated as an evidence within the meaning of S.3 of the Evidence Act, though the accused has a right if he chooses to be a witness, and once he makes that option, he can be administered oath and examined as a witness in defence as required under S.315 Cr.P.C." 144. The evidence of PW8 Maya would show that the victim girl was taken by Dharmarajan and Usha, they went to Kanyakumari and Thiruvananthapuram, that the victim girl was kept in hotels and the victim girl was subjected to forceful sexual intercourse. There is nothing to disbelieve the evidence of Maya.

145. The evidence of PWs.2, 3, 8, 14, 27, 28, 29, 30, 31, 32, 33, 35, 38 and 39 would corroborate the evidence of the victim girl that she was taken to various hotels and lodges at different places. Crl.A. NO. 877 OF2002::

153. :: The dresses of the victim girl were recovered from the house of accused No.2 Usha as per Ext.P5 seizure mahzar, witnessed by PW4. The evidence of PW6 and PW20 would prove that the victim girl was taken to Periyar Hospital at Kumily for treatment. The evidence of PW21 and PW22 would prove that the victim girl was treated at Anpu Hospital, Elappara on 25.2.1996. PW5, the Sales Manager of Star Jewellery, Ernakulam, who identified the victim girl and Dharmarajan, stated that the pendant belonging to the victim girl was sold by Dharmarajan at the Jewellery. The evidence of PW7 Swaminathan would show that the anklet of the victim girl was sold by Dharmarajan at Alankar Gold Covering Works. PW12 Basheer of Saflas Jewellery, Kozhikode stated that the accused and a girl came to his shop in January, 1996 and sold the studs worn by the girl. PW12 stated in evidence that he had identified the victim girl while he was examined in S.C.No.187 of 1999.

146. The evidence of PW11 Robert, the uncle of the victim girl, would show that on the disappearance of the victim girl, information was passed on to him and he sent

his son to Sooryanelli. Thereafter, his wife and daughter-in-law also went to Sooryanelli. Crl.A. NO. 877 OF2002::

154. :: Robert stated in evidence that on 21.1.1996, he received a telephone call stating that the caller was Raju from Chalakkudy. The witness was informed over phone that the victim girl was at the retreat centre at Potta and that she would return within two or three days. The witness also stated that after two days, he got another telephone call. The witness was informed by a person who styled himself as Raju that the victim girl had gone to Madurai with one Jose. Again on 27.1.1996, he was informed over phone that the victim girl was being taken to Hyderabad for securing a job for her. Robert also stated that on 28.1.1996, he was contacted over phone by a person who stated that he would handover the phone to the victim girl. After some time, the victim girl talked to the witness. Robert felt that the victim girl was afraid to talk. He also heard the voice of somebody over phone stating not to talk anything. Robert told the victim girl to cry aloud and to escape. Again a telephone call came to Robert and he was informed that the victim girl would be taken in a car and released and that he (Robert) should not inform the police or try to trace out the victim girl. The witness pleaded to them to release the victim girl and assured that he would not report the matter to the police. As directed over phone, the witness and his Crl.A. NO. 877 OF2002::

155. :: nephew waited at Mundakkayam till midnight but the victim girl was not seen. After two days, again a call came to Robert. Robert pleaded to them to release the victim girl. The witness stated that he realised that the victim girl was confined by somebody. The evidence of Robert would also corroborate the evidence of the victim girl on various aspects of the evidence given by her. The evidence of PW24 Fathima would show that she and the victim girl were friends, they used to travel in the same bus and that the victim girl was in love with Raju. Her evidence would also show that MO1 album was taken by Raju from her.

147. The evidence of PW34 Jacob Sait would corroborate the evidence of the victim girl that she was taken to Thiruvananthapuram by the appellant and others and she was lodged at Hotel Geeth.

148. After the victim girl came back home, she was examined by PW41 (Dr.V.K.Bhaskaran) of the Taluk Head Quarters Hospital, Adimali, who issued Ext.P47 Medical Examination Report. The evidence of PW41 has been discussed in paragraphs 32 and 33 above. PW41 stated in evidence that the symptoms he noted on the Crl.A. NO. 877 OF2002::

156. :: victim girl could be caused due to continuous violent sexual intercourse.

149. The evidence of PW21, Dr.V.Murugesan of Anpu Hospital, Elappara, would show that when he examined the victim girl in February 1996, she had complaints of back pain and lack of motion for one week. PW21 stated that it is possible to have constipation due to continuous sexual intercourse.

150. The medical evidence in the case corroborates the evidence of the victim girl that she was subjected to forcible sex repeatedly during several days.

151. MO1 photo album was produced by Raju before the Assistant Sub Inspector of Police, Munnar (Balakrishnan), who seized the same as per Ext.P89 mahzar. The prosecution case that MO1 album came into the possession of Raju and he made threats to the victim girl to misuse the same is strengthened by the seizure of the album from Raju. Crl.A. NO. 877 OF2002::

157. ::

152. The discussion made above would show that the evidence of the victim girl is corroborated by other evidence, documentary and oral, which would make it safe to rely on the evidence of the victim girl.

153. The learned senior counsel for the appellant relied on the decisions in Oma alias Omprakash and another v. State of Tamil Nadu ((2013) 3 SCC440 and submitted that a criminal court while deciding criminal cases should not be guided by or influenced by the views or opinions expressed by the Judges on a private platform or erroneous notions of law.

154. The learned counsel also relied on several decisions, which are discussed below. In Sadashiv Ramrao Hedge v. State of Maharashtra and another ((2006)

10 SCC92, it was held that if the version given by the prosecutrix is unsupported by any medical evidence or if the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the Court shall not act on the solitary evidence of the prosecutrix. In *Ramdas and others v. State of Maharashtra* ((2007) 2 SCC170, the Crl.A. NO. 877 OF2002::

158. :: Supreme Court held that conviction based solely on the testimony of the prosecutrix can be done in a case where the Court is convinced about the truthfulness of the prosecutrix. If the evidence of the prosecutrix is of such quality, that may be sufficient to sustain an order of conviction solely on the basis of her testimony.

155. In *Raju and others v. State of Madhya Pradesh* ((2008) 15 SCC133, the Supreme Court held: ".. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved." 156. In *Abbas Ahmad Choudhary v. State of Assam* ((2010) 12 SCC115, the Supreme Court held: "We are conscious of the fact that in a matter of rape, the statement of the prosecutrix must be given Crl.A. NO. 877 OF2002::

159. :: primary consideration, but, at the same time, the broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there can be no presumption that a prosecutrix would always tell the entire story truthfully." 157. In *Krishankumar Malik v. State of Haryana* ((2011) 7 SCC130, the medical evidence showed that the victim might be "habitual to sexual intercourse". Though she travelled some distance, she did not raise any alarm for help. Also on account of various serious contradictions in the statement of the prosecutrix, the Court held that the victim was not telling the truth.

158. In *Narender Kumar v. State (NCT of Delhi)* ((2012) 7 SCC171, after holding that once the statement of the prosecutrix inspires confidence, conviction can be based on the solitary evidence of the prosecutrix, the Supreme Court held: "Where evidence of the prosecutrix is found suffering from serious infirmities and

inconsistencies with other material, the prosecutrix making deliberate improvement on material point with a view to rule out CrI.A. NO. 877 OF2002::

160. :: consent on her part and there being no injury on her person even though her version may be otherwise, no reliance can be placed upon her evidence." 159. The learned counsel relied on the decision in Mohd. Faizan Ahmad alias Kalu v. State of Bihar ((2013) 2 SCC131, wherein it was held: "The High Court was carried away by the heinous nature of the crime and, in that, it lost sight of the basic principle underlying criminal jurisprudence that suspicion, however grave, cannot take the place of proof. If a criminal court allows its mind to be swayed by the gravity of the offence and proceeds to hand out punishment on that basis, in the absence of any credible evidence, it would be doing great violence to the basic tenets of criminal jurisprudence." 160. In State of Rajasthan v. Babu Meena ((2013) 4 SCC206, the Supreme Court held: "We do not have the slightest hesitation in accepting the broad submission of Mr.Jain that the conviction can be based on the sole testimony of the prosecutrix, if found to be worthy of credence and CrI.A. NO. 877 OF2002::

161. :: reliable and for that no corroboration is required. It has often been said that oral testimony can be classified into three categories, namely, (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In case of wholly reliable testimony of a single witness, the conviction can be founded without corroboration. This principle applies with greater vigour in case the nature of offence is such that it is committed in seclusion. In case prosecution is based on wholly unreliable testimony of a single witness, the court has no option than to acquit the accused." 161. In Lohit Kaushal v. State of Haryana ((2009) 17 SCC106, a case of kidnapping for ransom, the Supreme Court held that: "A court must, therefore, guard against the possibility of being influenced in its judgments by sentiment rather than by objectivity and judicial considerations while evaluating the evidence." 162. The prosecution alleged that the victim girl was gang raped by Dharmarajan and others and also by some others together. According to the prosecution, Dharmarajan was involved in gang rape at P.W.D.Rest House, Kumily on 19.1.1986, at Vanimel along with accused No.16 Thulaseedharan, at Aroma Lodge, Aluva on CrI.A. NO. 877 OF2002::

162. ::

27. 1.1996 along with accused No.3 P.K.Jamal and accused No.14 Yousuff, at P.W.D.Rest House, Kumily on 10.2.1996 along with accused No.6 Unnikrishnan, accused No.21 Sunny George and accused No.22 Jiji and at Metro Lodge, Kottayam on 12.2.1996 along with accused No.6 Unnikrishnan. The prosecution also alleged that there were other instances of gang rape by the other accused.

163. Section 375 of the Indian Penal Code states that a man is said to commit "rape" who, except in the case excepted in the Section, has sexual intercourse with a woman under circumstances falling under any of the six descriptions mentioned therein. For the purpose of the present case, it is sufficient to mention the first three descriptions mentioned in Section 375, as follows: "Firstly - Against her will. Secondly - Without her consent. Thirdly - With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt." CrI.A. NO. 877 OF2002::

163. :: Section 375 of the Indian Penal Code was substituted by Act 43 of 1983. Section 376 provides for the punishment for rape. Section 376 was also substituted by Act 43 of 1983. Sub-section (2) of Section 376 was included by the said amendment. Section 376(2) (g) deals with gang rape. Whoever commits gang rape shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine. Section 114A of the Indian Evidence Act was inserted by Act 43 of 1983. Section 114A reads as follows: "114A. Presumption as to absence of consent in certain prosecutions for rape.-- In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub-section (2) of section 376 of the Indian Penal Code, (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent." Section 90 of the Indian Penal Code is also relevant while considering the question of consent. Section 90 reads as follows: CrI.A. NO. 877 OF2002::

164. :: "90. Consent known to be given under fear or misconception.-- A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or Consent of insane person.-- if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or Consent of child.-- unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age." 164. Even without applying Section 114A of the Indian Evidence Act, let us consider the question whether there was consent on the part of the victim girl for the sexual activities in question. It would appear that the defence seems to be a case of consent in certain instances of sexual intercourse alleged by the prosecution. The statement given by the accused under Section 313 CrI.A. NO. 877 OF2002::

165. :: of the Code of Criminal Procedure would also show that the case of Dharmarajan is that the victim girl had consented.

165. The learned senior counsel appearing for the appellant relied on the decision of the Supreme Court in State of Karnataka v. Sureshababu Puk Raj Porral (1994 SCC (Cri) 435) and contended that in a case where the girl went in bus along with the accused and stayed with him in lodges, the Supreme Court confirmed the acquittal of the accused. The facts in State of Karnataka v. Sureshababu Puk Raj Porral (1994 SCC (Cri) 435) are quite different from the facts of the present case.

166. In Rao Harnarain Singh Sheoji Singh v. State (1958 CrI.L.J.563), the Punjab and Haryana High Court held thus: "7. A mere act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance, or passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be 'consent' as understood in law. Consent, on the part of a woman as a defence to an allegation of rape, CrI.A. NO. 877 OF2002::

166. :: requires voluntary participation, not only after the exercise of intelligence, based on the knowledge, of the significance and moral quality of the act, but after having freely exercised a choice between resistance and assent. Submission of

her body under the influence of fear or terror is no consent. There is a difference between consent and submission. Every consent involves a submission but the converse does not follow and a mere act of submission does not involve consent. Consent of the girl in order to relieve an act, of a criminal character, like rape, must be an act of reason, accompanied with deliberation, after the mind has weighed as in a balance, the good and evil on each side, with the existing capacity and power to withdraw the assent according to one's will or pleasure." "A woman is said to consent, only when she freely agrees to submit herself, while in free and unconstrained possession of her physical and moral power to act in a manner she wanted. Consent implies the exercise of a free and untrammelled right to forbid or withhold what is being consented to; it always is a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former." CrI.A. NO. 877 OF2002::

167. ::

167. In *Vijayan Pillai v. State of Kerala* (1989(2) KLJ234, the Kerala High Court held: "10. In order to prove that there was consent on the part of the prosecutrix it must be established that she freely submitted herself while in free and unconstrained possession of her physical and mental power to act in a manner she wanted. Consent is an act of reason accompanied by deliberation, a mere act of helpless resignation in the face of inevitable compulsion, non-resistance and passive giving in cannot be deemed to be 'consent'. Consent means active will in the mind of a person to permit the doing of the act of and knowledge of what is to be done, or of the nature of the act that is being done is essential to a consent to an act. Consent supposes a physical power to act, a moral power of acting and a serious and determined and free use of these powers. Every consent to act involves submission, but is by no means follows that a mere submission involves consent.... " 168. In *Anthony, In re's case*, the Madras High Court concurred with the view taken in *Rao Harnarain Singh's case* and held: CrI.A. NO. 877 OF2002::

168. :: "A woman is said to consent only when she agrees to submit herself while in free and unconstrained possession of her physical and moral power to act in a manner she wanted. Consent implies the exercise of a free and untrammelled right

to forbid or withhold what is being consented to; it always is a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former." 169. In Uday v. State of Karnataka ((2003) 4 SCC46, the Supreme Court quoted with approval the decisions of the Punjab and Haryana High Court in Rao Harnarain Singh's case, of the Kerala High Court in Vijayan Pillai's case and of the Madras High Court in Anthony, In re's case.

170. In Deelip Singh @ Dilip Kumar v State of Bihar ((2005) 1 SCC88, the Supreme Court referred to these decisions and also the decisions in Uday v. State of Karnataka ((2003) 4 SCC46 and State of Himachal Pradesh v. Mangoram ((2000) 7 SCC224.

171. In State of Himachal Pradesh v. Mangoram (2000 CrI.A. NO. 877 OF2002::

169. :: Cr.L.J.4027 = (2000) 7 SCC224, the Supreme Court held that the submission of the body under the fear of terror cannot be construed as a consented sexual act. Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between the resistance and assent.

172. The learned senior counsel for the appellant relied on the decision in Alamelu and another v. State ((2011) 2 SCC385. In that case, the victim girl was forcibly taken by the accused in a car and on the next day, the first accused married the girl in a temple. The Supreme Court held that the girl did not raise any complaint on so many occasions when she had the opportunity to do so. Even after the marriage, the girl continued to be a willing partner. It was held that her behaviour of not complaining to anybody at any of the stages after being allegedly abducted would be wholly unnatural.

173. In Alamelu's case, the Supreme Court did not believe the prosecution story on analysing the facts and circumstances of the CrI.A. NO. 877 OF2002::

170. :: case. The facts in the present case are quite different from the facts and circumstances available in Alamelu's case.

174. The learned counsel for the appellant also relied on the decision of the Supreme Court in *Kuldeep K. Mahato v. State of Bihar* ((1998) 6 SCC420. On going through the judgment in Kuldeep's case, it is seen that the Supreme Court held that the evidence of the prosecutrix that she was raped was unbelievable. However, the Supreme Court confirmed the conviction of the accused under Section 363 of the Indian Penal Code. The finding in paragraph 11 of the judgment in Kuldeep's case was on facts of that case and it cannot be applied to the case on hand.

175. In *State of U.P. v. Chhoteylal* (AIR 2011 SC697, the Supreme Court held that a wider meaning is to be given to the word 'consent'. After referring to Stroud's Judicial Dictionary and various decisions, the Supreme Court held thus: "14. This Court in a long line of cases has given wider meaning to the word 'consent' in the context of sexual offences as explained in various judicial Crl.A. NO. 877 OF2002::

171. :: dictionaries. In *Jowitt's Dictionary of English Law* (Second Edition), Volume 1 (1977) at page 422 the word 'consent' has been explained as an act of reason accompanied with deliberation, the mind weighing, as in a balance, the good or evil on either side. It is further stated that consent supposes three things- a physical power, a mental power, and a free and serious use of them and if consent be obtained by intimidation, force, meditated imposition, circumvention, surprise, or undue influence, it is to be treated as a delusion, and not as a deliberate and free act of the mind.

15. Stroud's Judicial Dictionary (Fourth Edition), Volume 1 (1971) at page 555 explains the expression 'consent', inter alia, as under :- "Every 'consent' to an act, involves a submission; but it by no means follows that a mere submission involves consent," e.g. the mere submission of a girl to a carnal assault, she being in the power of a strong man, is not consent (per Coleridge J., *R. v. Day*, 9 C. and P. 724)." Stroud's Judicial Dictionary also refers to decision in the case of *Holman v. The Queen* ([1970] W.A.R. 2) wherein it was stated: 'But there does not necessarily Crl.A. NO. 877 OF2002::

172. :: have to be complete willingness to constitute consent. A woman's consent to intercourse may be hesitant, reluctant or grudging, but if she consciously

permits it there is "consent".' 16. In Words and Phrases, Permanent Edition, (Volume 8A) at pages 205-206, few American decisions wherein the word 'consent' has been considered and explained with regard to the law of rape have been referred. These are as follows :- "In order to constitute "rape", there need not be resistance to the utmost, and a woman who is assaulted need not resist to the point of risking being beaten into insensibility, and, if she resists to the point where further resistance would be useless or until her resistance is overcome by force or violence, submission thereafter is not "consent". People v. McIlvain (55 Cal. App. 2d 322)." " "Consent," within Penal Law, '2010, defining rape, requires exercise of intelligence based on knowledge of its significance and moral quality and there must be a choice between resistance and assent. People v. Pelvino, 214 N.Y.S. 577" CrI.A. NO. 877 OF2002::

173. :: " "Consenting" as used in the law of rape means consent of the will and submission under the influence of fear or terror cannot amount to real consent. Hallmark v. State, 22 Okl. Cr. 422" "Will is defined as wish, desire, pleasure, inclination, choice, the faculty of conscious, and especially of deliberate, action. It is purely and solely a mental process to be ascertained, in a prosecution for rape, by what the prosecuting witness may have said or done. It being a mental process there is no other manner by which her will can be ascertained, and it must be left to the jury to determine that will by her acts and statements, as disclosed by the evidence. It is but natural, therefore, that in charging the jury upon the subject of rape, or assault with intent to commit rape, the courts should have almost universally, and, in many cases, exclusively, discussed "consent" and resistance. There can be no better evidence of willingness is a condition or state of mind no better evidence of unwillingness than resistance. No lexicographer recognizes "consent" as a synonym of willingness, and it is apparent that they are not synonymous. It is equally apparent, on the other hand, that the true relation between the words is that willingness is a condition or state of mind and "consent" one of the evidences of that CrI.A. NO. 877 OF2002::

174. :: condition. Likewise resistance is not a synonym of unwillingness, though it is an evidence thereof. In all cases, therefore, where the prosecuting witness has

an intelligent will, the court should charge upon the elements of "consent" and resistance as being proper elements from which the jury may infer either a favourable or an opposing will. It must, however, be recognized in all cases that the real test is whether the assault was committed against the will of the prosecuting witness. State v. Schwab, 143 N.E. 29" In Chhoteylal's case, the Supreme Court referred to Mangoram's case ((2000) 7 SCC224= AIR 2000 SC2798, Uday's case ((2003) 4 SCC46= AIR 2003 SC1639, Gurmit Singh's case (AIR 1996 SC1393 and Vijay @ Chinee v. State of M.P. ((2010) 8 SCC191.

176. In State of Himachal Pradesh v. Shree Kant Shekarl (AIR 2004 SC4404, the Supreme Court held: "15. Even otherwise the High Court seems to have fallen in grave error in coming to the conclusion that the victim has not shown that the act was not done with her consent. It was not for the victim to show that there was no consent. Factually also the conclusion is erroneous right from the beginning that is from the stage when the CrI.A. NO. 877 OF2002::

175. :: FIR was lodged and in her evidence there was a categorical statement that the rape was forcibly done notwithstanding protest by the victim. The High Court was therefore wrong in putting burden on the victim to show that there was no consent. The question of consent is really a matter of defence by the accused and it was for him to place materials to show that there was consent...." 177. In State of Rajasthan v N.K. (AIR 2000 SC1812, a three Judge Bench of the Supreme Court held that absence of injuries on the person of the prosecutrix had weighed with the High Court for inferring consent on the part of the prosecutrix and it was unjustifiable. The Supreme Court also held thus: "16. The absence of visible marks of injuries on the person of the prosecutrix on the date of her medical examination would not necessarily mean that she had not suffered any injuries or that she had offered no resistance at the time of commission of the crime. Absence of injuries on the person of the prosecutrix is not necessarily an evidence of falsity of the allegation or an evidence of consent on the part of the prosecutrix. It will all depend on the facts and circumstances of each case." CrI.A. NO. 877 OF2002::

176. :: The Supreme Court also held that the prosecutrix narrated the incident to her father and the statement of the father of the prosecutrix would corroborate her evidence and it is admissible and relevant in evidence under Section 157 of the Code of Criminal Procedure and also under Section 8 of the Evidence Act.

178. In *Satpal Singh v. State of Haryana* (2010 Cri.L.J.4283), the Supreme Court considered the question as to when a woman can be said to have given consent and it was held thus: "29. It can be held that a woman has given consent only if she has freely agreed to submit herself, while in free and unconstrained possession of her physical and moral power to act in a manner she wanted. Consent implies the exercise of a free and untrammelled right to forbid or withhold what is being consented to, it always is a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former. An act of helplessness on the face of inevitable compulsions is not consent in law. More so, it is not necessary that there should be actual use of force. A threat or use of force is sufficient. Crl.A. NO. 877 OF2002::

177. ::

30. The concept of 'Consent' in the context of Section 375, IPC has to be understood differently, keeping in mind the provision of Section 90, IPC, according to which a consent given under fear/coercion or misconception/mistake of fact is not a consent at all. Scheme of Section 90, IPC is couched in negative terminology. Consent is different from submission. [Vide *Uday v. State of Karnataka*, AIR 2003 SC1639: (2003 AIR SCW1035; *Deelip Singh @ Dilip Kumar v. State of Bihar*, AIR 2005 SC203 and *Yedla Srinivasa Rao Vs. State of A.P.* (2006) 11 SCC615]" 179. The victim girl stated in evidence that to almost all persons who approached her for sexual intercourse she stated that she is the daughter of the Postmaster of Munnar and that she was cheated by her lover and kidnapped by him. She also pleaded for mercy and requested them to rescue her. All her requests were turned down. It is also in evidence that the appellant had threatened the victim with dire consequences if she resisted. The appellant had beaten the victim girl when she resisted. He even pressed on her throat and she had a fear that she would be killed. After the victim girl was raped on the first

occasion at Metro Lodge, Kottayam, she CrI.A. NO. 877 OF2002::

178. :: pleaded as to why she could not be released even at that juncture. The appellant then stated to her that she was required for other purposes and if she did not obey the words of the appellant, her father and mother would be killed and the victim also would be done away with. The appellant told the victim that he is a lawyer and that he knew how to avoid a case being taken against him. On the next day, namely, on 17.1.1996, the victim girl again pleaded for releasing her. The appellant promised to release her in the evening and at the same time, took the money which was available in the purse of the victim. The appellant Dharmarajan did not release the victim girl as promised, but threatened her with dire consequences if she tried to escape. The evidence of the victim girl would also disclose that some other accused persons also manhandled her while she resisted or thwarted the attempt to commit rape. The evidence would disclose that the victim girl was put in such a predicament and situation that she could not escape. Even remote possibility of consent being given by the victim girl cannot be inferred in the facts and circumstances of the case and the evidence on record. On the other hand, the evidence of the victim girl, when taken into account as a whole, would show that in spite of her resistance, request to CrI.A. NO. 877 OF2002::

179. :: rescue and the plea for mercy, she was mercilessly and brutally raped by the appellant and the other accused.

180. It is relevant to consider the age of the victim girl, her mental make up, her maturity of understanding men and matters etc., while evaluating her evidence touching upon how she was subjected to kidnapping and rape. The question of free consent also should be evaluated based on these parameters. The father of the victim girl (PW23) stated in evidence as follows: "..... (name of the victim girl) fI^DafU V^Ldl D_Oa" &xa IE^a" %HaXx_AaK XbM^UUa" &O_xaKa.e%Uf{A^Z dl^O" 5ayE5G_Aagl^a" ?_O^f{ MOfM?aJaU^X5_OaN^O_xaKa.e&gx^?a" .D_xalyEa dID_5x_A^HaU5_Um)I^O_xaK_\o.Q181 T.J.Robert (PW11), the uncle of the victim girl stated about her in the following words: "..... (name of the victim girl) XbO" &O_ D`xaN^HfN?aA^X5_U_\o^J U{V:nOaU5G_O^O_xaKa.e&fxC_\a")y:na X"X^x_:n^W fG_U_yAa5Oa" &fxfOC_\a" fUyaA^gH^ .D_VA^gH^)U

gVW_Oa")I^O_xaK_\o. " CrI.A. NO. 877 OF2002::

180. :: Even the defence witness DW3 (George Varghese) stated in his evidence that: "..... (name of the victim girl) H_Wm5{CN^O f:y_O fIY5aG_Oaf? flxaN^xN^O_xaKa." E.J.Anna alias Kuttiamma (PW25), the tuition teacher of the victim girl stated about her nature and character as follows: "..... PW1fa XbM^U" .B_fH &O_xaKa (Q) 5o^T_W U{fx V^LOa" lyOaKDagl^f\ g5ZAa5Oa" f:OnaK5G_Oa" &O_xaKa.eU]AalyE^W ?_O^Z gl?_:na N_I^fD 'x_AaN^O_xaKa.(A)." PW24 Fathima, the classmate of the victim stated: "..... (name of the victim girl) .B_fHOaU5G_O^ (Q) gl?_:n XbM^U")U I^U" 5aG_O^ .(A)." PW8 Maya, who was also present when the victim girl was taken to Kanyakumari and Thiruvananthapuram, stated in evidence thus: "H_B{af? 5bf? 5aG_)I^O_xaKgM^Z .B_fH &O_xaKa ?_O^{af? x`D_(Q)e2xa NwLai_Oaf? gl^f\Oa" &fxfO^fAgO^ MOfM?aKDagl^f\Oa" |^HDgO^f?Oa" &O_xaKa.e:_x_Oa" 5{_Oa" 2Ka")I^O_xaK_\o. (A)." CrI.A. NO. 877 OF2002::

181. ::

182. Now we shall consider the question whether the victim girl was gang raped. The learned senior counsel for the appellant relied on the decision of the Supreme Court in State of Maharashtra v. Abdul Hafiz Faroki and others (1998 SCC (Cri) 1481), Pardeep Kumar v. Union Administration, Chandigarh ((2006) 10 SCC608, Lalliram and another v. State of Madhya Pradesh ((2008) 10 SCC69 and Hanuman Prasad and others v. State of Rajasthan ((2009) 1 SCC507.

183. State of Maharashtra v. Abdul Hafiz Faroki and others (1998 SCC (Cri) 1481), was a case where the allegation was that eight accused persons boarded a train, entered into the compartment where the victim was travelling and committed rape on her. After committing rape, the victim was pushed out of the running train. The Supreme Court held that if really eight persons committed rape on the victim and that too twice and had pushed her out of the running train after giving kicks, then some injuries would have been found on the victim. But except a small incised wound, there was none. The facts of the present case are entirely different. CrI.A. NO. 877 OF2002::

182. ::

184. In *Pardeep Kumar v. Union Administration, Chandigarh* ((2006) 10 SCC608, the Supreme Court referred to the decisions in *Ashok Kumar v. State of Haryana* ((2003) 2 SCC143, *Bhupinder Sharma v. State of H.P.* ((2003) 8 SCC551 and *Priya Patel v. State of M.P.*((2006) 6 SCC263, and held thus: "10. To bring the offence of rape within the purview of Section 376(2)(g), IPC, read with Explanation 1 to this Section, it is necessary for the prosecution to prove :- (i) that more than one person had acted in concert with the common intention to commit rape on the victim; (ii) that more than one accused had acted in concert in commission of crime of rape with pre- arranged plan, prior meeting of mind and with element of participation in action. Common intention would be action in concert in pre-arranged plan or a plan formed suddenly at the time of commission of offence which is reflected by element of participation in action or by the proof of the fact of inaction when the action would be necessary. The prosecution would be required to prove pre-meeting of minds of the accused persons prior to CrI.A. NO. 877 OF2002::

183. :: commission of offence of rape by substantial evidence or by circumstantial evidence; and (iii) that in furtherance of such common intention one or more persons of the group actually committed offence of rape on victim or victims. Prosecution is not required to prove actual commission of rape by each and every accused forming group.

11. On proof of common intention of the group of persons which would be of more than one, to commit the offence of rape, actual act of rape by even one individual forming group, would fasten the guilt on other members of the group, although he or they have not committed rape on the victim or victims.

12. It is settled law that the common intention or the intention of the individual concerned in furtherance of the common intention could be proved either from direct evidence or by inference from the acts or attending circumstances of the case and conduct of the parties. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved

circumstances." CrI.A. NO. 877 OF2002::

184. ::

185. In *Lalliram and another v. State of Madhya Pradesh* ((2008) 10 SCC69, the Supreme Court held that in criminal cases the question of a precedent, particularly relating to appreciation of evidence, is really of no consequence.

186. In *Hanuman Prasad and others v. State of Rajasthan* ((2009) 1 SCC507, the Supreme Court considered the scope and ambit of the expression "common intention" occurring in Section 376 (2)(g) read with Explanation I thereof and held: "10. The important expression to attract Section 376(2)(g) is 'common intention'. The essence of the liability in terms of Section 376(2) is the existence of common intention. In animating the accused to do the criminal act in furtherance of such intention, the principles of Section 34, I.P.C. have clear application. In order to bring in the concept of common intention it is to be established that there was simultaneously consensus of the minds of the persons participating in the act to bring about a particular result. Common intention is not the same or similar intention. It presupposes a prior meeting and pre-arranged plan. In other words, there must be a prior meeting of minds. It is not necessary that pre-concert in the sense of a distinct previous plan CrI.A. NO. 877 OF2002::

185. :: is necessary to be proved. The common intention to bring about a particular result may well develop on the spot as between a number of persons which has to be gauged on the facts and circumstances of each case." 187. In *Ashok Kumar v. State of Haryana* ((2003) 2 SCC143, the Supreme Court held: "8.... In order to establish an offence under Section 376(2)(g), IPC, read with Explanation I thereto, the prosecution must adduce evidence to indicate that more than one accused had acted in concert and in such an event, if rape had been committed by even one, all the accused will be guilty irrespective of the fact that she had been raped by one or more of them and it is not necessary for the prosecution to adduce evidence of a completed act of rape by each one of the accused. In other words, this provision embodies a principle of joint liability and the essence of that liability is the existence of common intention; that common intention presupposes prior concert which may be determined from the conduct of offenders revealed during the

course of action and it could arise and be formed suddenly, but, there must be meeting of minds. It is not enough to have the same intention independently of CrI.A. NO. 877 OF2002::

186. :: each of the offenders. In such cases, there must be criminal sharing marking out a certain measure of jointness in the commission of offence." 188. In *Bhupinder Sharma v. State of H.P.* ((2003) 8 SCC551, it was held: "14. In cases of gang rape the proof of completed act of rape by each accused on the victim is not required. The statutory intention in introducing Explanation I in relation to Section 376(2)(g) appears to have been done with a view to effectively deal with the growing menace of gang rape. In such circumstances, it is not necessary that the prosecution should adduce clinching proof of a completed act of rape by each one of the accused on the victim or on each one of the victims where there are more than one in order to find the accused guilty of gang rape and convict them under Section 376, IPC." 189. In *Priya Patel v. State of M.P.* ((2006) 6 SCC263, the Supreme Court held that common intention under Explanation I to Section 376 (2) relates to the intention to commit rape. It was held: CrI.A. NO. 877 OF2002::

187. :: "8..... By operation of the deeming provision, a person who has not actually committed rape is deemed to have committed rape even if only one of the group in furtherance of the common intention has committed rape. 'Common intention' is dealt with in Section 34, IPC and provides that when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it was done by him alone. 'Common intention' denotes action in concert and necessarily postulates a pre-arranged plan, a prior meeting of minds and an element of participation in action. The acts may be different and vary in character, but must be actuated by the same common intention, which is different from the same intention or similar intention. The sine qua non for bringing in application of Section 34, IPC is that the act must be done in furtherance of the common intention to do a criminal act. The expression 'in furtherance of their common intention' as appearing in the Explanation to Section 376(2) relates to the intention to commit rape. " 190. To constitute an offence under Section 376(2)(g) of the Indian Penal Code, what is important is that the persons constituting the group of persons act in furtherance of

their common intention. CrI.A. NO. 877 OF2002::

188. :: Common intention is action in concert in pre-arranged plan or a plan formed at the time of commission of the offence. There must be meeting of minds of the accused persons prior to the commission of the offence of rape. It is not necessary that all the persons in the group should commit rape on the victim. It is sufficient even if one person in such group commits rape. Clause (g) of sub-section (2) and Explanation I to Section 376(2) were introduced by the parliament with a view to effectively deal with the growing menace of gang rape. It was thought that to combat the evil of gang rape, it was necessary to introduce Section 114A of the Indian Evidence Act and it was done as per the Criminal Laws (Amendment) Act 1983. In order to attract Section 114A of the Indian Evidence Act, the ingredients required are (a) that the prosecution proves that rape was committed which would attract the offence under Section 376(2) (g) read with Explanation I of the Indian Penal Code; (b) the victim states in her evidence before the Court that she did not consent. If these ingredients are satisfied, the Court shall presume that the victim did not consent. Section 4 of the Indian Evidence Act defines the expression "shall presume" as "whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as CrI.A. NO. 877 OF2002::

189. :: proved, unless and until it is disproved". When Section 114A of the Indian Evidence Act is attracted, the burden of establishing that there was consent lies on the accused.

191. The prosecution alleged that several instances of gang rape took place in which different combination of accused persons were involved. For the purpose of this Appeal, it would be sufficient to consider the case of gang rape in which Dharmarajan is involved. It is alleged that on 19.1.1996, Dharmarajan and accused No.5 Cherian @ Cheriachan gang raped the victim girl at the Panchayat Rest House, Kumily. The evidence in the case would not disclose that there was common intention with Dharmarajan to commit rape on the victim girl. It is true that accused No.5 had committed rape on the victim girl but that by itself would not be sufficient to attract Section 376(2)(g) of the Indian Penal Code.

192. It was alleged that Dharmarajan and accused No.16 (Thulaseedharan) gang raped the victim girl at Vanimel. The victim girl stated that Dharmarajan took her to Vanimel in Kozhikode District. She was kept in a rented building where accused No.16 CrI.A. NO. 877 OF2002::

190. :: (Thulaseedharan) was residing. On 22.1.1996, Dharmarajan raped the victim girl. It was also alleged that on the following day Dharmarajan and Thulaseedharan gang raped her. On going through the evidence, it cannot be found that there was common intention for Dharmarajan and Thulaseedharan to commit rape on the victim girl and, therefore, there cannot be any conviction under Section 376(2)(g) of the Indian Penal Code.

193. The prosecution alleged that on 27.1.1996, the victim girl was taken to Aroma Tourist Home by Dharmarajan, Jamal and Yoosaff in a car belonging to Yoosaff. The victim girl was forcibly taken to the room of Yoosaff, where Yoosaff raped the victim girl. Thereafter, Dharmarajan and Jamal took the victim girl to another room in the lodge and both of them gang raped her. (Accused No.14 Yoosaff died on 23.12.2013.) The evidence in the case would establish that Jamal was present along with Dharmarajan not only at Aroma Tourist Home, Aluva, but also when the victim girl was kept in the Panchayat Rest House, Kumily. While the victim girl was taken to Cumbam, Jamal was present. When the victim girl was taken to Thottam Lodge, Muvattupuzha, Jamal was with Dharmarajan. The CrI.A. NO. 877 OF2002::

191. :: victim girl was taken to the house of accused No.39 Vilasini by Dharmarajan and Jamal. When the victim girl contacted her uncle Robert over phone, Jamal was also present with Dharmarajan. On 1.2.1996, Dharmarajan and Jamal took the victim girl to the bus stand and thereafter, proceeded to Kanyakumari. On 21.2.1996 when the victim girl was taken to Periyar Hospital, directions were given by Jamal and Dharmarajan to the victim girl that she should complain only about throat pain. Dharmarajan and Jamal came to the hospital in a jeep and took the victim girl to Cumbam during night. Jamal also assisted Dharmarajan to take the victim girl to the house of a relative of Jamal on 23.2.1996. All these incidents would clearly disclose the common intention shared by Dharmarajan, accused No.3 Jamal and accused No.14 Yoosaf. The finding of

the court below that they committed gang rape on the victim girl is liable to be confirmed.

194. Another incident of gang rape where Dharmarajan was involved was at Kumily Rest House on 10.2.1996. It was alleged that Dharmarajan, accused No.6 Unnikrishnan Nair, accused No.21 Sunny George and accused No.22 Jiji gang raped the victim girl. It Crl.A. NO. 877 OF2002::

192. :: was alleged that accused No.6 Unnikrishnan Nair and accused No.4 Reji brought accused Nos.21 and 22 to the room in Kumily Rest House where the victim girl was confined. It was alleged that the victim girl was gang raped during that night by Dharmarajan and Unnikrishnan Nair. The victim girl stated that on 12.2.1996, Dharmarajan and accused No.6 Unnikrishnan Nair gang raped her at Metro Lodge, Kottayam.

195. The evidence in the case would disclose that on 10.2.1996, Dharmarajan and accused No.6 Unnikrishnan Nair had taken the victim girl to the Panchayat Rest House, Kumily. The evidence of the victim girl would also disclose that they gang raped her at Kumily Rest House. On 11.2.1996, Dharmarajan and accused No.6 Unnikrishnan Nair took the victim girl to Muvattupuzha, where accused No.11 (Aji) and accused No.15 (Davood) were waiting. The victim girl was taken to the house of accused No.27 Varghese where she was raped by him as well as by accused No.11 (Aji) and accused No.15 (Davood). On the night of 11.2.1996, the victim girl was taken to Kottayam where she was lodged at Metro Lodge. The victim girl stated in evidence that Dharmarajan and accused No.6 Crl.A. NO. 877 OF2002::

193. :: Unnikrishnan Nair gang raped her at Metro Lodge, Kottayam. She was thereafter taken to the house of accused No.39 Vilasini. From the evidence in the case, it is clear that accused No.6 Unnikrishnan Nair shared common intention with Dharmarajan to commit rape on the victim girl. It is true that the evidence discloses that accused Nos.21 and 22 approached the victim girl for having illicit intercourse with her. But it is not established that they shared the common intention with Dharmarajan or accused No.6 Unnikrishnan Nair. It is also not proved that accused Nos.21 and 22 shared any common intention. Therefore, we are of the view that the offence under Section 376(2)(g) of the Indian Penal Code

is established against Dharmarajan and accused No.6 Unnikrishnan Nair but not in the case of accused No.21 Sunny George and accused No.22 Jiji.

196. The evidence on record would clearly establish that the offences under Section 376(1) and 376(2)(g) are established against the appellant Dharmarajan. Offence under Section 372:- 197. The trial court found Dharmarajan guilty of the offence Crl.A. NO. 877 OF2002::

194. :: under Section 372 of the Indian Penal Code. Though there is a charge under Section 373 of the Indian Penal Code as well, no finding was rendered by the court below in respect of the same. Since the appellant was not found guilty for the offence under Section 373 of the Indian Penal Code, it is not necessary to consider that question.

198. The learned senior counsel for the appellant submitted that the ingredients of Section 372 of the Indian Penal Code are not made out in the case. The counsel submitted that even according to the prosecution, Dharmarajan kept custody of the girl and there was no parting of dominion, control or possession of the victim girl. He also submitted that the ingredients of the expression "sells, lets to hire, or otherwise disposes of " occurring in Section 372 are not established, even if the prosecution case is taken as true.

199. Section 372 of the Indian Penal Code is extracted below for the sake of convenience. "372. Selling minor for purposes of prostitution, etc.-- Whoever sells, lets to hire, or Crl.A. NO. 877 OF2002::

195. :: otherwise disposes of any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall be liable to fine. Explanation I.-- When a female under the age of eighteen years is sold, let for hire, or otherwise disposed of to a prostitute or to any person who keeps or manages a brothel, the person so disposing of such female shall, until the contrary is proved,

be presumed to have disposed of her with the intent that she shall be used for the purpose of prostitution. Explanation II.-- For the purposes of this section "illicit intercourse" means sexual intercourse between persons not united by marriage or by any union or tie which, though not amounting to a marriage, is recognised by the personal law or custom of the community to which they belong or, where they belong to different communities, of both such communities, as constituting between them a quasi-marital relation." CrI.A. NO. 877 OF2002::

196. ::

200. The ingredients of Section 372 are: (a) that the accused sells, lets to hire or otherwise disposes of any person, (b) that the person concerned is under the age of eighteen years, (c) the intention of the accused for doing so is that such person be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or that the accused knows it to be likely that the person concerned will at any age be employed or used for such purpose. The expression "sells, lets to hire, or otherwise disposes of" requires to be considered for dealing with the contention of the learned senior counsel for the appellant. In the case of "sale", possession usually follows such transfer as a necessary consequence. However, the offence may be complete on proof of sale without proof of change of possession. The expression "lets to hire" implies making over of a minor in perpetuity or for a term. The term "otherwise disposes of" is of wide import. It does not necessarily imply an actual change of possession. Even without parting with dominion or possession, it can be said that a minor is "otherwise disposed of" for the purposes mentioned in Section 372 of the Indian Penal Code. If the accused CrI.A. NO. 877 OF2002::

197. :: makes available a girl under the age of eighteen years for the purpose of prostitution or illicit intercourse, it would come within the expression "otherwise disposes of" in Section 372 of the Indian Penal Code. Delivery of possession or change of dominion over the minor is not required to attract the Section. Prostitution is the act or practice of offering the body of a woman to an indiscriminate intercourse with men. Illicit intercourse is distinct from prostitution. The expression "immoral purpose" denotes purposes inconsistent with rules and

principles of morality. Immorality is not confined to sexual matters alone. The criminal intention is the crux of the offence under Section 372.

201. In the present case, the evidence would reveal that not only that the appellant satisfied his lust by raping the victim girl, he made available the victim girl for illicit sexual intercourse by several other accused persons for over a period of forty one days at different places. The evidence of PW8 Maya would disclose that a quarrel took place between accused No.4 Reji and Dharmarajan at Kanyakumari with respect to the money received by Dharmarajan for making available the victim girl for illicit intercourse by Reji and Crl.A. NO. 877 OF2002::

198. :: others. The evidence of PW8 would also show that at Kanyakumari, Dharmarajan demanded 5,000/- from Reji. Reji asked Dharmarajan that did he not receive 7,000/- for bringing the victim girl. A scuffle ensued between Dharmarajan and Reji. The evidence would show that the victim girl was in the custody of Reji for six days during which period, the girl was subjected to forcible sexual intercourse on several occasions by Reji, Adv. Jose Nedumthakidiyhil (accused No.7), Sreekumar (accused No.8), Rajendran Nair (accused No.9) and Vijayakumar (accused No.29). During these days, the victim girl was lodged at Hotel Samudra, Kanyakumari and Hotel Geeth at Thiruvananthapuram. The prosecution succeeded in proving that Dharmarajan made available the girl for illicit sexual intercourse with the other accused. The court below was right in holding that Dharmarajan committed the offence under Section 372 of the Indian Penal Code. Offence under Section 392 of the Indian Penal Code.- 202. The evidence would disclose that Dharmarajan took the victim girl to Star Jewellery, Ernakulam and sold her ear-drops in the jewellery. He threatened the victim girl to give the year-drops. When Crl.A. NO. 877 OF2002::

199. :: the victim girl refused to give the same, he stamped on her foot and thereby forcibly and dishonestly obtained her gold ear-drops. The evidence of PW5 would prove the same. PW5 identified the victim girl and Dharmarajan. PW5 stated that Dharmarajan represented to him that he lost his purse and he could not go home due to want of money. PW50, the investigating officer recovered MO19 gold ingot as per Ext.P66 mahzar. It has also come out in evidence that the victim girl was

taken to Saflas Jewellery, Kozhikode. The appellant intimidated the victim girl to hand over the gold ear-stud and sold the same at Saflas Jewellery. This evidence of the victim girl is corroborated by the evidence of PW12 Basheer who was running the jewellery. PW12 identified the appellant and stated that he came to the jewellery with a girl in January 1996. The appellant stated that he had no money for bus fare and that was the reason to sell the ear-studs. PW12 stated that the appellant went near the victim girl and took out the ear-studs from her. PW12 stated in evidence that he identified the victim girl in S.C.No.187 of 1999. He produced before the investigating officer MO21 gold ingot which was seized as per Ext.P70 seizure mahzar. Crl.A. NO. 877 OF2002::

200. ::

203. The victim girl was under the illegal custody of Dharmarajan during the relevant period when her ear-drops and ear- studs were sold as mentioned above. The evidence would also disclose that she was threatened by Dharmarajan to part with the jewellery items. The court below rightly held that the appellant committed the offence under Section 392 of the Indian Penal Code. Whether investigation was unfair:

204. The learned senior counsel appearing for the appellant submitted that the investigation of the case was unfair and the prosecution suppressed material particulars gathered during investigation. Certain witnesses cited by the prosecution were not examined and their evidence was withheld. The unfair investigation of the case caused prejudice to the accused. It was contended that the prosecution suppressed relevant materials and thereby disabled the accused from moulding the defence. The learned senior counsel contended that there was no fair trial of the accused since the prosecution suppressed material particulars and infringed the procedural safeguards. The learned senior counsel for the appellant pointed out the following in support of his submission: (1) The Crl.A. NO. 877 OF2002::

201. :: statement of the victim girl was recorded on 27.2.1996 by PW54 (Balakrishnan - Assistant Sub Inspector of Police) in the handwriting of the Police Constable Hari (DW6). That statement was suppressed by the prosecution and

another statement in the handwriting of the Assistant Sub Inspector of Police Balakrishnan was substituted. (2) Though the petition filed by the appellant/accused before the court below to direct the prosecution to produce the statement of the victim girl recorded by PW53 K.M.Mathew was allowed, the accused was not permitted to cross examine the witness using that statement. (3) The prosecution did not produce all the relevant documents though they produced some of the documents. In Ext.D29 bail order there is a reference to the statement of the victim, in which she stated that she was given 1,600/-, but in the statement produced by the prosecution as allegedly recorded by the Assistant Sub Inspector of Police Balakrishnan, there is no such statement. (4) On 28.2.1996 the statement of the victim girl was recorded by PW49 V.K.Mathew but that statement was suppressed. (5) Copy of Ext.X2 Crime Ledger shows that the statement dated 27.2.1996 given by the victim girl contained fourteen pages, whereas, the statement in the handwriting CrI.A. NO. 877 OF2002::

202. :: of Assistant Sub Inspector of Police Balakrishnan, produced by the prosecution, runs into 23 pages. This statement is a subsequent substitution. (6) Ext.X13 report from the Deputy Superintendent of Police, Munnar to the Superintendent of Police, Idukki refers to the letter handed over by the victim girl to Joy, the driver of "Anjaly" bus plying from Munnar to Adimaly, which was intended to be handed over to Kochumon (DW3). But, this letter was suppressed by the prosecution. (7) All the statements recorded under Section 161 of the Code of Criminal Procedure were not produced and copy supplied to the accused and thereby Section 173(5) of the Code of Criminal Procedure was violated. (8) Though the FIR was registered on 17.1.1996, it reached the Magistrate only on 20.1.1996. (9) Even though it is stated that MO1 album was seized from Raju, no mahzar was prepared. Ext.P89 mahzar was concocted later. The learned senior counsel for the appellant also cited several decisions in support of his contentions.

205. The learned Director General of Prosecution submitted that the statement dated 27.2.1996 was recorded by the Assistant Sub Inspector of Police Balakrishnan in his handwriting. No CrI.A. NO. 877 OF2002::

203. :: statement was recorded in the handwriting of the Police Constable Hari. On 28.2.1996, no statement was recorded by the Circle Inspector of Police, though the victim girl had a brief interaction with him. The learned Director General of Prosecution submitted that there was no suppression of material facts. He submitted that with the help of the policemen in Munnar Police Station several things were manipulated by the accused to show that the investigation was tainted and that prejudice was caused to him.

206. The following facts were revealed from the evidence of DW1 Anil Kumar. He had helped Reji (accused No.4) for the purpose of the case. Reji's brother requested to take certain records from Devikulam Police Station. DW1 contacted the District Congress Committee Office at Idukki for that purpose. DW1 was the President of the Kottayam Town Mandalam of Youth Congress. He went along with Somarajan to Munnar Police Station. Somarajan informed that the records are available in Devikulam Police Station. Accordingly, they went to Devikulam Police Station. DW1 waited in the car while Somarajan went to the Police Station. After some time, a policeman and Somarajan came out and they got into the car. CrI.A. NO. 877 OF2002::

204. :: They were having case files with them. Photostat copies of the records were taken. The policeman provided each and every document for the purpose of taking photostat copies. Three sets of photocopies were taken. The evidence of DW1 would disclose that he had helped accused No.4 Reji in the case to get several documents from the police station and the policeman also helped them for that purpose. Some of the photocopies were attempted to be confronted to the witness during his examination in Court.

207. G.S.Hari, the Police Constable in whose handwriting the defence alleges that the statement of the victim girl was recorded, was examined as DW6. He stated that he worked under the Assistant Sub Inspector of Police Balakrishnan (PW54) for more than a year. He was in the investigation team of the Circle Inspector of Police. He identified a photostat copy of the statement of the victim as in his handwriting. He stated that the signature at the foot of the same is that of ASI Balakrishnan. According to DW6, he had recorded the statement in his handwriting

at Munnar Police Station, as directed by ASI Balakrishnan. In cross examination, DW6 stated that he heard only a part of the statement given by the victim girl to CrI.A. NO. 877 OF2002::

205. :: the ASI Balakrishnan. The evidence given by DW6 while he was examined in S.C.No.187 of 1999 was confronted to him. In that case, he had stated that ASI Balakrishnan had directed him to write something after looking into a paper. He also stated that he did not hear what the victim girl stated to ASI Balakrishnan. DW6 was also confronted with the statement that he had only seen the victim girl being questioned but he did not hear what she said. DW6 stated that what he stated in S.C.No.187 of 1999 is correct. DW6 was entrusted with the investigation of Crime No.34 of 1996 of Munnar Police Station. In the course of the investigation of Crime No.34 of 1996, he was at Cumbam and he admitted that he had investigated that crime on 24.2.1996 to 27.2.1996. He also admitted that he had inspected the details of the vehicles which passed through Kumily Sales Tax Check Post from 24.2.1996 to 27.2.1996 and that process continued till 27.2.1996. A specific suggestion was made to DW6 that he manipulated a statement in his handwriting as if that statement was given by the victim girl, and handed over the same to the accused. The suggestion to DW6 was that he did so at the instance of PW49 V.K.Mathew, who was the Circle Inspector of Police, Munnar. It is to be noted that V.K.Mathew was examined in CrI.A. NO. 877 OF2002::

206. :: the case as PW49. He was the investigating officer of the case from 28.2.1996 to 7.3.1996. Still he had to be declared hostile and had to be cross examined by the prosecution.

208. There is a case for the accused that V.K.Mathew (PW49) recorded the statement of the victim girl on 28.2.1996 and that was in the handwriting of Police Constable Rajan. It was suggested to PW49 in cross examination that Constable Rajan was in charge of the investigation of Crime No.34 of 1996 from 26.2.1996 and that he came back and reported in the office of PW49 only at 8 p.m. on 28.2.1996. PW49 stated that records are to be verified to state anything about it. Another suggestion was made to PW49 that public meetings were held alleging that his investigation was improper. It was also suggested to him that some of the

accused, namely, Advocate Jose Nedumthakidiyil, Jacob Stephen and George Cherian are his friends. It was also suggested to PW49 that the statement allegedly recorded by him was manipulated for the purpose of weakening the prosecution case.

209. It is relevant to note here that PW49 stated in cross Crl.A. NO. 877 OF2002::

207. :: examination that he recorded the statement of the victim girl after looking into the statement of the victim girl dated 27.2.1996, which was recorded by ASI Balakrishnan and which was produced in Court. This would indicate that the statement recorded by ASI Balakrishnan which form part of the final report submitted by the investigating officer is the real statement recorded by ASI Balakrishnan and that the statement alleged to have been recorded in the handwriting of Police Constable Hari (DW6) is a manipulated one at the instance of the accused. The evidence of PW49, when considered as a whole, would show that the accused could manipulate the records with the help of the policemen in Munnar and Devikulam Police Stations. It would appear that some of the accused persons are powerful and influential and that was why a person like DW1 himself went to the police station for the purpose of taking copies of some documents.

210. The victim girl denied of having given any statement to PW49 V.K.Mathew. Her evidence would disclose that she met V.K.Mathew and had a brief interaction with him in the presence of ASI Balakrishnan. The victim girl had to be sent to the doctor with Crl.A. NO. 877 OF2002::

208. :: whom there was an appointment at 2 p.m. The sequence of events and the time factor as disclosed in the evidence of the victim girl would show that there was no chance for V.K.Mathew, the investigating officer, to record any statement of the victim girl on 28.2.1996. We do not think that the contention raised by the defence that there was no fair investigation and consequently, no fair trial and that prejudice was caused to the accused is correct. In view of these findings, we do not think it necessary to refer to the decisions cited by the learned senior counsel for the appellant in this regard.

211. It is also relevant to note here that one of the investigating officers (A.T.Jose) was summoned as a defence witness as DW2. In cross examination, he stated that the victim, her family members and the general public had complaints about the improper investigation made by V.K.Mathew (PW49). The allegation was that PW49 had helped the accused and misbehaved towards the family members of the victim girl. DW2 also stated that there was doubt about the veracity of the investigation conducted by PW49. He stated that there was an allegation that Jacob Stephen CrI.A. NO. 877 OF2002::

209. :: (accused No.10) was known to PW49 and the former was giving instructions to PW49, after staying at Munnar. DW2 stated that even before the genuineness of the complaints raised against PW49 was realised, the investigation was handed over to another police officer.

212. In State of Punjab v. Gurmit Singh and others (AIR 1996 SC1393, it was held: "7.Again, if the Investigating Officer did not conduct the Investigation properly or was negligent in not being able to trace out the driver of the car, how can that become a ground to discredit the testimony of the prosecutrix? The prosecutrix had no control over the investigating agency and the negligence of an Investigating Officer could not affect the credibility of the statement of the prosecutrix....." 213. In Karnel Singh v. State of M.P. (AIR 1995 SC2472, it was held thus: "5. Notwithstanding our unhappiness regarding the nature of investigation, we have to consider whether the evidence on record, even on strict scrutiny, establishes the guilt. In cases of defective investigation the Court CrI.A. NO. 877 OF2002::

210. :: has to be circumspect in evaluating the evidence but it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the Investigating Officer if the investigation is designedly defective....." 214. In Zindar Ali SK v. State of W.B. and another (AIR 2009 SC1467, the Supreme Court held: "13. The shabby quality of investigation was severely criticized by the learned counsel. There can be no dispute that the investigation in this case is not at all satisfactory. There are discrepancies galore. However, in this case, the truthful version of the prosecutrix cannot be ignored. It

is trite law that the defence cannot take advantage of such bad investigation where there is clinching evidence available to the prosecution as in this case. We, therefore, confirm the finding of the High Court that the accused is guilty of the offence under Section 376 of IPC." 215. In *State of Karnataka v. K.Yarappa Reddy* (AIR 2000 SC185, the Supreme Court held that the criminal justice system should not be made the casualty for the wrongs committed by the investigating officers. It was held thus: CrI.A. NO. 877 OF2002::

211. :: "19. But can the above finding (that the Station House Diary is not genuine) have any inevitable bearing on the other evidence in this case? If the other evidence, on scrutiny, is found credible and acceptable, should the Court be influenced by the machinations demonstrated by the Investigating Officer in conducting investigation or in preparing the records so unscrupulously. It can be a guiding principle that as investigation is not the solitary area for judicial scrutiny in a criminal trial, the conclusion of the Court in the case cannot be allowed to depend solely on the probity of investigation. It is well nigh settled that even if the investigation is illegal or even suspicious the rest of evidence must be scrutinized independently of the impact of it. Otherwise criminal trial will plummet to the level of the Investigating Officer ruling the roost. The Court must have predominance and pre-eminence in criminal trials over the action taken by Investigating Officers. Criminal justice should not be made the casualty for the wrongs committed by the Investigating Officers in the case. In other words, if the Court is convinced that the testimony of a witness to the occurrence is true the Court is free to act on it albeit Investigating Officer's suspicious role in the case." 216. In *Dayal Singh and others v. State of Uttaranchal* (AIR CrI.A. NO. 877 OF2002::

212. ::

2012. SC3046, a three Judge Bench of the Supreme Court emphasised the need for the Court to be cautious when the prosecution attempts to misdirect the trial on the basis of defective investigation. It was also held that the Courts should ensure that no innocent man is punished but, at the same time, also ensure that a guilty man does not escape. The Supreme Court held thus: "28. Where our criminal justice system provides safeguards of fair trial and innocent till proven guilty to an

accused, there it also contemplates that a criminal trial is meant for doing justice to all, the accused, the society and a fair chance to prove to the prosecution. Then alone can law and order be maintained. The Courts do not merely discharge the function to ensure that no innocent man is punished, but also that a guilty man does not escape. Both are public duties of the judge. During the course of the trial, the learned Presiding Judge is expected to work objectively and in a correct perspective. Where the prosecution attempts to misdirect the trial on the basis of a perfunctory or designedly defective investigation, there the Court is to be deeply cautious and ensure that despite such an attempt, the determinative process is not sub-served. For truly attaining this object of a 'fair trial', the Court Crl.A. NO. 877 OF2002::

213. :: should leave no stone unturned to do justice and protect the interest of the society as well." 217. In C.Muniappan and others v. State of T.N. with D.K.Rajendran and others etc. etc. v. State of T.N. (AIR 2010 SC3718, the Supreme Court held that the defect in the investigation by itself cannot be a ground for acquittal. The Supreme Court held thus: "44. There may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the I.O. and whether due to such lapse any benefit should be given to the accused. The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence de hors such lapses, carefully, to Crl.A. NO. 877 OF2002::

214. :: find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation. (Vide Chandra Kanth Lakshmi v. State of Maharashtra, AIR 1974 SC220 Karnel Singh v. State of Madhya Pradesh (1995) 5 SCC518:

(AIR 1995 SC2472:

1995. AIR SCW3644; Ram Bihari Yadav v. State of Bihar, AIR 1998 SC1850: (1998 AIR SCW1647; Paras Yadav v. State of Bihar, AIR 1999 SC644: (1999 AIR SCW296; State of Karnataka v. K. Yarappa Reddy, AIR 2000 SC185: (1999 AIR SCW4276; Amar Singh v. Balwinder Singh, AIR 2003 SC1164: (2003 AIR SCW717; Allarakha K. Mansuri v. State of Gujarat, AIR 2002 SC1051: (2002 AIR SCW781; and Ram Bali v. State of U.P., AIR 2004 SC2329: (2004 AIR SCW2748." 218. It is not necessary to arrive at any final conclusion in this case as to who tried to manipulate things and derail the investigation of the case. It also does not matter if the accused could influence the police officers to create loopholes in the case. Whatever may be the defects in the investigation, the ultimate decision making rests Crl.A. NO. 877 OF2002::

215. :: on the Court to find out whether the accused has committed the offence. The investigation is only a part of the entire process of criminal justice administration. If one wing of the criminal justice administration goes astray, that does not mean that it should result in the acquittal of the accused. Creating doubt for the purpose of doubt is not a reasonable doubt, the benefit of which can be claimed by the accused. The reasonable doubt should arise on the basis of the facts as such and not on the basis of the contrived or manipulated facts. Should the victim be told by the Court that it cannot convict the accused because one or more of the police officers and policemen involved in the investigation were dishonest and they did not conduct proper investigation? Would the dents deliberately created by the accused to the prosecution case, by influencing the investigating agency, result in raising a reasonable doubt in the mind of the Court so as to enable the accused to claim that benefit? We are of the view that answer to all these questions would be in the negative.

219. In Sucha Singh and another v. State of Punjab (AIR 2003 SC3617, it was held that a reasonable doubt is not an Crl.A. NO. 877 OF2002::

216. :: imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It was also held that proof beyond reasonable doubt is a guideline, not a fetish. The Supreme Court held thus: "20. Exaggerated devotion

to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice according to law. (See Gurbachan Singh v. Satpal Singh and others (AIR 1990 SC209. Prosecution is not required to meet any and every hypothesis put forward by the accused (See State of U.P. v. Ashok Kumar Srivastava (AIR 1992 SC840 .A reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. If a case is proved perfectly, it is argued that it is artificial; if a case has some flaws inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty persons must be allowed to escape. Proof beyond reasonable doubt is a guideline, Crl.A. NO. 877 OF2002::

217. :: not a fetish. (See Inder Singh and another v. State (Delhi Admn.) (AIR 1978 SC1091. Vague hunches cannot take place of judicial evaluation. "A Judge does not preside over a criminal trial, merely to see that no innocent man is punished. A Judge also presides to see that a guilty man, does not escape. Both are public duties." (Per Viscount Simen in Stirland v. Director of Public Prosecutor (1944 AC (PC) 315) quoted in State of U.P. v. Anil Singh (AIR 1988 SC1998. Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth." 220. In Shivaji Sahabrao Bobade and another v. State of Maharashtra (AIR 1973 SC2622, a three Judge Bench of the Supreme Court cautioned against the exaggerated devotion to the rule of benefit of doubt. Speaking for the Bench, Justice Krishna Iyer said: "6. Even at this stage we may remind ourselves of a necessary social perspective in criminal cases which suffers from insufficient forensic appreciation. The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good Crl.A. NO. 877 OF2002::

218. :: regardless of justice to the victim and the community, demand especial emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The Cherished principles or golden thread

of proof beyond reasonable doubt which runs thro: the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then break down and lose credibility with the community. The evil of acquitting a guilty person light-heartedly as a learned author has sapiently observed, goes much beyond the simple fact that just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicted 'persons' and more severe punishment of those who are found guilty. Thus too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless." Miscellaneous points:

221. The learned senior counsel for the appellant submitted CrI.A. NO. 877 OF2002::

219. :: that it cannot be believed that the victim girl could not escape from the clutches of Dharmarajan at any point of time during the course of forty days. He submitted that the victim girl was lodged in various hotels and lodges. She also remained in the houses of accused No.39 Vilasini and accused No.38 Mary @ Ammini as well as in the rented house of accused No.16 Thulaseedharan. It is submitted that the evidence would disclose that the inmates in the lodges and hotels could communicate with outsiders and the staff in the hotels. If so, the victim girl could raise alarm and rescue herself. The learned counsel submitted that there was ample opportunity for the victim girl to escape from the houses of accused Nos.38 and 39 and also from the rented house of accused No.16 Thulaseedharan.

222. It is to be noted that the victim girl left Munnar under the hope that Raju would marry her and protect her. She was in love with Raju. On her way to Kothamangalam, Raju disappeared. Usha entered into the scene and thereafter, Dharmarajan appeared. It was clearly a trap. The victim girl had no other go but to fall into the trap, since it was night and there was no way to reach any destination

for her safe stay. She saw the real colour of CrI.A. NO. 877 OF2002::

220. :: Dharmarajan at Metro Lodge, Kottayam. She was terrorised, manhandled and threatened to be done away with by Dharmarajan and later by his confidants. Even a threat was made to kill the victim girl's parents if she tried to escape. Having come to the trap of Dharmarajan and others, it was their concern that the girl should not escape; lest all their plans would be futile and they would be exposed to penal action. Therefore, it is only reasonable to think that at any cost, they wanted to keep the victim girl under wrongful confinement to achieve their goal. They succeeded in doing so. It is too much to expect that a girl like the victim girl could raise alarm and escape, in the peculiar facts and circumstances of the case.

223. In State of Punjab v. Gurmit Singh and others (AIR 1996 SC1393, the Supreme Court held that no fault could be found with the prosecution version on the ground that the prosecutrix did not raise an alarm while being abducted. It was noticed that the prosecutrix asserted that as soon as she was pushed inside the car, she was threatened by the accused to keep quiet and not to raise any alarm, otherwise she would be killed. It was held that under CrI.A. NO. 877 OF2002::

221. :: these circumstances, to discredit the prosecutrix for not raising an alarm would be a travesty of justice.

224. In State of U.P. v. Chhoteylal (AIR 2011 SC697, the victim girl was kidnapped by two adult males, one of them wielded fire-arm and threatened her and she was taken away from her village. Answering the contention that the victim girl could have raised alarm at the bus stand and other places where she was taken, the Supreme Court held that in the circumstances of the case it was sensible not to raise any alarm. Any alarm at unknown place might have endangered her life. The absence of alarm by her at the public place cannot lead to an inference that she had willingly accompanied the accused. The circumstances made her a submissive victim and that does not mean that she was inclined and willing to have sexual intercourse with the accused.

225. The learned senior counsel for the appellant submitted that the victim girl was a deviant girl and her evidence cannot be believed. It was contended that she misappropriated her hostel fees given by her father and she pledged her gold ornaments in order to CrI.A. NO. 877 OF2002::

222. :: raise money. DW4 was examined on the side of the defence to substantiate this contention. DW4 is a jeweller at Munnar. He stated that on 1.1.1996 by about 10 a.m., the victim girl came to his house and stated that she wanted to pledge her gold ring. She stated that her purse was lost and in order to remit the school fees she had to raise money. DW4 stated that he asked the victim girl to disclose her name and address. She stated that her name was Anjali. She was in the school uniform. To a query, she stated that she was in the Convent School at Nallathanni, Munnar. When she was asked about her father's name, at first she hesitated. Later, she disclosed her true identity and wept. DW4 contacted the victim's father and he took the victim girl with him. DW4 also stated that when the victim girl met him and asked for money by pledging the gold ring, she was seen frightened.

226. The victim girl explained in evidence that she misappropriated the hostel fees in order to give the same to Raju with whom she was in love. She stated that accused No.1 Raju insisted on taking some money and the dress of her mother while leaving the station along with him. She stated that she wanted to give fees by CrI.A. NO. 877 OF2002::

223. :: pledging the gold ring. In cross examination, the victim girl stated that she misappropriated the school fee in order to give the same to accused No.1 Raju. She stated that accused No.1 stated about his financial difficulties and took money from her. In the facts and circumstances, we are not inclined to think that the victim girl was a deviant girl. She misappropriated the school fees and tried to pledge her gold ring only to provide money to her lover. She had love towards accused No.1 Raju, but he did not have love towards her. We do not think that it is an answer to an allegation of rape that the victim had misappropriated money or tried to pledge her ornaments without the knowledge of her father. Even a sex worker is entitled to protection from sexual atrocities. We would like to ask a question why did Raju demand money from her. If his love towards her was

genuine, he would not have tried to get money from her by adopting these methods. He trapped the girl and led her to her lifelong misery. We cannot comprehend the contention raised by the accused that the victim is a deviant girl and that in the facts and circumstances, her evidence cannot be believed. We reject that contention of the accused. Crl.A. NO. 877 OF2002::

224. ::

227. A question arises as to why the victim girl left her parents and left her convent. Was it for love, lust or money? She stated that she left to accomplish her desire to live with Raju. There is no material to come to the conclusion that she had sexual intercourse with a large number of persons of different age to satisfy her lust. Among the accused there are persons who are aged as much as that of her father. She even pointed out to some of them that they were aged like her father and requested for their mercy. Could anybody imagine that a girl who had just crossed sixteen years of age would leave her parents, roam around for days together, have sexual intercourse with any 'Tom Dick and Harry' to satisfy her lust? Certainly not. There is no material to think that she did so to earn money. After all, what did she earn? Nothing. Even according to the statement of the appellant under Section 313 of the Code of Criminal Procedure, he had paid 2,100/-, purchased gold covering ornaments worth 250/- and two churidars for the victim girl. We cannot believe that the victim girl left her parents and roamed around for forty one days to gain 2,100/-, some gold covering ornaments and two churidars. The evidence would disclose that her ornaments were sold by Dharmarajan and he received money. Crl.A. NO. 877 OF2002::

225. ::

228. In the course of arguments, we put a query to the learned senior counsel appearing for the appellant as to whether the appellant has a case that the events in question involve child prostitution. The learned senior counsel submitted that nobody has such a case. Role of Court while trying rape cases:

229. The Supreme Court in State of A.P. v. Gangula Satya Murthy (AIR 1997 SC1588 held that the Courts are expected to show great responsibility while trying

rape cases. It was held thus: "27. Before parting with the case we would like to point out that the Courts are expected to show great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the witnesses, which are not of a fatal nature to throw out allegations of rape. This is all the more important because of late crime against women in Crl.A. NO. 877 OF2002::

226. :: general and rape in particular is on the increase. It is an irony that while we are celebrating woman's rights in all spheres, we show little or no concern for her honour. It is a sad reflection and we must emphasise that the Courts must deal with rape cases in particular with utmost sensitivity and appreciate the evidence in the totality of the background of the entire case and not in isolation. One of us (Dr. Anand J.) has observed in State of Punjab v. Gurmit Singh, (1996) 2 SCC384: (1996 AIR SCW998 Para 20) thus: "The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity." 230. In State of Punjab v. Gurmit Singh and others (AIR 1996 SC1393, the Supreme Court held thus: "20. Of late, crime against women in general and rape in particular is on the increase, It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but Crl.A. NO. 877 OF2002::

227. :: inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Court, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a

fatal nature, to throw out an otherwise reliable prosecution case. " 231. On a re-appraisal of the evidence in the case and on considering the various arguments raised by the learned counsel for the appellant/accused, we do not find any ground to interfere with the finding of guilt rendered by the court below against the appellant. The court below imposed a sentence of imprisonment for life for the offence under Section 376(2)(g) of the Indian Penal Code and took the view that no separate punishment need be imposed on the appellant for other offences for which he was convicted. In the facts Crl.A. NO. 877 OF2002::

228. :: and circumstances, we are of the view that the sentence imposed is just. The appellant is an Advocate. He stooped to the level of an adventurer in sex, trapped a minor girl and thrown her to untold misery and hardship. The appellant does not deserve any sympathy. For the aforesaid reasons, we dismiss the Criminal Appeal. The court below shall issue fresh committal warrant, if required. (K.T.SANKARAN) Judge (M.L.JOSEPH FRANCIS) Judge ahz/

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