

Rajeev vs State of Kerala

Rajeev vs State of Kerala

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Court : Kerala

Decided On : Jul-05-2022

Judge : Honourable Mr.Justice K.Vinod Chandran,Honourable Mr.Justice C. Jayachandran

Appeal No. : CRL.A/765/2015

Appellant : Rajeev

Respondent : State of Kerala

Judgement :

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN & THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN TUESDAY, THE 5TH DAY OF JULY 2022 / 14TH ASHADHA, 1944 CRL.A NO. 191 OF 2015 AGAINST THE ORDER/JUDGMENT IN SC 290/2013 OF ADDITIONAL DISTRICT COURT & SESSIONS COURT (VIOLENCE AGAINST WOMEN & CHILDREN) CP 13/2010 OF JUDICIAL MAGISTRATE OF FIRST CLASS - I, NORTH PARAVUR CRIME NO.216/2008 OF PUTHENVELIKKARA POLICE STATION

APPELLANT: FRANCIS @ CHEECHI PANCHI
S/O.THOMAS,KURIAPPILLY VEEDU,KEEZHUPPADAM
BHAGAM,ELENTHIKKARA KARA,PUTHENVELLIKKARA VILLAGE. BY
ADV SRI.P.MOHAMED SABAH RESPONDENT: STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,HIGH COURT OF
KERALA,ERNAKULAM. BY ADVS. GOVERNMENT PLEADER
SMT.AMBIKA DEVI S, SPL.GP ATROCITIES AGAINST WOMEN &
CHILDREN & WELFARE OF W & C ADVOCATE GENERAL OFFICE
KERALA SMT.S.AMBIKA DEVI, ADDL.CGSC(CG-151) THIS CRIMINAL
MISC. CASE HAVING COME UP FOR ADMISSION ON 05.07.2022,
ALONG WITH CRL.A.211/2015, 765/2015 AND CONNECTED CASES,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN &
THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN TUESDAY,
THE 5TH DAY OF JULY 2022 / 14TH ASHADHA, 1944 CRL.A NO. 211
OF 2015 AGAINST THE ORDER/JUDGMENT IN SC 197/2011 OF
ADDITIONAL DISTRICT COURT & SESSIONS COURT (VIOLENCE
AGAINST WOMEN & CHILDREN) CP 13/2010 OF JUDICIAL
MAGISTRATE OF FIRST CLASS - I, NORTH PARAVUR CRIME
NO.216/2008 OF PUTHENVELIKKARA POLICE STATION
APPELLANT:

RAJEEV, AGED 32 YEARS S/O.RAVEENDRAN, GEETHALAYAM,
MARUTHAMOODU DESOM, PULLAPPARA VILLAGE,
VENJARAMOOD, THIRUVANANTHAPURAM DISTRICT. (NOW
RESIDING AT THE HOUSE OF BHARGAVI AMMA, CHITTETHU,
POOPPATHI DESOM, POYYA VILLAGE, KODUNGALLUR TALUK). BY
ADVS. SRI.G.HARIHARAN SRI.PRAVEEN.H. G.HARIHARAN
K.S.SMITHA(K/106/2012) V.R.SANJEEV KUMAR(K/000741/2017)
ANJALY T.A(K/1694/2020) RESPONDENT: STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF

KERALA, ERNAKULAM. BY ADVS.SMT.AMBIKA DEVI S, SPL.GP ATROCITIES AGAINST WOMEN & CHILDREN & WELFARE OF W & C THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 05.07.2022, ALONG WITH CRL.A.191/2015 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN & THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN TUESDAY, THE 5TH DAY OF JULY 2022 / 14TH ASHADHA, 1944 CRL.A NO. 765 OF 2015 AGAINST THE ORDER/JUDGMENT IN SC 289/2013 OF ADDITIONAL DISTRICT COURT & SESSIONS COURT (VIOLENCE AGAINST WOMEN & CHILDREN) CP 13/2010 OF JUDICIAL MAGISTRATE OF FIRST CLASS - I, NORTH PARAVUR CRIME NO.216/2008 OF PUTHENVELIKKARA POLICE STATION APPELLANT:

RAJEEV, AGED 32 YEARS S/O. RAVEENDRAN, GEETHALAYAM, MARUTHAMOODU DESOM, PULLAPPARA VILLAGE, VENJRARAMOODU, THIRUVANANTHAPURAM. BY ADVS. SRI.P.VIJAYA BHANU (SR.) SMT.PRAMEELA.C.K. SRI.SAM ISAAC POTHYIL SRI.A.S.SREEJAN RESPONDENT: STATE OF KERALA REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM. BY ADVS. SMT.AMBIKA DEVI S, SPL.GP ATROCITIES AGAINST WOMEN & CHILDREN & WELFARE OF W & C SMT.PRAICY JOSEPH SPL. GOVERNMENT PLEADER THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 05.07.2022, ALONG WITH CRL.A.191/2015 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN & THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN TUESDAY, THE 5TH DAY OF JULY 2022 / 14TH ASHADHA, 1944 CRL.A NO. 802 OF 2015 AGAINST THE ORDER/JUDGMENT IN SC 289/2013 OF ADDITIONAL DISTRICT COURT & SESSIONS COURT (VIOLENCE AGAINST WOMEN & CHILDREN) CP 13/2010 OF JUDICIAL MAGISTRATE OF FIRST CLASS - I, NORTH PARAVUR CRIME NO.216/2008 OF PUTHENVELIKKARA POLICE STATION APPELLANT: FRANCIS @ CHEECHI PANCHI AGED 49 YEARS S/O.THOMAS, KURIAPPILLY VEEDU, KEEZHUPPADAM BHAGAM, ELENTHIKKARA KARA, PUTHENVELIKKARA VILLAGE. BY ADV SRI.P.MOHAMED SABAH RESPONDENT:

STATE OF KERALA REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM. BY ADVS. SMT. AMBIKA DEVI S, SPL.GP ATROCITIES AGAINST WOMEN & CHILDREN & WELFARE OF W & C SMT.PRAICY JOSEPH SPL. GOVERNMENT PLEADER THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 05.07.2022, ALONG WITH CRL.A.191/2015 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN & THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN TUESDAY, THE 5TH DAY OF JULY 2022 / 14TH ASHADHA, 1944 CRL.A NO. 449 OF 2016 AGAINST THE ORDER/JUDGMENT IN SC 288/2013 OF ADDITIONAL DISTRICT COURT & SESSIONS COURT (VIOLENCE AGAINST WOMEN & CHILDREN) CRIME NO.216/2008 OF PUTHENVELIKKARA POLICE STATION APPELLANT: RAJEEV AGED 30 YEARS S/O.RAVINDRAN, AGED 30 YEARS, GEETHALAYAM, MARUTHAMMODU, DESOM, PULLAPPARA VILLAGE, VENJARAMOOD, THIRUVANANTHAPURAM. BY ADV SRI.LAVARAJ

M.G. RESPONDENT: STATE OF KERALA REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM. BY ADVS. SMT.AMBIKA DEVI S, SPL.GP ATROCITIES AGAINST WOMEN & CHILDREN & WELFARE OF W & C THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 05.07.2022, ALONG WITH CRL.A.191/2015 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN & THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN TUESDAY, THE 5TH DAY OF JULY 2022 / 14TH ASHADHA, 1944 CRL.A NO. 1286 OF 2015 AGAINST THE ORDER/JUDGMENT IN SC 287/2013 OF ADDITIONAL DISTRICT COURT & SESSIONS COURT (VIOLENCE AGAINST WOMEN & CHILDREN) CRIME NO.216/2008 OF PUTHENVELIKKARA POLICE STATION APPELLANT: RAJEEV S/O.RAVINDRAN, GEETHALAYAM, MARUTHAMMOODU, DESOM, PULLAPPARA VILLAGE, VENJARAMOOD, THIRUVANANTHAPURAM. BY ADV SRI.LAVARAJ M.G. RESPONDENT:

STATE OF KERALA REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM. BY ADVS. SMT.AMBIKADEVI S, SPECIAL GOVERNMENT PLEADER FOR ATROCITIES AGAINST WOMEN AND CHILDREN & WELFARE OF W & C SMT.PRAICY JOSEPH, SPL. GOVERNMENT PLEADER THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 05.07.2022, ALONG WITH CRL.A.191/2015 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN & THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN TUESDAY, THE 5TH DAY OF JULY 2022 / 14TH ASHADHA, 1944 CRL.A NO. 783 OF 2016 AGAINST THE ORDER/JUDGMENT IN SC 288/2013 OF ADDITIONAL DISTRICT COURT & SESSIONS COURT (VIOLENCE AGAINST WOMEN & CHILDREN) CRIME NO.216/2008 OF PUTHENVELIKKARA POLICE STATION APPELLANT: SINOJ AGED 25 YEARS AGED 25 YEARS,S/O.SIDHARTHAN, VELLARATHARA VEEDU, VELLARAMPADAM KARA, VARANTHARAPPILLY VILLAGE, MUKUNDAPURAM TALUK, THRISSUR 680 303. BY ADV SRI.P.B.AJOY RESPONDENT:

STATE OF KERALA REPRESENTED BY SHO PUTHENVELIKKARA POLICE STATION, THROUGH THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM. BY ADVS. SMT.AMBIKA DEVI S, SPL.GP ATROCITIES AGAINST WOMEN & CHILDREN & WELFARE OF W & C THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 05.07.2022, ALONG WITH CRL.A.191/2015 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN & THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN TUESDAY, THE 5TH DAY OF JULY 2022 / 14TH ASHADHA, 1944 CRL.A NO. 955 OF 2016 AGAINST THE ORDER/JUDGMENT IN SC 288/2013 OF ADDITIONAL DISTRICT COURT & SESSIONS COURT (VIOLENCE AGAINST WOMEN & CHILDREN) CRIME NO.216/2008 OF PUTHENVELIKKARA POLICE STATION APPELLANT: LIJITH AGED 27 YEARS, S/O.JOLLY, KUNJELIPARAMBU VEEDU, PUTHENVELIKARA VILLAGE, ERNAKULAM DISTRICT (NOW UNDERGOING IMPRISONMENT AT CENTRAL PRISON, VIYYOOR (C.NO.2740), THRISSUR DISTRICT, PIN - 680 010. BY ADV SRI.C.C.ANOOP(STATE

BRIEF) RESPONDENT: STATE OF KERALA REPRESENTED BY
CIRCLE INSPECTOR OF POLICE, VADAKKEKARA, (CRIME
NO.216/2008 OF PUTHENVELIKKARA POLICE STATION) THROUGH
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM,
COCHIN - 682 031. BY ADV SMT.AMBIKA DEVI S, SPL.GP
ATROCITIES AGAINST WOMEN & CHILDREN & WELFARE OF W & C
THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON
05.07.2022, ALONG WITH CRL.A.191/2015 AND CONNECTED
CASES, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN &
THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN TUESDAY,
THE 5TH DAY OF JULY 2022 / 14TH ASHADHA, 1944 CRL.A NO. 1215
OF 2016 AGAINST THE ORDER/JUDGMENT IN SC 287/2013 OF
ADDITIONAL DISTRICT COURT & SESSIONS COURT (VIOLENCE
AGAINST WOMEN & CHILDREN) CRIME NO.216/2008 OF
PUTHENVELIKKARA POLICE STATION APPELLANT: LIJITH AGED 27
YEARS, S/O JOLLY, KUNJELIPARAMBU VEEDU, PUTHENVELIKARA
VILLAGE, ERNAKULAM DISTRICT (NOW UNDERGOING
IMPRISONMENT AT CENTRAL PRISON, VIYYOOR (C. NO 2740),
THRISSUR DISTRICT, PIN 680 010. BY ADV SRI.C.C.ANOOP (STATE
BRIEF) RESPONDENT: STATE OF KERALA REPRESENTED BY
CIRCLE INSPECTOR OF POLICE, VADAKKEKARA, (CRIME NO
216/2008 OF PUTHENVELIKKARA POLICE STATION) THROUGH
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM,
COCHIN 682 031. BY ADVS. SMT.AMBIKA DEVI S, SPL.GP
ATROCITIES AGAINST WOMEN & CHILDREN & WELFARE OF W & C
THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON
05.07.2022, ALONG WITH CRL.A.191/2015 AND CONNECTED
CASES, THE COURT ON THE SAME DAY DELIVERED THE

FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN & THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN TUESDAY, THE 5TH DAY OF JULY 2022 / 14TH ASHADHA, 1944 CRL.MC NO. 2437 OF 2014 AGAINST THE ORDER/JUDGMENT IN SC 197/2011 OF ADDITIONAL DISTRICT COURT & SESSIONS COURT (VIOLENCE AGAINST WOMEN & CHILDREN) CRIME NO.216/2008 OF PUTHENVELIKKARA POLICE STATION PETITIONERS:

1 RAJEEV, AGED 35 YEARS, S/O. RAVEENDRAN, GEETHALAYAM, MARUTHAMOODU DESOM, PULIPPARA VILLAGE, VENJARAMOOD, THIRUVANANTHAPURAM. 2 SINOJ AGED 31 YEARS, S/O. SIDHARTHAN, VELLANTHARA VEETIL, VELLARAMPADAM, VARATHARAPALLY VILLAGE, MUKUNDAPURAM TALUK, THRISSUR DISTRICT. 3 AJI P.A. AGED 41 YEARS, PULLIKKAL HOUSE, PUTHENVELIKKARA P.O, PANJIPARA, ERNAKULAM DISTRICT - 683 594. 4 LIJITH J AGED 30 YEARS, S/O. JOLLY, KUNJELIPARAMBU HOUSE, P.O. ELANTHIKARA, PUTHENVELIKARA P.O, ERNAKULAM DISTRICT - 683 594. 5 FRANCIS K.T. AGED 46 YEARS, KURIAPILLY HOUSE, ELANTHIKKARA P.O., PUTHENVELIKKARA, ERNAKULAM DISTRICT. 6 SIVADASAN A.R @ DASAN AGED 39 YEARS, S/O. RAMAKRISHNAN, ACHANGALAM HOUSE P.O. MUPLIYAM, THRISSUR DISTRICT. BY ADVS. SRI.G.HARIHARAN SRI.PRAVEEN.H.

RESPONDENTS:

1 STATE OF KERALA REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM - 682 031. 2 THE INSPECTOR OF POLICE VADAKKEKARA CIRCLE, VADAKKEKARA NORTH PARAVOOR, ERNAKULAM DISTRICT - 683

513. 3 THE SUB INSPECTOR OF POLICE PUTHENVELIKKARA POLICE STATION, PUTHENVELIKKARA -683 513, ERNAKULAM DISTRICT. 4 ASWATHY ALIAS VEENA AGED 24 YEARS, D/O. VINOD PUTHENVELIKKARA, ERNAKULAM DISTRICT (NOW RESIDING AT MAHILA SADANAM, CHAMBAKARA, ERNAKULAM DISTRICT - 682 304)

BY ADVS SMT.AMBIKA DEVI S, SPL.GP ATROCITIES AGAINST WOMEN & CHILDREN & WELFARE OF W & C THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON 05.07.2022, ALONG WITH CRL.A.191/2015 AND CONNECTED CASES, THE COURT ON THE SAME DAY PASSED THE FOLLOWING: CR K.VINOD CHANDRAN & C.JAYACHANDRAN,JJ -----

Crl.Appeal Nos.191 of 2015, 211 of 2015, 765 of 2015, 802 of 2015, 1286 of 2015, 449 of 2016, 783 of 2016, 955 of 2016, 1215 of 2016 & Crl.M.C 2437 of 2014 ----- Dated this the 05th day of July, 2022

JUDGMENT

Vinod Chandran, J.

Abject failure of the prosecution is the bane of criminal judicial administration and the instant case is

a classic example. A minor child was subjected to repeated sexual abuse over a period of time by a group of persons who were close acquaintances. The defence is also of consent, for reason of the child being above sixteen, a permissible legal ground, as the Indian Penal Code stood at that point of time. The Court split up the trial

of the offences, looking at Section 219 (1) of the Criminal Procedure Code (Cr.PC), with over emphasis on the period of one year, within which three offences of the same kind could be clubbed together; without paying attention to the fact that Sections 218 to 220 speaks of the offences committed by one single person

and not different accused, as also ignoring the definition of offences of the same kind as available in sub-section (2) of Section 219.

2. The accused, numbering seven, arrayed in a

single final report was charged separately of some offences and others, charged together. The offences were committed by different accused, in the course of almost two years. The Final Report of the police itself split up

the offences as committed prior to and later to 28.11.2006; the date divined by the police and not the victim. Prejudice was raised as a preliminary ground in one of the appeals, by A1 in the Final Report (F.R), on the ground that there should have been a joint trial of all the offences alleged in the F.R, of the single crime registered. However, no such application was filed under the proviso to Section 218 (1) Cr.P.C before the trial Court, at least with respect to the offences charged against him. The request was made in a Crl.M.C filed

before this Court. It is admitted that the same was withdrawn by the petitioner and then a separate Crl.M.C was filed by the very same person joining with other five accused, which is still pending before this Court and placed before us along with these appeals; which obviously has become infructuous.

3. S.218 mandates, for every distinct offence of

which any person is accused, a separate charge, tried separately; with the proviso that an accused, all the same, could make an application for joint trial which could also be permitted, if the Court opines that there would be no prejudice caused to the accused. Sub-section

(2) saves the operation of Ss.219 to 223 from the rigour

of S. 218(1). S.219 permits three offences of the same kind to be clubbed together, if the allegation is of those offences having been committed within the space of twelve months from the first to the last of such offences and S.220 any number of such offences, if the acts alleged constitute the same transaction; but again that committed by a single person.

4. Crime No.216/2008 of Puthenvelikara Police station led to the F.R filed by the C.I of Police, Vadakkekara, alleging commission of offences under Sections 366A and 376(2)(g) read with 34 IPC against seven accused. The incidents forming the basis of the

allegations; as decipherable from the original charge sheet prepared by the trial Court, were ten in number. First, that, 'for about 11 months prior to 28.11.2006', the 1st accused Rajeev (A1) repeatedly raped the prosecutrix/victim, a girl of 16 years in the house rented out by him, when the victim went to that house to watch T.V. Secondly, it was alleged that during the same period 'a day after Onam', A2 (Sinoj) and A3 (Aji) friends and acquaintance of A1 raped the victim from the very same house. The third charge was that after 'five

months of the aforesaid period, of 11 months before 28.11.2006', A4 (Lijith), friend of A1 raped the victim in the house of A1. Fourth charge was that, 'on a day after 28.11.2006', A1 kidnapped the victim in a Tempo Trax vehicle bearing Reg.No.KL-07J-3191, from the lawful guardianship of her father and took her to the house of one Chittedath Bhargavi Amma and raped her. Fifthly it was alleged that, A1 took the victim to the house of A4 and raped her on 'one of those days'. Sixthly, 'during

the same period' A4 took the victim in a car with Registration No.KL-08-AD-908, to a lodge, Mogul Palace, at Kodungallur thus kidnapping her and eventually raping her in Room No.110 of that lodge. Seventhly, A6 (Sivadasan@Dasan) kidnapped the prosecutrix 'on a day during the summer vacation of 2007' in an auto, bearing Registration No.KL-10D-5443 and took her to his house, where A2 and A6 raped her. Eighthly, 'two days prior to reopening of Schools, after the summer vacation', A6 kidnapped the victim in his auto and took her to his house, where he again committed rape on her. Ninthly, A1 took the victim to A5 (Francis@Cheechi Panchi) in a car bearing Reg No. KL07-AK-1529 to a house in Puthenvelikara Panchayath, where both of them raped her, 'on a day before the X'mas exams of 2007'. Lastly, 'a month after the above incident', A5 took the victim in the very same car, kidnapping her to a house at Elanthikkara of Puthenvelikkara Village, where he confined her and raped her repeatedly. It was also alleged that the victim, by the continued rape on her by A5, became pregnant. To bring in Section

34 of the IPC it was also alleged that the accused committed the aforesaid offences in furtherance of a common intention.

5. The learned Sessions Judge found that the ten

different transactions occurred at different times and places and hence a single charge was not maintainable under Section 219(1) (sic) of Cr.P.C. The charges were hence split up and tried as five different cases, two against the sole accused and three jointly against some of them. The said Sessions Judge framed the initial charges and two others conducted the trials, in some cases after altering the earlier charge, and passed judgments convicting some and acquitting others. We are called upon to decide the appeals against the convictions. The case originated on a single FIS and culminated with a single final report. We considered each Sessions Case, from which the appeals arise, separately but consecutively and deliver this common judgment. Though a common judgment, since separate trials were conducted, we are deciding the cases separately, on the basis of the evidence led in the separate trials. We would notice the charges levelled against the respective accused in each of the sessions cases; some of which were altered, when we consider the individual cases. A1 (Rajeev), A2 (Sinoj), A4 (Lijith) and A5 (Francis), as arrayed in the Final Report alone were convicted and the others were acquitted. There is no appeal filed against the acquittals and hence we consider only the evidence which led to the convictions.

6. Before the appeals are considered on merits, we have to consider the preliminary objections raised on the splitting up of the case and also on the charges being not specific as to the time and place or even the

approximate period in which the alleged acts were committed, which, it is argued, prejudices the accused to such an extent that they were not able to rebut the presumption under S.114A of the Evidence Act. The first objection raised is on the prejudice caused due to splitting up of the charges. The prejudice is said to be; in a joint trial even if separate sentences are imposed for separate offences, the same would run concurrently.

From the sentences imposed, it is pointed out that certain accused have been imposed with more than one life imprisonment and in such circumstance remission will have to be sought for separately in those cases. We are not convinced that any prejudice is caused for the reason above cited, since the accused merely presumes that the sentences under separate offences would be directed to be run concurrently; which is not the rule, but an exception at the discretion of the Court, in any case, not a right available to the accused; Sukumaran v. State of Kerala - 2008 (1) KLJ 535 (D.B.). Discretion is conferred on the

Court even when there are separate trials with consecutive convictions as provided in Section 427 (1) of Cr.P.C. Further, when separate life sentences are imposed, it goes without saying that the sentences would run concurrently, as is provided under Section 427 (2) of the Cr.P.C as there is only one life available to the accused. Remission and commutation again is not a right and is the discretion of the Government.

7. On a reading of S.218 to S.223, we find that the clubbing up of charges in SC No.287 of 2013 and SC

No.288 of 2013 were not perfectly in order. As we noticed, S.218 of the Code mandates separate trial of every distinct offence, subject only to the proviso which

enables an accused to make an application for joint trial, which can be permitted if the Magistrate is also of the opinion that no prejudice is caused thereby. Sub-Section (2) saves the operation of S.219 to 223 from the rigour of S.218(1). S.219 permits clubbing up of three offences of the same kind committed within the space of 12 months. Sub-Section (2) defines offences of the same

kind as those punishable with the same

offences committed in the course of the same transaction and by the same person, in a single trial. Sub-Section

(2) deals with criminal breach of trust and dishonest misappropriation of property, with which we are not concerned. Sub-Section (3) speaks of the acts alleged constituting an offence falling within two or more separate definitions of any law,

being tried together at one trial and sub-section (4) when several acts, constitute by themselves an offence and together, in combination, constitute a different offence, again being

permitted to be tried together; the sentencing being limited as provided under S.71 IPC as is clear from sub- section (5). S.221 & S.222 are not applicable in the present case.

8. What we emphasise is the application of Ss.219

& 220 being confined to a single person who is accused of a series of offences of the same kind or the series of offences being inextricably connected as to form the same

transaction. This is clear by the words employed in S.219: 'A person is accused of more offences than one of the same kind' and that employed in S.220: 'If in one series of acts connected together as to form the same transaction, more offences than one are committed by the same person'. The enabling provision for two or more persons being tried jointly is available in S.223. As applicable to the allegation of a rape and gang rape, as arising in these cases, we need only look at clause (a) to (d) of S.223. Clause (a) is with respect to persons accused of the same offence committed in the course of

the same transaction, Clause (b) deals with persons accused of an offence and those accused of abetment of, or attempt to commit such offence, Clause (c) deals with persons accused of more than one offence of the same kind, within the meaning of S.219, committed by them jointly coming within the period of 12 months and Clause

(d) speaks of persons accused of different offences

committed in the course of the same transaction. Pertinent here is the Proviso to S.223, where several persons are charged with separate offences, who do not fall within Clauses (a) to (g) of S.223. It enables a joint trial, even then; provided the accused persons file an application for joint trial and the court is satisfied that it is expedient to do so and that the accused would not be prejudiced thereby.

9. In the present appeals, the first trial was

in SC No.197 of 2011, which deals with the first instance and repeated rape committed by Rajeev on the victim; which definitely can be clubbed together since Rajeev is said to have lived in the neighbourhood of the victim for less than a year. The second in the sequence of offences

committed, related to Rajeev having raped the victim along with Sinoj and Aji again in the rented house at Padavayal, where the first incident was also alleged to have been committed. This offence was rightly split up and tried in SC No.288 of 2013, however, along with the offence of rape alleged against Lijith who was accused of committing rape on the victim in the rented premises of

Rajeev. The offence committed by Lijith was not with the knowledge of Rajeev and the same should not have been clubbed with the gang rape alleged against Rajeev and two others. Similarly, in SC No.287 of 2013, separate offences of rape, charged against five accused were tried

together, of which three were acquitted. The offence against Rajeev, A1, in that case was that he kidnapped the victim to the house of Lijith, wherein he committed rape on her; without any allegation of Lijith having abetted the same offence. Lijith was tried along with Rajeev, being accused of having abducted the victim to a hotel and committed rape on her. These were two separate instances, which should not have been clubbed together. As far as SC No.218 of 2013 is concerned, A1 & A2, Rajeev and Francis, were accused of gang rape. A3 & A4 accused of separate offences of rape on the very same victim, but acquitted, was tried along with the charge of gang rape against A1 & A2; joined together erroneously. SC No.290 of 2013, which dealt with the last instance of rape by Francis, in the sequential order as per the FIS, was correctly tried separately with the sole accused arrayed.

10. Looking at the records of SC No.287, 288 & 289

of 2013, we cannot but notice that no application was filed under the Proviso to S.223 ; nor was an allegation of prejudice raised at any point of time before the

Court which tried them. As was noticed earlier, there was a Crl.M.C. filed by Rajeev, admittedly withdrawn and another filed by five of the appellants herein, except Francis, wherein again a joint trial was sought for. The offences committed by the various accused were not in the course of the same transaction nor was there any allegation of abetment against all the accused. The offence alleged of rape and gang rape were not jointly by all of them. The offences committed, though against the same person, was not in the course of the same

transaction. Rajeev had committed rape on the victim individually, jointly with Francis and also with Sinoj and Aji, all distinct offences. Lijith is accused of twice having committed rape on the very same victim but again, neither with the knowledge nor in combination with others. Likewise Francis, after the incident of gang rape

along with Rajeev, had individually raped the victim repeatedly, is the accusation. Hence there was no joint trial possible; unless under the proviso to Section 223, at the instance of the accused.

11. The prejudice in combining distinct offences,

we reiterate, was not raised at any point of time, before commencement of trial or when trial was going on. The question of prejudice will have to be looked at along with the allegation raised of the charge alleged against the respective accused being not precise enough to put them on notice about the offences alleged. S.212 of the Cr.P.C. requires the charge to contain such particulars

of time and place of the alleged offence as are reasonably sufficient to give the accused notice of the matter with which he is charged, which does not require it to be precise as to the hour or even the day on which the offence was committed. The Hon'ble Supreme Court in Chittaranjan Das v. State of West Bengal [AIR 1963 SC 1696]; relied on by the State, held that if the charge is of rape and there is insistence on specifying the date of offence, then there could be no charge successfully laid, since ordinarily the unfortunate victim would not be able to precisely state the dates on which she was made to submit to the accused. It was held that in dealing with

the sufficiency of a charge, the Court will have to examine all the relevant facts and if it appears to the Court that having regard to them, the charge could and ought to have been framed more precisely, the Court may reach that conclusion and then enquire whether the defective charge has, resulted in any prejudice to the accused. That, in our opinion, is the reasonable course to adopt, in dealing with contentions like the one raised

by the appellant before us. Before we look at the individual charges it has to be stated that the victim, in the present appeals, was subjected to repeated rape over a period of about two years by different persons and at different places. It is difficult for the Court to expect that she would speak of the specific dates on which such atrocities were committed by each accused or in different combinations, and what is expected is only

an approximation of the period in which the various accused, made her submit to their lust.

12. S.215 of the Cr.P.C. provides that no error in

the statement of the offence or the particulars required in the charge and no omission thereof, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission and there is occasioned failure of justice. We also take note of S.464 Cr.P.C. as pointed out by the learned Special Government Pleader, with respect to the effect of omission to frame or absence of, or error in, a charge. Sub-section (1) declares that no error, omission or irregularity in the charge, including any misjoinder of charges, shall render

invalid a finding, sentence or order of a Court of competent jurisdiction unless the Appellate or Revisional Court is of the opinion that there is failure of justice occasioned thereby. The consequence of the opinion regarding failure of justice having occasioned, as provided in sub-section (2) is to order a fresh trial. The proviso also enables the higher Court, to quash the conviction if no valid charge could be preferred. 12(a). We are not persuaded in the facts of the above

case and the charges levelled, to find either that there was absolutely no scope for a valid charge to be levelled against the various appellants or a failure of justice having occasioned. We notice that the charges contain an artificial date, 28.11.2006, obviously the doing of the Police, not referred to by the victim in the FIS. It also arises from the misconception of the learned Sessions Judge of S.219. Be that as it may, we cannot, as a preliminary issue find prejudice caused to the accused, or a miscarriage of justice, in the individual trials

conducted, where the victim related the separate instances and the accused were given ample opportunity to cross-examine. In one of the cases [SC No.287 of 2013], the charge against Lijith was altered as late as in 2016 when the victim was recalled and the accused permitted to cross-examine her again. There is also a ground of prejudice caused for reason of the accused being disabled from raising the ground of consent, for reason of the presumption under Section 114A. Even if the charge was that the victim was a minor girl, at the time of the alleged commission of offence, nothing prevented the accused from challenging the age and also urging consent as an alternative plea. Further we find that the charges are reasonably clear to put the victim-girl, under 16, in three of the cases and above that, in two cases. 12(b). Subject to further discussion based on the

facts of each case, we are of the prima facie opinion

that the charges, as framed, though can be technically faulted, were reasonably sufficient as regards time and place, so as to give the accused notice of the matter with which he is charged, wherefore, there is no prejudice occasioned; much less any failure of justice. We may profitably refer to S.465 of the Code in this context. S.465(1) stipulates that no finding, sentence or

order shall be reversed by reason of any error, omission

or irregularity, unless a failure of justice has in fact been occasioned thereby. Due emphasis to the language employed, viz: 'in fact' would rule out a reversal on a mere theoretical possibility of failure of justice, as distinguished from failure of justice occasioned in fact. We immediately refer to S. 215 of the Code, which specifically deals with errors or omissions with respect to charges, where again the

expression 'in fact' is seen employed. An error or omission in a charge will not be regarded as material, unless the accused was in fact misled by such error or omission, and it has occasioned failure of justice. Coming back to S.465 (2), the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage of the proceedings in determining whether the error, omission or

irregularity had occasioned failure of justice. This requirement is not satisfied at all in the given facts. We can neither hold that the accused was in fact misled by an error or omission in the charge, nor are we convinced that a failure of justice had, in fact been occasioned.

13. We are fortified in taking this view with *Nasib Singh v. State of Punjab* (2022) 2 SCC 89. That was

a case in which the victim of rape, subsequently committed suicide and two FIRs were registered, one on the charge of rape and the other on abetment of suicide. The I.O was also implicated and was acquitted in the separate trials conducted. The High Court in an appeal by the victim's mother, directed re-trial, clubbing both the cases together. The Hon'ble Supreme Court considered the decisions from *Ukha Kolhe v. State of Maharashtra* (1964)

1 SCR 926 to *Issac v. Ronald Cherian* (2018) 2 SCC 278 and reiterated the principles regarding joint trials and separate trials, to hold so :

39. From the decisions of this Court on joint trial and separate trials, the following principles can be formulated:

(i) Section 218 provides that separate trials

shall be conducted for distinct offences alleged to be committed by a person. Sections 219-221 provide exceptions to this general rule. If a person falls under these exceptions, then a joint trial for the offences which a person is charged with may be conducted. Similarly, Under Section 223, a joint trial may be held for persons charged with different

offences if any of the clauses in the provision are separately or on a combination satisfied;

(ii) While applying the principles enunciated

in Sections 218-223 on conducting joint and separate trials, the trial court should apply a two-pronged test, namely, (i) whether conducting a joint/separate trial will prejudice the defence of the Accused; and/or (ii) whether conducting a joint/separate trial would cause judicial delay.

(iii) The possibility of conducting a joint

trial will have to be determined at the beginning of the trial and not after the trial based on the result of the trial. The Appellate Court may determine the validity of the argument that there ought to have been a separate/joint trial only based on whether the trial had prejudiced the right of Accused or the prosecutrix;

(iv) Since the provisions which engraft an

exception use the phrase 'may' with reference to conducting a joint trial, a separate trial is usually not contrary to law even if a joint trial could be conducted, unless proven to cause a miscarriage of justice; and

(v) A conviction or acquittal of the Accused

cannot be set aside on the mere ground that there was a possibility of a joint or a separate trial. To set aside the order of conviction or acquittal, it must be proved that the rights of the parties were prejudiced because of the joint or separate trial, as the case may be.

14. The considerations weighing on the Appellate Courts to order re-trial were restated thus :

29. The principles that emerge from the decisions of this Court on retrial can be formulated as under:

(i) The Appellate Court may direct a retrial only in 'exceptional' circumstances to avert a miscarriage of justice;

(ii) Mere lapses in the investigation are not sufficient to warrant a direction for retrial. Only if the lapses are so grave so as to prejudice the rights of the parties, can a retrial be directed;

(iii) A determination of whether a 'shoddy' investigation/trial has prejudiced the party, must be based on the facts of each case pursuant to a thorough reading of the evidence;

(iv) It is not sufficient if the

Accused/prosecution makes a facial argument that there has been a miscarriage of justice warranting a retrial. It is incumbent on the Appellant Court directing a retrial to provide a reasoned order on the nature of the miscarriage of justice caused with reference to the evidence and investigatory process;

(v) If a matter is directed for re-trial, the evidence and record of the previous trial is completely wiped out; and

(vi) The following are some instances, not intended to be exhaustive, of when the Court could

order a retrial on the ground of miscarriage of

justice: a) The trial court has proceeded with the trial in the absence of jurisdiction; b) The trial has been vitiated by an illegality or irregularity based on a misconception of the nature of the proceedings; and c) The prosecutor has been disabled or prevented from adducing evidence as regards the nature of the charge, resulting in the trial being rendered a farce, sham or charade.

While observing that the effect of an order of retrial

would ordinarily be wiping out the evidence

exigencies bearing on facilitating the ends of justice.

15. Apposite also would be reference to paragraphs 43 & 44 :

43. In deciding upon the correctness of the

judgment of the High Court in the present

case, it is necessary to emphasize that the power to order a retrial has been consistently

held to be of an exceptional nature beginning

with the formulation of the principles by the Constitution Bench in *Ukha Kolhe* (supra) and the resultant formulation, more recently, by the two judge Bench in *Ajay Kumar Ghoshal* (supra). Directing a joint trial is not mandatory but lies within the discretion of the Court Under Section 223 of the Code of Criminal Procedure. Clause (d) of Section 223 permits persons Accused of different offences committed in the course of the same transaction to be charged and tried together. While explaining the ambit of the corresponding provision of the Code of 1898, this Court in *Chandra Bhal* (supra) has emphatically ruled that:

(i) The statutory provision neither renders a joint trial imperative nor does it bar or prohibit separate trials;

(ii) The matter is required to be determined by the trial court at the beginning of the trial and it is not to be determined on the basis of the result of the trial; and

(iii) Where the issue is raised in the court of appeal, clear prejudice must be established as having been caused as a result of the separate trial.

44. A formulation similar to that in *Chandra*

Bhal finds expression in the two judge Bench decision in Bhooraji (supra) where the Court emphasized that a de novo trial should be a matter of last resort only when such a course of action becomes "so desperate and indisputable". Moreover, this Court emphasized that the Appellate Court would do so in an extreme exigency to avert a failure of justice. While exercising its power as a Court of appeal Under Section 386 Code of Criminal Procedure, the Court has to be conscious of the fundamental principle that the power to order a de novo trial or "that the Accused be retried or committed for trial" is of an exceptional nature which is intended to prevent the miscarriage of justice. The same principle is in fact embodied in Section 465(1) of the Code of Criminal Procedure.

The 'prejudice occasioned to accused' and 'miscarriage of justice' are not empty or hollow refrains but must be demonstrably evident from the records and clearly enumerated by the higher courts while resorting to the 'desperate and indisputable course of action' (sic) of a retrial. Referring to State of A.P v. Cheemalapati Ganeswara Rao AIR 1963 SC 1850 the observation that

merely because there is a misjoinder of parties an order

of conviction cannot be set aside, unless there is caused a failure of justice, was approvingly noted.

16. We will deal with the individual charges

in the respective places to better understand whether it put the accused to reasonably sufficient notice of the charges alleged or on the contrary, it put them to any prejudice and resulted in failure of justice. None of the learned Counsel canvassed for a retrial at this distance of time; which is the only alternative since we find no reason to quash the charges. If we find a miscarriage of justice or real prejudice that is the only course open. In the cited decision of Nasib Singh (supra), on the joint retrial ordered, after seven years from the date of incident, it was held, this would not advance the cause of justice and would only result in serious miscarriage of justice. Here the incidents occurred in the years 2006-2008 and

seven years have further elapsed from the date of judgment, from which later date the accused are serving their sentences.

17. A teen aged girl, who had discontinued her studies after failing thrice to clear the 7th standard, is the victim. A Panchayath Member residing in the neighbourhood was informed of the minor child being pregnant, by the child's uncle. She, along with some

other Members of the Panchayath, visited the child's house and on seeing her physical condition, suspected pregnancy. They made a complaint before the police upon which the police went to the child's house and then took her to the Police Station to record the FIS. In the FIS, the child spoke of having studied up to the 7th standard

and having been residing with her parents, younger sibling and maternal grandmother. Rajeev (A1) was her neighbour who had a lorry which was parked in the open plot nearby. She used to frequent the open plot with her friends and thus struck up an acquaintance with A1. Since her house did not have television she used to go to the nearby house of one Raju and that of Rajeev, to watch

T.V. Rajeev residing with his family, was often left al

examinations, when she was studying in the 7th standard for the second time, when Rajeev's wife was absent, she went to his house at around 10 a.m to watch T.V. While she was watching T.V, A1 invited her inside the room and she hesitated. Rajeev persisted and when she went in, he made her sit on the cot. Rajeev then forcefully made her

lie on the cot and had intercourse with her. Her statement was also that after the incident, she went home and had lunch but did not disclose the incident for fear. She also alleged that after that, many times Rajeev had sexual intercourse with her in the same house and another house, to which he shifted as also in the house of one Lijith, who is Rajeev's friend and driver. The second specific incident alleged was in the rented house of Rajeev, two years back, after Onam. When she reached Rajeev's house she found two of his friends also present there. Rajeev invited her inside the room and had sexual

intercourse, when the others were watching T.V. When Rajeev left, one of the friends came into the room and

caught hold of her. Though she resisted, she was forcefully made to lie down on the bed and he raped her. Later, the other friend also came inside the room and raped her. She did not disclose this incident also to anyone at home since Rajeev prohibited her from so doing. Five to six months later Lijith, friend of Rajeev was at

the house of Rajeev, when she went there. Lijith threatened disclosure of her relationship with Rajeev and raped her at Rajeev's house. She also spoke of herself

having resisted the advances of Lijith and made a hue and cry, to no avail. After the incident, Lijith warned her against disclosing his actions to Rajeev. Rajeev, then shifted his residence to Poopathy, after which, on a day Lijith came to Raju's house in a bike and asked her to be ready on the next day. He also threatened that if she does not come, he would disclose her relationships to everyone. On the next day, by around 10'o clock Lijith came in a white car which was driven by another, in which she was taken to Kodungallur. Lijith took a room in a hotel and had sexual intercourse with her. Again, before the Christmas exams, Rajeev called her in Raju's mobile phone and asked her to be ready by 1.30, on the next day. On the next day she was taken to an uninhabited house in the possession of Francis and both Francis and Rajeev had sexual intercourse with her. She was again raped in the same house by Francis three or four times; on the threat of disclosure of her frequent trysts with Rajeev, if she does not succumb to his desires. She also named the two friends of Rajeev who raped her in his house as Aji and Sinoj. The Section 164 statement however was a set of broad allegations without any specifics; which we would refer from, when discussing the individual cases, as to the specific instance dealt with. We are dealing with the individual trials in the sequence in which the victim alleged the different instances having occurred. Though

there is no precise time frame available, there is sufficient approximation in every case.

17. The facts in at least certain cases are

intermingled and the victim is the very same person. We have to keep in mind that the adjudication can only be on the basis of the evidence led in each case. In this context, we refer to State of Kerala v. Joseph 2013 (1) KLT 546 wherein, the Hon'ble Supreme Court was considering an appeal arising from a common judgment in several appeals arising from two independent trials. In

the appeals, the judgments impugned were from two Sessions Cases, one of which convicted 35 accused and the other, the sole accused. The victim was the very same person and this Court, taking into account the evidence adduced in the case against the sole accused, found the victim to be a willing partner in the alleged crimes of rape and acquitted not only the sole accused but also all those convicted in the other case. The Hon'ble Supreme Court found that the High Court failed to appreciate that merely because the victim was a willing partner in one of

the cases, it cannot necessarily follow

depend on the facts of each case was the finding. What applies to consent, would necessarily apply to the other

facts alleged by the prosecution to constitute the

offence, which has to be established, beyond all reasonable doubt, in each individual case. The evidence led in one case though may prove the offence alleged in the other case, it cannot be relied on to convict the accused. The bottom line is that the acquittal in one case, cannot persuade us to acquit the accused in all the cases and the conviction entered in one, should not cloud our minds while appreciating the evidence led in another case.

I. Criminal Appeal 211/2015 [SC No.197/2011] Rajeev - Appellant State of Kerala - Respondent Rajeev is the sole accused in this case and the charge against him is that '11 months prior to 28.11.2006' he had repeatedly raped the minor girl of 16 years inside the rented house owned by Kalakkasseril Krishnan; earliest of the alleged incidents of rape being on a day before Onam Exams at 10 a.m., thus committing an offence punishable under S.376 IPC. The trial Court convicted the

accused and sentenced him to suffer rigorous imprisonment for ten years, a fine of Rs.1 lakh and in default, undergo RI for two more years under S.376(1) IPC. The conviction was for the first alleged incident and the repeated acts were not reckoned

2. Learned Counsel for the appellant, Ms. Anjali G.A., first pointed out that the date, 28.11.2006, specifically made mention of in the charge-sheet, has

absolutely no relevance and even the victim never mentioned the said date. There is no date or even year mentioned by the victim and the period and time specified in the FIS is ambiguous. In the FIS, the first instance is said to have occurred before Onam Exams, when she was in the 7th standard, the second time, ie: in 2006; but in

Court PW1 deposed that it was after Onam

specified, it is not discernible as to whether the child has passed 16 years of age. There are no details stated in S.164 statement and she says she does not remember the date. This offers no corroboration to the case in the FIS or in the deposition before Court. The father of the child and the Uncle who is said to have complained to PW2, who is a Panchayath Member, were not examined. There is unexplained delay in reporting the alleged crime. The mother, PW3, specifically stated that she became aware of the pregnancy of her child in the fourth month. But when the child was medically examined by the Doctor, at the instance of the Police, she was eight months pregnant. The accused is said to have called Raju, a neighbour, over the telephone, but there was no attempt made to trace the calls by the Investigating Officers [I.Os], PW14 & PW15. PW15 also did not conduct any DNA test to ascertain the parentage of the child. The learned Counsel would also point out the discrepancy of the deposition of PW1 and that reflected from Ext.P6 scene plan and Ext.P8 scene mahazar. On the discrepancy in the deposition, the learned Counsel refers to Ganesan v. State [2020 (10) SCC 573], to urge that the testimony of the victim in this case cannot be considered to be, of that sterling quality to form the sole basis of conviction.

3. Smt.S.Ambikadevi, learned Special Government

Pleader [Atrocities against Women and Children and Welfare of Women and Children], at the outset, points out that there is no ambiguity in the FIS and the deposition. The FIS clearly states the day to be before Onam, the festival, and in Court the victim said that it was after the Onam Exams. Onam vacation starts after the Exams and the festival day falls, three days into the vacation. The FIS and S.164 statements were taken at an advanced stage of pregnancy, that too from a minor girl aged 16 years.

The minor discrepancies does not put to peril the prosecution case and in any event, S.164 statement is not

substantive evidence, unless the contradictions and omissions are marked through the witness. It is asserted that there is no consent discernible in the above case and in any event the incident alleged is in the year 2006 when the child was below 16 years of age. S.114A of the Evidence Act is also relied on to argue that the burden to prove consent shifts to the accused; if at all the child is above 16 years of age. As far as the call

details are concerned, the service provider only maintains it for one year, after which no records will be available. The complaint here was made after two years. On the question of delay it is argued that it is natural that the family of the victim would attempt to hide the atrocity committed on the girl; especially to avoid disrepute to the family. In the present case only when the people's representatives raked up the issue, there was a formal complaint given. The delay is inconsequential.

4. The charge in the above case is of repeated rape on the victim, a minor girl of 16 years, inside the

rented house of one Kalakkassery Krishnan in Puthenvelikkara Village near Thondal Bridge, the first of which incident occurred on a day before Onam Exams at 10.00 a.m. There is reasonable and sufficient notice of the offence of the first incident of rape which occurred in the year 2006 before Onam Examinations at 10.00 a.m. True, if the first portion of the charge 'since about 11 months prior to 28.11.2006', alone is read, the first incident should be in the beginning of the year;

but there is sufficient clarity by mentioning the same having occurred before Onam, which festival falls in August- September of every year. The first incident has also come out in the FIS as having occurred when the victim was studying in the 7th Standard for the second time and on a day before the Onam Exams. In the deposition before Court in 2014, almost 8 years after the incident, the victim stated that it was in the year 2007, after the Onam

Exams. The same was clarified in re-examination, as having occurred in the year 2006. The re-examination was 8 months after the first examination. The accused was given a chance to cross examine the witness and the only question was with respect to the accused having not specifically stated the year to the police.

5. There was a doubt with respect to the period,

as occurred to this Court, insofar as Ext.P7 extract of Admission Register is concerned. The said Certificate was produced through the Headmaster, PW9 to prove the date of birth of the victim as 12.05.1992. Obviously the date entered in the School is not correct going by Ext.P13 extract of the Birth Register issued by the Secretary of the local body. Be that as it may, Ext.P7 indicates the

child having been admitted to the 5th Standard on 29.05.2002. If that be so, the child would have been studying in the 7th Standard for the first time in 2004-2005 and then for the second time, having failed, in 2005-2006. However, according to the Certificate, she discontinued studies on 09.06.2008 and she has not passed

the 7th Standard, as is clear from Ext.P7. PW3, the mother, in cross-examination said that when PW1 failed 2-3 times, she stopped going to School. What comes out from the testimonies and the extract produced, is that PW1 had been studying in the 7th Standard for three academic years starting from 2004 to 2007. The minor discrepancy does not commend us to rubbish the testimony of rape, especially when it is natural that PW1 would have committed a mistake, in so far as she having studied in the 7th Standard for three years. The attendant

circumstances would clearly indicate that the victim child was raped for the first time during the Onam in the year 2006. The mere fact that the victim stated in the

FIS that it was during Onam of the year, when she was studying for the second time in the seventh standard, that the first instance of rape occurred, cannot result in eschewing the entire testimony. The child studied in the seventh standard for three academic years and it cannot be expected that after discontinuing studies, she would clearly remember the sequential year precisely.

6. It has to be noticed that the FIS was on

18.07.2008 and contemporaneous to the complaint, a medical examination was carried out, of the victim, the certificate of which was produced as Ext.P4 marked and proved by PW6, the Doctor. In Ext.P4, the history was noted as continuous rape for a period of one and half years, by five named accused, of which the first was the accused in this case. The date of birth of the victim was stated to be 12.07.1992, by the victim and also as per

the school records. Ext.P13 attested copy of birth register produced by the Secretary of the Local Body, PW16, indicates the date of birth to be 12.07.1991. Hence, clearly the victim was below 16 years, during the period of Onam of the year 2006, when the allegation arose of the first molestation by A1. The mentioning of the year 2007 in chief examination, obviously is a mistake which is not a discrepancy commending us to totally discard the evidence of the victim.

7. PW1's testimony goes on to say that, after

breakfast on the crucial day, she went to the house of the accused to watch television. The accused called her inside a room and first she hesitated, but later complied and she was asked to sit down on the cot. She did not comply and then the accused forcefully made her sit. She was wearing a frock and blouse and also undergarments.

She categorically spoke of A1 having had sexual intercourse with her, once, after which she went home. She also testified that she did not disclose the incident to her family members since she was threatened by the accused, that, if she did, she would be killed. In the FIS itself, the victim had categorically stated that she was forced to sit down in the cot and the accused had sexual intercourse with her; and

consent in any case is irrelevant for reason of the proved age.

8. In the FIS and before Court, she also spoke of the accused and his friends having repeatedly molested her physically and that Francis was the last person who

abused her physically. We find the testimony to be credible for acceptance as a valid account and according to us, PW1 can be believed to find the offence of rape having been committed on her by the accused inside his rented house. PW17 is the owner of the house as mentioned in the charge, but who came to live there only in the

year 2007. He merely stated that there was somebody staying for rent before he started residing there. Ext.P6 scene plan produced by the prosecution, is the house of

one Jomon, a serious lapse on the part of the prosecution. But, Ext.P6 mahazar indicates the scene of occurrence as pointed out by the victim. The mahazar was attested by PW10 who is also the victim's uncle. He was acquainted with the accused, who, he testified, as having resided in that rented house near that of the victim. He

affirmed his presence when the police inspected the premises and also confirmed having put his signature on Ext.P8 mahazar. Further, affirmation of the residence of the accused in the house neighbouring to that of PW1, is available from the evidence of PW3, mother of the victim PW4, another neighbour and PW5, brother of the victim.

9. PW3 affirmed the accused to be a nearby resident. When her daughter was found to be pregnant, she

queried her. PW1 told PW3 that the pregnancy was by reason of Francis and the accused herein had first laid his hands on her. PW4 is the neighbour who confirmed that the victim used to come to his house and the house of the accused to watch T.V. He also spoke of the accused herein having resided two houses away from his own house. In cross examination, though he did not remember

correctly, he said that it was during 2006 that the accused lived in the neighbourhood. In chief examination, he also deposed that he had seen the victim going to the house of the accused herein.

10. Ext.P4 is the medical certificate issued by

PW6 the Doctor who examined the victim on the directions of the police. As was noticed, the repeated molestation by 5 persons, including the accused herein, was recorded, as available in the history narrated by the victim. Ext.P2, Section 164 statement also indicates that PW1 used to visit the house of the accused to watch T.V, and on a day when his wife was not present, the accused first molested the victim. Ext.P5 is the potency certificate of the accused, as proved by PW7 Doctor. There is considerable delay in making the complaint, but according to us, quite natural in the circumstances. The testimonies of the various witnesses indicate that both the parents went for work and only the grandmother used to be in the house during daytime. The child, who was studying in the 7th standard, had failed once or twice and was below 16 years of age. The child having been impregnated, the family hid the said fact and the child victim also discontinued her studies. Considering the overall circumstances of the family, the father employed as a Driver and the mother a Coolie Worker; the impecunious circumstances further evident from the fact that the house did not have a television or even a power connection; the delay obviously is by reason of the family trying to avoid societal gaze and public humiliation.

11. The prosecution also has a credible version as

to how the offences came to light. PW3, the mother, having detected the pregnancy confided in her brother, one Ambujakshan, who expired before the trial. PW2, a Panchayath Member, testified that the said Ambujakshan told her about the suspected pregnancy of PW1. She along with two others went to the house of PW1 and confirmed the suspicion especially, on seeing the noticeable bulge on the belly of PW1. The Panchayath Members together made a complaint to the Sub Inspector of Police; rightly so, since the girl child was a minor. This led to the Sub Inspector visiting the house of PW1 and taking her to the Police Station, to put the law into motion by recording an FIS and registering the FIR as has been testified

by PW12, the Sub Inspector.

12. PW14 & PW15 were the I.Os. The call records

of the telephone admittedly was not obtained; impossible as stated by the Special GP since the service providers maintain the same, only for one year. PW15 admitted that no DNA profiling was done; again inconsequential since admittedly the delivery was in the year 2008 and the incident complained of in the present case was of the year 2006. We do not find anything to upset the findings of the Trial Court, both on the conviction as also the

sentence imposed. The principle, of conviction being possible on the sole testimony of the prosecutrix, if it is absolutely trustworthy and unblemished and is of a sterling quality, as held in Ganesan (supra), is squarely applicable in this case. The sentence imposed as seen from the judgment is only under S.376(1), for conviction of the offence of rape in 2006 during the Onam period. The offence comes out clearly from the testimony of the victim and the attendant circumstances are testified by

the other witnesses offering corroboration. The prosecution failed in not having elicited the repeated instances of rape more elaborately; despite a charge having been laid on that count, but that cannot upset the conviction entered of the first rape alleged and proved. We reject the appeal and uphold the conviction and sentence imposed on the accused. II. Criminal Appeal Nos. 449, 783 & 955 of 2016 [SC No.288/2013]

Rajeev

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Appellant [Crl.Appeal No.449 of 2016]

In SC No.288/2013, there were four accused, of whom A3, though present in Court in the initial stages of trial, later absconded. Subsequently he was tried and acquitted of the charges. The three appellants herein were charged in the above Sessions Case on two distinct instances of rape; the first a gang rape as alleged against A1 & A2, along with A3 and a later incident of rape by A4; on the very same victim. The charge on which the accused faced trial are as follows: A1 was accused individually of rape and gang rape along with A2 & A3. Separate charges were framed against A1 and A2 & A3 together, for the same instance of gang

rape. As against

A1, firstly it was alleged that on a house and from the lawful guardianship of her father to

the house of one Chittedath Bhargavi Amma in Poyya Panchayath, Poyya Village with the intention of having illicit intercourse with her, punishable under S.366A and subsequent rape having been committed in the said house, punishable under S.376 IPC. The third charge against A1 was altered and on 27.10.2014 he was charged with having gang raped CW1, along with A2 & A3, a girl aged below 16 years, in his rented premises, 'on a day after Onam in 2006, within 11 months of 28.11.2006'. A2 & A3 on the same day, was separately charged of having gang raped the victim along with A1 from the rented house of A1, 'on a day after Onam in 2006 during a period of 11 months since 28.11.2006'.

2. A4, on the same day, was charged with kidnapping the victim, a girl below 16 years of age to the house of A1 with the intention of having sexual intercourse with her punishable under S.366A and secondly

to have raped her in that house, punishable under S.376(2)(g). The same was altered on 11.02.2016 and he was charged with having raped the victim in the house of A1 on a day, after Onam in 2006, within 11 months of 28.11.2006.

3. Sri.Levaraj, learned Counsel for A1,

argued that the charge of gang rape alleged against A1, A2 & A3 ought not to have been tried along with the offence of rape alleged against A4, which is a distinct offence. This according to him violates the mandate under S.218 Cr.P.C. It is also pointed out that the first two charges against A1 though deposed by PW1, has not been dealt with at all by the Sessions Judge. There is no conviction entered nor a sentence imposed and the State

has not chosen to file an appeal. On the third charge against A1 and that against A2 & A3, it is contended that though the allegations arise from the same incident, which alone could make it a gang rape, there is clear ambiguity in the period

specified in the respective charges, which has caused serious prejudice to the accused since it is not clear whether the victim was above the consenting age or not, when the alleged act took place. The deposition of PW1 is read to argue that the victim has no definite case and prevaricates

considerably before Court. The evidence of PW11, the Doctor who examined the victim, is relied on to contend that her contemporaneous statement on 19.07.2008 was that A1 to A4 and Francis molested her for one and a half years, which would result in further ambiguity as far as the time in which the alleged act is carried out.

4. Sri.P.B.Ajoy, learned Counsel appearing for

A2, would argue that in the S.164 statement the version of the victim was that A1 summoned her to his house and she willingly went there. It is argued that but for a bland statement of the victim having complied due to fear; it is not stated as to what created the fear. There is no injury or misconception, which would put to peril a claim of consent; which in any event could not have been established by the accused for reason of the ambiguity in the period in which the alleged offence was committed. There is also no clarity as to the place of occurrence and Ext.P7 scene plan does not indicate a hall, in which A2 & A3 were watching T.V, as deposed by the victim. The ambiguity in time is further stressed from that stated in the FIS, the S.164 statement, the history noted in the

Certificate issued by the Doctor and the deposition before Court.

5. It is also argued that the overall conduct of

the victim implies a consent and the material contradictions regarding the location, the time and even the incident itself, makes it mandatory that the Court look for corroboration as has been held in *Krishan Kumar Malik v. State of Haryana* [(2011) 7 SCC 130]. Asserting consent, absence of any injury is pointed out and the learned Counsel relies on *Rameshwar v. State of Rajasthan*

[AIR 1952 SC 54]. It is contended that there was unexplained delay in reporting the matter especially when

the mother, PW3, deposed that she was aware of the pregnancy from the fourth month. Even PW2, the Panchayat Member, did not speak of any complaint having been raised by the victim or their family. PW4 & PW6 neighbours did not speak of any incriminating circumstance, from which an inference of rape on the victim can be ferreted out. It is also argued that the grandmother, who was residing in the victim's house, the brother of the victim, the wife of the neighbour (PW4) whose house the victim used to frequent and the Doctor who had seen the victim first, were never examined before Court.

6. The locality was thickly populated and had many houses in close proximity, but there was no local person examined to speak on either, the antecedents of the accused or the victim. The learned Counsel would conclude

that if conviction is upheld, then there may be a reduction in sentence especially since A2 is a first offender, has aged parents, and two children living in impecunious circumstances; his wife having left him. The appellant was 25 years old and has spent almost seven years in jail and there is scope for reformation. S.212

Cr.P.C. is also read over to emphasise that the particulars of time and place of the alleged offence should be reasonably sufficient, to give the accused notice of the matter with which he is charged. The said ingredients being quite ambiguous in the charge, the accused was seriously prejudiced.

7. Sri.Anoop, learned Counsel appearing for the

4th respondent, emphasises the improvements and embellishments made by the victim at every stage and also points out the contradictions. It is argued that the version of the victim is not credible and the charge fails for reason of there being only an approximate date when the alleged crime took place, based on which no conviction can be entered. In the FIS, the allegation was

that it was on the second instance that rape was

committed on the victim by A4. While adopting the argument regarding prejudice caused by combining distinct charges, it is also argued that consent can be

inferred from the overall conduct of the victim. While initially the statement of the victim was that, when A1 called, she went with him, later she alleged forceful intercourse. The prior statements and the deposition of PW1 reveals excessive tutoring and the first allegation of a mere physical relationship was later changed to a forceful rape. The victim herself was not clear about her date of birth. On mitigation it is argued that the appellant is a young man, a bachelor, a first offender, who has only his mother as family. His mother is aged and unable to look after herself.

8. Smt.S.Ambikadevi, learned Special Government

Pleader, concedes that though there is accusation of offences under S.366A and 376 against A1, there is no discussion in the judgment and hence in the event of no appeal having been filed, the same can be ignored.

However, the charges against A1 & A3 of gang rape survives. Though A1, A2 and A3 were separately charged, the separate charges clearly indicates the three accused having committed the offence together, thus attracting the offence under S.376(2)(g). The allegation was clearly stated in the FIS itself and both the friends of A1 were specifically named. The gang rape stands established and it is very evident that there was no consent as spoken of

by the victim. The sequence in which the rape was committed is not significant and even if there is some mistake occurred, that was corrected in re-examination. The testimony of the victim is reliable, credible and trustworthy and so is the offence spoken of against A4. PW1 is a victim of rape and not an accomplice. The child was in an advanced stage of pregnancy when S.164 was given. The trauma, the child was put through in having to repeat the details of the offence before the Police and then the Magistrate is emphasised. It is also pointed out that the examination in Court, was eight years after the incident and there can be no exactitude regarding the time and place. As far as no injury having been caused, reliance is placed on *State of Himachal Pradesh v. Manga Singh* [(2019) 16 SCC 759]. There is no discrepancy in the

medical certificate and five persons are specifically named. Even though DNA profiling was not done, that is not imperative to find rape, when rape is proved from the testimony of the victim. The phone calls were not traced because of the delay in the complaint being raised; which delay is justified considering the social strata of the family of the victim. The approximate time of the alleged offence is clear from the charge and reliance is placed on Chittaranjan Das [supra]. Reliance is also placed on 1980 KHC 754 Rafeeq vs. State of Kerala.

9. The first two charges of A1 having committed kidnapping of the victim and having raped her in the house of one Chittedath Bhargavi Amma, have not been discussed by the trial Court at all and there is no appeal against that aspect. A mishap created by the Court; which was never attempted to be cured with an appeal, by the Prosecution. There is no question of

consideration of evidence on the said charges. The Offence alleged against A1, A2 and A3, of gang rape in the above case is distinct from that alleged against A4, which is of rape. There is no prejudice caused to the accused by clubbing the above two incidents and there is also no miscarriage of justice. The victim spoke of the two incidents separately and the accused were also permitted to cross-examine the victim on both these aspects. When the charge against A4 was altered after the examination of the witnesses, the victim was recalled and A4 permitted to cross-examine her on that count.

10. The learned Counsel would however point out

that, though from the same incident, there are two different charges against A1 and then A2 & A3 together. In so far as the charge against A1, the incident is said to be within 11 months of 28.11.2006 while as against A2 and A3, it is alleged to be during a period of 11 months since 28.11.2006. We have already found that the date 28.11.2006 was an error, which does not however result in

any ambiguity. Despite distinct charges having been framed, it is necessarily of gang rape of a girl below 16 years of age, after the Onam festival in 2006, in the

subsequent 11 months from 28.11.2006. Onam falls on August-September of every year and the child with date of birth of 12.07.1991 was below 16 years in 2006. As proved in evidence, by Ext.P21, marked through PW22, the date of birth of the victim is 12.07.1991. There is sufficient notice of the charge on which the accused 1 to 3 were accused of and we find no prejudice occasioned on that count. The plea of consent cannot be raised.

11. Even going by the FIS, the specific

accusation made by the victim is that, two years back, on a day after Onam, when she went to A1's house, two of his friends were also present there. While they were watching T.V, A1 invited her into the room and caught hold of her. Despite her protest, she was forcefully made to lie down on the cot and submit herself to sexual intercourse. It was also her version that after A1, both his friends had sexual intercourse with her and A1 threatened her not to disclose the same. The FIS was on 18.07.2008 and Onam, two years back, could only have been in the year 2006.

12. The victim's testimony as PW1, was that she was residing in a house which was not electrified or

having a television. Her parents were employed as a driver and as a daily wage employee in a tile factory. The parents go for work in the morning and return only in the evening at 6'o clock. She used to frequently visit the neighbouring house of A1, to watch T.V. She struck up an acquaintance with A1 at the playground used by her; also used by A1 as a parking ground of his lorry. One month after A1 started residing there, his wife and son joined him; who used to be regularly away in their native

place at Trivandrum. In the year 2006, after Onam, according to her, the incident of gang rape occurred, which she deposed in tandem with that stated in the FIS. She identified all the accused and even in the FIS, in the closing paragraph she had specifically named the two persons who raped her on that day in A1's house.

13. The medical certificate, Ext.P9, on examination of the victim showed the history to be of repeated rape for about one and half years, by five named

persons. A1 to A3 were specifically named in that certificate. PW11, the Doctor who examined the victim proved the certificate and also spoke of the history specifically naming the three persons who gang raped the child victim in the year 2006. The learned counsel for the appellants sought to discredit the testimony of the victim on the ground that the sequence in which she was raped was not correctly stated by her. The testimony, in the year 2015, is of an incident which occurred in the year 2006. We do not find any reason to find that, to be

a grave inconsistency. The specific deposition of A1 having first sexually assaulted her followed by two friends of his can be accepted to find the victim having been gang raped by three accused; the two convicted having been identified. The absence of injury is inconsequential, considering the time elapsed from the last act and the medical examination.

14. PW2, the Panchayat Member along with two

others visited the house of the victim and then raised a complaint with the S.I of Police, which complaint was produced as Ext.P3. As far as the S.164 statement is concerned, the victim had spoken of the incident where she was raped by A1 and two of his friends, without her consent; that, in any event being immaterial for her age. PW3 is the mother who confirmed the version of PW1, that both parents would be absent from their residence during

day time; being away at work. She deposed that her child's date of birth was 12.07.1991 and that their house did not have power connection or television. She also confirmed that PW1 used to visit the neighbouring house of Raju and A1 to watch TV. She came to know of PW1's pregnancy in the June of 2008 when she started vomiting. She was taken to a Government Hospital at Puthenvelikkara

where the Doctor examined her and found her to be pregnant. True, no enquiry was conducted in that direction by the Police and as in the other cases, it was also argued that no DNA profiling was done. DNA profiling is not very relevant to prove

the alleged rape, for the incident of 2006, which was not the cause of the child birth in 2008.

15. We cannot but find, that the delay is

irrelevant considering the impecunious circumstances of the family and also the conduct being quite natural to avoid societal gaze and shame. In the present case, PW3 the mother has also come out with a case that Francis, one of the alleged rapists owned up the pregnancy and agreed to do the needful; which also might have contributed to the delay. PW3 also spoke of the manner in which the complaint was made, after the visit of PW2 and others to their house. PW4, their neighbour, Raju, deposed that A1 was staying in a neighbouring house and both PW1 and her brother used to go to that house to watch T.V. PW5 is the uncle of PW3 who attested the scene mahazar of the house of A1, Ext.P4, as pointed out by the victim. PW6 another neighbour also spoke of both PW1 and A1 having resided in neighbouring houses and the former having regularly visited the house of A1 and a nearby house.

16. Ext.P7 site plan was produced by PW9. The learned counsel based on the site plan argued that there is no hall with a T.V as seen from the plan. We have to notice that when the plan was prepared, A1 was not residing there. Even according to PW4, the neighbour, A1 was residing in the said house only for a period of less

than one year, in 2006; when the incident allegedly occurred. The site plan was prepared in the year 2009 and it clearly shows two rooms with beds. Merely because the site plan prepared in the year 2009 shows two bedrooms, it cannot be assumed that the testimony of the victim regarding the scene of occurrence is not credible. One of the bed rooms in all probability was used as a T.V room when A1 was residing there.

17. We already dealt with the evidence of the

Doctor who examined the victim, PW11, and the certificate produced as Ext.P9. The alleged perpetrators of the crime were tested for potency; A1 by PW12

(Ext.P10) and A2 by PW13 (Ext.P11). PW16 is the Sub Inspector who registered the FIR and put the law into motion and PW21 was the I.O who enquired into the offences alleged against A1 to A3. The evidence led proves the gang rape on the victim by A1 and A2 and we find the testimony of the victim to be reliable. There is no discrepancy in the circumstances as testified by the various witnesses, led in trial, by the prosecution. Considering the totality of the evidence, with special emphasis on the sterling testimony of the victim, we are of the opinion that the gang rape on the child stands proved and we uphold the conviction and the sentence imposed on both A1 and A3.

18. CrI. Appeal No.955/2016 is filed by Lijith, A4 in this case. The allegation against him is of rape of the child victim in the house of A1. In the testimony of

PW1, after deposing on the gang rape, PW1 deposed that 5 to 6 months later to the incident of gang rape, in March 2007, A4 raped her in A1's house. PW1 had gone to the house of A1 in the belief that his wife was available there. However, A1 and his wife were not available but A4 was present in the house. On seeing PW1, A4 wanted her in

the same way A1 ravished her. She protested but he forcefully pushed her into the room and closed the room. She was made to lie down on the cot and her dress was removed and then she was raped. Though it was argued that

A4 was shown to the victim by the Police, she specifically stated in cross examination that she named the person to the police when making her statement. The identification cannot be doubted since the testimony of the victim is to the effect that she knew A4, from his close acquaintance with A1 who had employed A4 as his driver. The medical certificate also in the narration of history had the name of A4 recorded.

19. As we noticed earlier, when the charge

against A4 was altered in the year 2016, the witness was recalled and cross examined. In cross examination, though she admitted that for the first time she spoke of the molestation in March 2007, before Court, she immediately corrected

herself and said that she spoke of the same to the police. In fact to a specific question, she affirmed that she was raped even before the incident in which A4 raped her. She also specifically spoke of three persons having raped her prior to the incident alleged against A4 in the above case. When we look at the sequence of the

events as consistently spoken of by PW1, the three persons are Rajeev, Shinoj and Aji. The rape complained of by PW1, as against A4 is clearly established by the credible evidence of the child-victim.

20. Krishan Kumar Malik (supra) was a case in

which the allegation was of gang rape by six persons after forceful abduction of the victim from her relatives house and the accusation was also of some of the accused having fingered her genitals and bitten her cheeks. The Court found that the number of persons involved in the abduction and subsequent rape was not ascertained, the accused were not named in the FIR, no injuries detected except the bite marks, the victim failed to identify the crime scene and the accused being shown to the victim

before dock identification; all together

matter of this case, were spoken of in the FIS and the accused named, which names were also revealed before the Doctor who examined the victim. The victim identified the crime scene, a neighbouring house and all the accused were persons of the locality, very well known to the victim. As for injury, but for forceful laying down on the cot and removal of dress, there is no assault made on the child, except that of sexual molestation. The possibility of any injury in the genitals being detected on examination after two years, is remote, since the allegation is of repeated molestation for about two years.

21. Here, the ratio decidendi in Manga Singh (supra) is more appropriate that, '..corroboration is not a sine qua non for conviction in a rape case and if evidence of victim does not suffer from any basic

infirmity, probabilities factor does not render it unworthy of credence'. It was also held that the absence of injuries on private parts are to be tested on the

facts and circumstances of each case. Rameshwar (supra)

relied on by the accused finds corroboration of victim's testimony in rape cases, to be not imperative. On the other hand the decision, expresses a caution that it is only a rule of prudence which should underlie the appreciation of the testimony, and even when there is corroboration sought, it need not be in all material particulars and it would be sufficient if there is some evidence, from an independent source making the complainants evidence probable.

22. We find no mitigation possible considering

the tender age of the child subjected to rape. We do not find any reason to upset the findings of the trial Court and fully uphold the conviction and sentence passed. Crl. Appeal 449/2016, Crl. Appeal 783/2016 and Crl. Appeal III. Criminal Appeal Nos. 1286/2015 & 1215/2016 [SC No.287/2013] Rajeev - Appellant [Crl.Appeal No.1286/2015] State of Kerala - Respondent Lijith - Appellant [Crl.Appeal No.1215/2016] State of Kerala - Respondent In the above case A2, A4 & A5 were acquitted and the appeals are by A1 & A3. The charge against A1 was that on a day after 28.11.2006, the victim, a minor girl below 16 years, was taken to the house of A3, committing the offence under S.366A, since the procurement of the minor girl was for the purpose of illicit sexual intercourse. A1 was also charged with rape; consequent to such procurement, under S.376 IPC. The charge against A3 first levelled on 28.03.2014 was altered and he stood trial for the charge alleged on 20.10.2014. A3 was charged with the offence under S.366 IPC for having kidnapped a minor girl below 16 years in order to force

her to have illicit intercourse, 'on a day after 28.11.2006' and also charged for the offence of rape without consent in Room No.110 of a lodge by name Mughal Palace at Kodungallur. After trial both the accused were convicted. A1 was sentenced to rigorous imprisonment for 7 years and a fine of Rs.25,000/- under S.367 IPC and

sentence of life with a fine of Rs.75,000/- under S.376(1) IPC. A3 was sentenced to 10 years and fine of Rs.25,000/- under S.366 and also life with fine of Rs.75,000/- under S.376(1) IPC.

2. Sri.Leveraj, learned Counsel appearing for

A1, pointed out that the charge levelled against A1 was not mentioned in the FIS or the S.164 statement. Even in the charge, the vehicle was not specified, which was

stated by PW1 in her deposition, clearly indicating tutoring. The gross embellishment of the incident itself throw suspicion on the victim's deposition and the same has to be rejected. The vehicle spoken of by PW1 was in the possession of A1 on September, 2007, even as per the evidence led by prosecution, through the owner of the vehicle, PW8. This is contrary to the time specified in the charge and more over the victim crossed 17 years by

September, 2007. It is contended that in such circumstance, consent was a relevant aspect, which could not be urged by the accused for reason of the charge having specified the abduction and rape of a minor girl. S.114A of the Evidence Act hence has no application and the major discrepancy in the charge seriously prejudiced the accused from raising the question of consent before Court.

3. Sri.Anoop, learned Counsel appearing for A5,

would contend that the incident, without any details, was merely mentioned in the FIS and there is no reference to the specific lodge or room to which the victim was taken. Ext.P23 Scene Mahazar, Ext.P16 Ownership Certificate and Ext.P11 scene plan produced respectively through PW7, PW22 & PW17 does not prove anything incriminating against the accused. The incident now charged is not sequenced in the manner in which the allegations were raised in the FIS. The testimony of the driver of the vehicle, PW7, belies the very testimony of the victim. It is also argued that even if the event occurred, it is well after

the girl attained 16 years and with her

refused to accompany A3, she willingly came out of the house on the next day and travelled with him in the car, without any protest. The victim did not make any hue and cry in the hotel, a public place and never raised a complaint on the way back, in the car. There is no threat employed by the accused. The subsequent conduct of the girl having had refreshments on the way back, shows that she was very comfortable in the company of A3, which clearly demonstrates a consent. It is argued that the accused has to be acquitted of the charge giving him the

benefit of doubt and in any event his age and the impecunious circumstance of his mother, solely dependant on him, commends mitigation in the sentence imposed.

4. Learned Special Government Pleader reiterates her contention regarding the charge based on S.215 & S.465 of the Cr.P.C. Here, it is pointed out that the

allegation is not of kidnapping but abduction under S.363. There is no warrant to assume that if abduction in the vehicle is not proved, the rape is not committed and

vice versa. The testimony of PW1 is not seriously challenged. There is nothing to show permission from the guardian, to absolve the accused of the charge under S.363 and the rape is established by the testimony of PW1, which is credible and reliable. Reliance is placed on *Prakash v. State of Haryana* 2004 (1) SCC 339 to argue that the taking or enticing of a minor, as coming under Section 363 need not necessarily be with force or fraud and even persuasion would suffice. The allegation of rape in another person's house is corroborated by a neighbour, PW5, though the lady of the house, grandmother of one other accused, turned hostile for obvious reasons. As far as A3 is concerned, the driver of the vehicle spoke of the incident, wherein the victim was picked up on the road and taken to a lodge. The scene mahazar and the

scene plan [Exts.P4 & P10] as also the attesting witnesses [PW10 & PW16] establish the scene of crime. There is no confusion regarding the age and no prejudice is caused, for the age is clearly discernible from the charge. The age has been proved from the extract of the Register maintained by the local body and in any event the accused could have refuted the age and brought out the element of

consent to rebut the presumption under S.114A.

5. The charge against A1 is that, on a day after 28.11.2006 he had taken PW1, a minor girl below the age

of 16 years, for the purpose of illicit sexual intercourse to the house of A3 and committed rape on her. A1 was thus accused of the offences under S.366A and S.376 IPC. PW1, the victim, before Court deposed that her date of birth was 12.07.1991, which is also proved by Ext.P32 attested copy of the extract of the Birth & Death Register produced by PW32, the Secretary of the Grama Panchayath. The deposition of PW1 was that after a day on 28.11.2006, A1 took her in a Trax to the house of A3, at some distance from Thayanchira. According to PW1, while she was playing near her house, A1 asked her to be at Thayanchira, to accompany him. She agreed only because she was threatened and the next day morning she reached Thayanchira. A1 came there in a Trax vehicle and took her to A3's house, which was empty when they reached there.

She was taken to a room on the western side and forcefully made to sit on the cot, then A1 undressed her, laid her on the bed and raped her. It was also her contention that when they heard a commotion outside the house, A1 left the room and PW1 put on her dress. Soon, A3's grandmother came there and saw her in the room. Though she was queried by the grandmother she did not reply, being afraid of A1. The grandmother of A3 was not examined in the above case and was examined in SC No.90 of 2013 as PW18, where she turned hostile; a serious lapse of the Prosecution.

6. PW5, a neighbour of A3, said that in the year

2008, when he was staying at Puthenvelikkara, in the afternoon, after lunch, the mother of Francis called him from A3's house. It is borne out from the testimonies of the witnesses that A3 was the nephew of Francis. According to PW5, the grandmother of A3 told him that there was a girl in the house and when she caught hold of her, she jerked out of her grip and ran away; not in

consonance with PW1's version. The learned Special Government Pleader had, in the absence of the testimony of the grandmother, emphasised the testimony of the above witness; with which we are not impressed. Pertinently the date or an approximation has not been specified even in the charge and the day is simply stated to be after 28.11.2006; as vague as possible. The evidence of PW5, strongly relied on by the prosecution is also that the year in which he was residing near A3, was 2008.

7. PW8 is the person who earlier owned the Trax

vehicle having Registration No.KL-07J-3191. The vehicle or its registration number is not stated in the FIS, nor is it a part of the charge. Here we have to further observe that in the FIS, the victim after stating the first instance of rape by A1 and the second instance of gang rape, made a bland statement that A1 had repeatedly raped her in the house neighbouring to her residence, the subsequent rented accommodation at Pooppathy and at the house of Lijith, who was his friend and driver. There is

no evidence led by the Prosecution of the repeated offence of rape even in S.C.No.197 of 2011, in which Rajeev was charged with that offence. Be that as it may, according to PW8, the Tempo Trax was left with A1 during September, 2007 for one month, to enable sale of the vehicle. The sale did not fructify and he took back the vehicle. PW9 is the subsequent purchaser of the Tempo

Trax vehicle, who is said to have purchased it on 20.10.2007, after which definitely A1 did not have access to the same. It is thus evident that even the year in which the alleged incident occurred is in a total flux, for the evidence of prosecution itself does not fix it in either of the three years from 2006 to 2008. The victim vaguely says it is after 28.11.2006, the vehicle used was in the custody of A1 in 2007 and the neighbour of A3, PW5, referred to the incident of a strange girl in A3's house, to be in 2008.

8. The further reliance placed by the State is

on the scene mahazar which describes the

mahazar is of the house in Elanthikkara-Vattekkattukunnu Road in Puthenvelikkara Panchayath bearing house No.IV/568; the house number referred to in the charge also as the house belonging to A3. PW21 is the Secretary of Puthenvelikkara Grama Panchayath, who issued Ext.P15 Ownership Certificate of the house bearing No.IV/568 in Puthenvelikkara Panchayath. Ext.P15 indicates the ownership of the house to be with Lakshmikkutty, D/o.Krishnan, Thattoorupadi House, Puthenvelikkara. There is nothing to connect A3 to the said house and the address of A3 as available from the cause title is that he is the son of Jolly of Kunjelipparambu veedu. We reiterate here that the charge against A1 was that he raped the victim in the house of A3.

9. Considering the entire circumstances and the vague allegation made by the victim in the FIS and also the equally vague allegation as testified before Court of the said incident having 'occurred on a day after

28.11.2006', we cannot accept the testimony without further corroboration. Ext.P2 is the S.164 statement of the victim, which also does not speak of an instance of a rape by A1 in A3's house. The mere fact that A1 was found guilty of an offence of rape on the very same victim, cannot lead to a conviction in every case where he is

charged with rape, unless the charge is proved by reliable evidence. In the charge and also in the evidence led before Court by the prosecution, neither the time or the place nor the means by which the victim was kidnapped is stated, nor is it established in trial. We find it difficult to convict A1 on the charge levelled herein. We concede the benefit of doubt on the reasonable doubts raised and acquit A1 of the offences charged.

10. As far as A3 is concerned, the altered

charge is of kidnapping the victim from the lawful guardianship of her parents in a vehicle bearing No.KL- 08AD-908, taking her to a lodge, by name Mughal Palace in Kodungallur and committing rape on her. A3 was charged under Ss.366 & 376 IPC. The allegation was also of the incident having 'occurred on a day after 28.11.2006' and the girl being below 16 years. In the FIS the allegation raised was

that Rajeev shifted his residence to Pooppathy and on a day later to that, A3 approached PW1 at the house of PW4, a neighbour and asked her to be ready on the next day to go with him. She is

around 10'o Clock, A3 came in a white car driven by another and she was picked up near the petrol bunk. A3 told her that they were going to Kodungallur, where he took a room and they had physical relationship. On the way back, near the Krishnankotta Bridge they had refreshments and she was dropped back, near her house at around 2 O'Clock.

11. In her testimony before Court she added that

she heard A3 addressing the driver as Jomon and she also spoke of the name of the hotel, being Mughal Palace; both of which did not find a place in the FIS. It was the specific deposition that A3 took a room for rent, to which she was taken and raped. She spoke of the incident in tandem with that spoken in the FIS, but made further embellishment insofar as speaking on the ownership of the vehicle, which was said to be of Francis and clearly recounting the registration number. The driver of the vehicle, Thomas, was examined as PW7 and he said that he was also known by the name Jomon. He used to be the

driver of the tipper lorry of Francis till 2007 and identified A3 as the nephew of Francis. According to him, in the beginning of 2007, he had to attend a marriage, for which he requested Francis for a car. Francis, at that time, had three cars; an Ambassador, a Cielo and a Peugeot. KL-08-AD-908 was a white Peugeot Car, which was allowed to be taken by PW7 for the marriage. PW7 took the Car on the previous day of the marriage. When he was washing the car, A3 came to him and asked when the marriage was and he answered that it was at 10'o Clock in the morning. A3 requested him to come a bit early in the morning and drop him at Kodungallur. A3 also phoned PW7 on the next day morning and asked him to come by 8.30 a.m. near the petrol bunk.

12. A3 came on the next day to the petrol bunk and

PW7 put fuel in the car with Rs. 500/- given by A3. A3 asked PW7 to come to Thayanchira, where A3 and a girl boarded the car. PW5 took them to Kodungallur and when they reached the hotel, A3 called the hotel, over telephone and booked a room. Then A3 and the girl went into the hotel asking him to wait for half an hour. After half an hour they returned and they were taken back. A3 was dropped at the place he boarded the car and the victim, near her house, at Thondan palam. In cross- examination, PW7 said that he did not attend the marriage at the Church, nor did his wife attend the marriage; for

which purpose he took the car from Francis. He also clarified that it took about three hours to travel from Thayanchira to Kondungallur and back; reaching back only at 12.15 p.m. He also said that on coming back, he and his brother-in-law shared a beer, which he bought at Kodungallur. The evidence of PW7 is totally unbelievable.

While PW7 deposed that he requested a vehicle from Francis for the purpose of attending a marriage, that too his wife's cousins marriage, neither himself nor his wife attended the marriage. According to him, in the morning he took A3 and the girl to Kodungallur and came back. The testimony of PW7 offers no corroboration to the testimony of PW1; because of the inherent disbelief that it evokes. There were also gross embellishments made by PW1 as we found herein above.

13. In this context, we also have to examine

whether the rape inside the hotel, is established by the prosecution, with cogent evidence. PW1 had deposed that A3 booked a room in the hotel and the evidence of PW7, the alleged driver of the vehicle in which PW1 was taken to the hotel, also spoke of A4 having phoned up the hotel from the car and made arrangements for a room. Definitely while taking a room on rent, in a hotel, the details would be entered in a register as kept at the hotel, which has not been produced. It is not as if the I.O did not make enquiries with the hotel. PW17 prepared Ext.P11 scene plan of a room in the hotel, as per the scene mahazar, which is produced as Ext.P23, prepared by the I.O, PW28. The ownership details of the hotel is produced

through PW22, as Ext.P16. Neither the owner nor the person in charge of the hotel was examined to evidence the room having been given on rent on the said day. PW27 a cleaning employee of the hotel was also examined to prove the scene mahazar, the preparation of which he witnessed. The evidence with respect to the hotel led before Court does not at all establish the factum of A3 and the victim having rented out a room. The ownership of the car also was not established. Coupled with the other inconsistencies, this Court cannot but find appellant-A3 entitled to the benefit of doubt. The accused has to be acquitted and the appeal allowed.

Crl.A No.1286/2015 and 1215/2016 arising from SC No.287/2013 are allowed and the accused acquitted. IV. Criminal Appeal Nos. 765 & 802 of 2015 [SC No.289/2013] Rajeev - Appellant [Crl.Appeal No.765 /2015] State of Kerala - Respondent Francis - Appellant [Crl.Appeal No. 802 of 2015] State of Kerala - Respondent In S.C.No.289 of 2013, there were four accused, of which two were acquitted and A1 & A2 were convicted.

Both were sentenced to rigorous imprisonment for ten years with fine of Rs.10,000/- each under S.366 read with 34 IPC and also life with fine of Rs.10,000 each under S.376 (2)(g) IPC.

2. A1 was charged with kidnapping, a minor girl

of 16 years, with the intention of having sexual intercourse, to a house in Puthenvelikkara Panchayat, in a car owned by A2 bearing registration No.KL-07AK-1529 and both A1 & A2 having acted in furtherance of a common intention, thus committing an offence under S.366A and following it up with rape of the victim in that house by both of them thus committing the offence under S.376(2)

(g) IPC. A2 was also similarly charged with the offence of raping the victim under the very same provisions.

3. Learned Senior Counsel, Sri. P. Vijaya Bhanu, appearing for A1 argued that the credibility of the

victim, who was examined as PW1, is very suspect especially considering the manner in which she gave a wrong date of birth before Court. The wrong date of birth was a deliberate falsehood to make it appear that she was below the consenting age. In fact the incident occurred even as per the charge, in December, 2007 when the victim passed the age of 16 years. The specific instance has not

been spoken of in the S.164 statement. Even in the deposition there is only a bland statement made that when

she was asked to go with A1, she hesitated but he threatened her with disclosure. As per the deposition, she willingly went with him on the next day and she did not raise any protest when A1 or A2 allegedly had sexual intercourse with her. Subsequently she came back to her house and raised no complaints against either of them. In fact in cross-examination, the victim said that she was happy.

4. The learned Senior Counsel would also seriously

challenge the argument of the prosecution that S.164 statement having been taken at the advanced stage of pregnancy, the victim was under severe stress. In cross-examination, she specifically deposed that before the Magistrate, she gave the statement without fear and without prompting. She also asserted that she was in a fit mental state to recollect things and depose. She said that she deposed before the Magistrate about the gang rape committed on her by A1 & A2. That was an omission from the S.164 statement marked on the side of the defence. The learned Senior Counsel would emphasise the shopping, carried out by PW1 after the alleged incident, where the accused admittedly purchased trinkets for the alleged victim. It is argued that the alleged victim was a willing partner and the admission of the purchase

reveals the tacit consent of the victim. It is also contended that there is absolutely no corroboration for the offence alleged under S. 366A and the house to which PW1 was allegedly taken, was in a thickly populated area. The consent is very clear from the conduct of the victim and there cannot be an offence of gang rape made out against the accused, since as per the charge and as per the evidence of

date of birth, the victim had been above the consenting age.

5. Smt.Sai Pooja, appears for A2 and submits that

the tone of the statements made by the victim as discernible from the narration in the FIS, clearly shows her close association with the accused. The victim had made embellishments at every stage and what, initially was described as a mere physical relationship in the FIS,

later became molestation and then forceful rape. The learned Counsel would also point out that even in the FIS, the victim had said that there was no difficulty for her. The arguments of the learned Senior Counsel with regard to the S.164 statement was adopted by the Counsel for A2. S.90 IPC was pointed out to argue that there was no fear or misconception projected by the victim, which requires the Court to draw an inference of consent, for

the sexual acts. The learned Counsel relies on Jagannivasan v. State of Kerala (1995) Supp.(3) SCC 204 and Mohanlal v. State of Rajasthan 2002 10 SCC 14, which

held that glaring contradictions and omissions in the

testimony of the prosecutrix makes it unsafe to solely rely on it to convict the accused. It is pointed out that the sole testimony of a victim can be relied on, if it is of a sterling quality, which it is not in the instant case. Coupled with this is the gross delay in reporting and the discrepancies in the prior statement as also the deposition in Court. There is also no gang rape alleged

in the S.164 statement. The testimony of PW1 in the totality of the circumstance cannot be accepted and there is no corroboration. K.P.Thimmappa Gowda v. State of Karnataka [(2011) 14 SCC 475] held that when two views are possible, the benefit of doubt should be conferred on the accused and here there is a possible inference of consent. Mohanlal (supra) authoritatively declared that consent could be inferred from the attendant circumstances. It is argued that there can be no allegation of an offence under S.366A as against A2, since there is no case for the prosecution that he induced PW1 and presented her to someone else.

6. Learned Special Government Pleader would counter

that even if the victim is found to be of consenting age, she was still a minor and S.366A is attracted. Reliance is placed on *Prakash v. State of Haryana* 2004 (1) SCC 389, wherein it was held that where a minor is taken away or enticed, it need not necessarily be by means of force or fraud and it could also be by way of persuasion. As far as A2 is concerned, Section 34 of the IPC is charged and when there is common intention, and the victim having been taken away in the car of A2, resulting in both A1 and A2 committing rape on her, the offence under S.366A definitely gets attracted, as against A2 also. In any event, even if S.366A does not get attracted, A2 has to be convicted for the lesser offence under Section 362. Strong reliance is placed on *Thakorlal B.Vadgama v. State of Gujarat* (1993) 2 SCC 413. The offence of rape has been graphically described by PW1 and her testimony clearly indicates the same to be without consent and against her will. Even the accused do not have a case of consensual sex and the allegation is only of false implication, to allege misappropriation of funds by her father; for which

also no proof is offered. The charge h

molestation, has been dealt with by this Court in *Madhu v. State of Kerala* 2021 5 KHC 602. There is clear proof of the vehicle which was used as is evident from the document evidencing seizure and the various persons who used the said vehicle. The scene of crime has also been established beyond doubt from the various documents produced, attested by the witnesses and prepared by the officials. The possession of the scene of crime, a residential building, by A2, also stands established by the witnesses. The allegation of rape stands corroborated by the testimony of the Doctor who examined the victim and spoke about the history as recorded in the medical certificate.

7. *Babu v. State of Kerala* 2013 2 KHC 526 is proffered to argue on the aspect of DNA profiling not

being conducted as also the various circumstances in which there could be possible inference of consent; which is totally absent in the present case. *Bharwada Bhogin*

Bhai Hirji Bhai v. State of Gujarat 1983 3 SCC 317 held

that more significance than that is necessary, cannot be

given to minor discrepancies and the requ

rape, the mechanical insistence for corroboration results in an insult, over and above, the injury already caused. State of UP v. M.K.Antony (1985) 1 SCC 505 and State of Rajasthan v. Noorkhan (200) 5 SCC 30 is relied on to urge that corroboration is not necessary in every case.

8. We cannot countenance the argument of the learned Senior Counsel that the credibility of PW1, the victim is suspect, since she has spoken of a wrong date of birth. PW1 deposed that her date of birth was

12.07.1992, which is the date as revealed from the records of the school and it is only natural that she spoke of that date. It is only borne out from the extract produced of the Register of Births and Deaths that, actually the victim was born on 12.07.1991, thus passing

the age of consent, 16 years, as on 12.07.2007. The charge in the above case reads as A1 having procured a minor girl of 16 years on a day before Christmas exams on 2007 from her house to another house bearing No.VIII/367 of Puthenvelikkara Panchayat in a car owned by A2 bearing registration No.KL-7AK-1529 and both A1 and A2 having committed rape on the minor child. A day before Christmas exams definitely would be in the December of 2007, in which case the child has passed the consenting age as on the date of the alleged molestation. The age has been proved by the prosecution witness PW28 who produced the Birth Register and the certified copy of its extract, Ext.P23.

9. The FIS is Ext.P1 and the incident with respect

to the specific charge in the above case has been spoken of by the victim. According to the victim, before the Christmas exams in the last year, A1 asked her to go with

him to a house. The request was made through the telephone when she was in the house of DW1, watching T.V. She also says that as agreed upon by them at around 1.30 noon, A1 took her from near the Thondanpalam to a house at Thazhanchira, in a car. When they reached there, A2 was present there and she stated that the house, was one purchased by A2 and did not have any inhabitants. She admitted that both A1 and A2 had physical relationship with her in the said house. Later, A1 went home in a bike and she told A2 that she wanted to go to Vala. A2 took her in a car to Vala, purchased a chain and ear-drops for her from a shop by name 'New Kerala' and dropped her back home by around 4 O'clock. She also said that there was no problem on that day. But, later, A2 forced her to have sexual intercourse in the very same house and when she protested, he used to ask her why she does not come with him, when she always obliged A1. The latter part of the FIS statement we just mentioned, is not the allegation in the present case. However, on a reading of the portion of the FIS, with respect to the charge of A1 and A2 having

committed a gang rape on the victim in the house purchased by A2; there was no protest spoken of by the victim for the sexual intercourse which ensued, either to A1 or A2 and neither the previous day, over telephone, nor personally on the subject day.

10. Pertinent is also the fact that there is no reference to the said incident in the Section 164 statement. We notice the argument of the learned Special Government Pleader that the child was under a trauma

especially being in an advanced stage of pregnancy. However, in cross examination, she said that after the subject incident, she had no quarrel with either A1 or A2 and that she was happy. She also asserted that she gave the statement before the Magistrate, voluntarily and without fear. She had the mental status to recollect and speak about the incidents. She also stated that she had stated about the incident of a gang rape by A1 and A2 to the Magistrate; which however was marked as an omission.

11. PW1, in her deposition before Court spoke of

the incident in the same manner in which she gave the FIS. There was however an embellishment that when she was called by A1, in DW1s telephone, she hesitated, but complied, on threats of disclosure to her family; which was never spoken to, in the FIS. Definitely this is a circumstance which could raise an inference of consent,

coupled with the statements made by her in cross examination of her being happy on the said occasion and the factum of she having willingly accepted the gifts by A2, after the incident. But however the FIS speaks of repeated sexual molestation despite her resistance and just because the victim failed to speak of the protest

raised at one instance, cannot be a very material omission.

12. We perfectly agree with the argument of the learned Special Government Pleader that it is not an

imperative condition that the testimony of the rape victim should be corroborated and if that be the rule, there is often no chance of a successful prosecution; as has been held in the decisions cited. The requirement for corroboration arises only in circumstances where a doubt troubles the mind of the Court by reason of the discrepancies in the testimony of the victim. When there are major omissions and contradictions, so grave as to

raise a suspicion regarding the victim's testimony, it makes the testimony not of such a sterling quality as to convict the accused, on that sole basis. In the above case, the victim regarding the incident complained of, did not at the initial stage, raise any allegation of a protest having been raised. It is only in the box, in Court, that the same was raised; which viewed in the context of the attendant circumstances and the admitted

prior and subsequent conduct of the victim, raise a reasonable doubt, which benefit has to be conceded to the accused.

13. Deelip Singh v. State of Bihar [(2005) 1 SCC

88] examined S.375 and held that though against the will and without her consent often interlace and an act done against the will of a person can also be categorised as an act done without consent, the IPC categorises these two expressions under separate heads in order to be as comprehensive as possible (sic-para-14). Examining S.90 further, it was found that it has two parts. The first regarding consent having been given under fear of injury or misconception of fact, applicable to the victim. The corresponding provision of having reason to believe the consent to be tainted, is with reference to the accused.

It was declared that the requirements of both the parts should be cumulatively satisfied ie: the Court should be satisfied of such mental state of both the

victim and the accused. The scheme of S.90, though couched in negative terminology, cannot be construed as an exhaustive definition of consent for the purposes of the Penal Code and the normal connotation of concept is not intended to be excluded. The decisions of the High Court and the Supreme Court, according to the learned Judges, travelled a wider field guided by the etymology of the word 'consent'. Specific reference was made to the decision in Uday v. State of Karnataka [2003 4 SCC 46] which approvingly culled out the principle 'that adult

female's understanding of nature and consequence applicable in the Indian context too.

14. In the present case we are not looking at an adult female, but a minor child, though having passed the age of consent, as the Penal Code stood at that point of time. Rao Harnarain Singh v. State [AIR 1958 Punjab 123], was approvingly referred to by the Hon'ble Supreme Court in Deelip Singh (supra). It was observed that

though there is a difference between consent and submission and while every consent involves a submission, the converse does not follow and a mere act of submission does not involve consent. R. v. State [173 ER 1026], spoke identically that '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 it, cannot be consent' (sic). State of Himachal Pradesh v. Mango

Ram [2000 (7) SCC 224] was also approvingly referred to, in which it was categorically declared that

'Submission of the body under the fear of terror cannot be construed as a consented sexual act. Consent, for the purpose of S.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 resistance and assent. Whether there was consent or not is to be ascertained only on a careful study of all relevant circumstances.

15. What we understand from the above observations

is that consent cannot be easily ferreted out in the wake of allegation of rape under S.375 and its absence cannot be confined to the negative terminologies in S.90. But a resistance, however frail, or refusal, however weak, or even a reluctance, however feeble would erase the plea of consent. A prior relationship or even a prior sexual

intercourse cannot necessarily lead to a finding of consent, if there was a frail resistance or weak refusal or even a feeble expression of reluctance, by the victim, however modicum and minimal it be in effect. When the victim says NO, however feebly, it cannot be taken otherwise and there cannot be a consent found from the attendant circumstances. 15(a). In the present case what assumes

significance is the fact that the victim in the initial statement made before the Police, ie. the FIS, did not speak of any resistance. At the next stage, when the victim was examined by the Magistrate under S.164, there was no reference to the said incident. At every other instance, as spoken in the FIS, there was a definite protest made by the victim which she spoke of at the

first stage itself. Before Court, the victim

categorically stated that her statements before the Magistrate were with full knowledge of what she was doing and she had the mental state to recount the

incidents clearly. It was in her testimony in Court; for the first time, with reference to this incident, that the victim spoke of her reluctance on the previous day, over the telephone and the threat levelled of disclosure. Even on the next day, when she saw A2 and the intention was obvious, no protest was made. The clear embellishment from the earlier statements, assumes relevance and raises a reasonable doubt in the mind of the Court. Viewing the

entire circumstances in this context, there arises a suspicion and hence it is necessary that we look for corroboration as has been held in the precedents.

16. Thakorlal D. Vadgama (supra) held also that even if there is consent, there could be a conviction, on

the offence under Section 366. It was found that the taking away or enticing as required under Section 361 need not necessarily be, with force or fraud and could also be on persuasion. That, even if the minor voluntarily accompanied the accused, that will not absolve the accused, since enticement could be in many gentle forms, which provides an inducement or allurement,

very subtle in employment. Further it

attracted, if the girl is a minor, below 18 years of age. The Hon'ble Supreme Court also held that even if there is no active part played by the accused, just prior to the minor leaving the custody of the lawful guardian, a solicitation or persuasion at an earlier stage would definitely attract the offence. In the present case the victim speaks of an earlier instance and it is clear that the innocent girl was lured into the web of carnal

pleasures, which could have resulted in her willing participation; but that would not absolve the accused of the offence under section 366, if the taking away in the car, as charged in the instant case stands established; for which also, corroboration is necessary; the victims testimony if found, not solely capable of conviction on the charge of gang rape.

17. PW2 is the Panchayat Member who first informed the S.I of Police about the suspicion of a minor child

being pregnant. PW3 is the mother of the victim who categorically stated that A1 was her neighbour and she had specifically warned her daughter against going to his house, to watch T.V. In cross examination however, she stated that she used to permit her daughter to go to A1s house also since his wife would be there. Her explanation for the delay was that according to the victim, A2 was responsible for the pregnancy and he had agreed to look after the victim. PW7 is the father of the victim who

feigned total ignorance about the affairs of his daughter, but was aware of the fact that she had given birth to a child.

18. The incident complained of, is kidnapping of a minor from lawful guardianship, by A1, in a car owned by A2, to a house owned by A2 and the victim having been

subjected to gang rape. In this context, we have to examine whether the prosecution has been successful in establishing the charge laid of kidnapping and gang rape. We see very flimsy evidence having been led, on the incident by the prosecution. The charge specifically mentioned the registration number of the car in which she

was taken, which car according to the prosecution, belongs to A2. PW6, wife of DW1 was examined to prove the purchase of the said car by her husband from A2, however, PW6 was not asked about the date of purchase. PW11 is the witness to Ext.P4 mahazar by which the subject car was taken into custody. It is not clear as to the location or the person from whose possession, the car was seized, on going through Ext.P4 mahazar. If the car was used in the

crime, when it was in the ownership of A2 and then subsequently sold to DW1, necessarily when the seizure was made, it could not have been from the custody of A2. The car is said to have been seized from the eastern side of the compound of one Valappakath Santha; whose identity is not at all revealed. PW6 examined to speak on the purchase made of the car from A2 or her husband DW1, does

not speak of the car having been seized from their possession. The registration book and other details of the car, which could have proved the ownership, was

also not produced. There is nothing to show that A2 had possession of the car, much less its ownership and in that context neither could A1 have taken away the girl in that car.

19. The charge also specifies the house in which A1 and A2 allegedly raped the victim being house

No.VII/367 of Puthenvelikkara Village. There is no ownership certificate produced, of the said house and witnesses were examined to evidence the transactions of a residential building, the identity of which is neither clear from the testimonies, nor have the transactions been substantiated with documents. PW5 is a resident of Vattekad in Puthenvelikkara village and states that A2

had purchased a small house near her residence. The purchase was from one police man residing at Vadakkumpuram. Before the police man purchased the house, there was one Bindu and family residing in the said house, which was about 5 to 6 years back. She repeated that it is the house in which Bindu resided, that was

purchased by the police man, in which one Jomon is residing as of now. There is no period in which the ownership of the house can be determined, on any of the said persons. From the evidence of PW5, given in 2014, if the police man purchased the house in which Bindu was residing; 5 to 6 years back, it must have been in 2008. A2 purchased the house from the police man, as per the testimony of PW5; which could only be in 2008. This puts to peril the allegation of gang rape in the December of

2007. In this context, it has to be noticed that, though

PW5 speaks of having seen A2 with a woman in the said house, it was a woman of her age. She was 52 when she deposed and she also said that it was 3 to 4 years back that she saw Francis with the woman in that house, still later to 2008, when Jomon was residing there.

20. PW10 is the scene mahazar, Ext.P3, of Jomons

house which is said to be at Vattekkunnu. Ext.P3 shows the number to be VII/367, the ownership of which was not established. Jomon, who claimed to be the present owner of the house was examined as PW29. He deposed that he purchased the house from a police man and he received the key of the building from A3 in December 2007; in which month the alleged incident occurred. We cannot but notice that the prosecution has utterly failed to establish the charges levelled against the accused. We cannot but find

the allegations to have been not proved and in that circumstance both A1 and A2 are hereby acquitted, conceding them the benefit of doubt. Criminal Appeal Nos. 765 & 802 of 2015 stand allowed. V. Criminal Appeal No. 191/2015 [SC No.290 of 2013] A.Francis - Appellant State of Kerala - Respondent Francis is the sole accused in the above case

and the charges are three in number. Firstly it was alleged that a minor girl of 16 years was taken by the accused for illicit sexual intercourse from the custody of her father in a car bearing registration No.KL-07AK- 1529 to a house at Elathikkara Kara of Puthenvelikkara Village after the exams of 2007, where she was confined

and subjected to rape, thus committing offences punishable under S.366A, 342 and 376 IPC.

2. Smt.Sai Pooja, learned Counsel appearing for

the accused, points out that the deposition in Court is that the incident occurred in the November of 2007. PW1 also made a statement that it was in 2006. The definite time within which the alleged acts were committed are not clear and in that circumstance the accused was prejudiced from raising a plea of consent. There is also no definiteness about the place of occurrence which has been

stated alternatively as Elanthikkara, Kalanchira and Thazhanchira. The witness also prevaricates with respect to the number of times the accused raped the victim. Emphasis was placed on the age of the accused, which, as per the evidence led by the prosecution itself, was past 16 years, when the alleged

incidents occurred. Despite

allegation of threats levelled, there is no protest raised or an effort made to prefer a complaint before the authorities or at least her parents, against the alleged repeated acts of rape. The totality of the circumstances raise serious suspicion about the credibility of the witness, compounded by her own prevaricating statements. The victim has to be found to be not of a sterling quality and in that circumstance, there is no further

corroboration coming forth about the alleged acts of rape. The mother and the victim makes unsubstantiated allegations against the accused of the victim having been impregnated by the accused. Such statements were also made before the Police, who did not even attempt a DNA test verification. The accused has to be acquitted, is the forceful submission.

3. The learned Special Government Pleader, while

reiterating the arguments raised in the earlier cases points out that there is clear and graphic description of the repeated offence of rape committed on PW1 by the sole

accused herein. The deposition of PW1 categorically states that she was hesitant to go with the accused and complied, only since there was a threat of disclosure. The allegations raised of the time and place not being precise, cannot be countenanced since the crime scene, a residential building, has been clearly pointed out by the victim and the house number in the scene mahazar, is also repeated in the charge sheet. There is ample evidence to show that the house was in the possession of the accused and that he was not ordinarily residing there and nobody else was residing there, when it was in his possession. It was the friend of the accused, one Rajeev, who had been regularly molesting the girl sexually, who brought her to this house and first introduced the victim to the

accused. It was on the threat of disclosure of her liaison with Rajeev that the accused committed repeated acts of rape on the victim; all of which were without

consent. In fact from the proceedings sheet, it is pointed out that there was a specific hearing on consent in the above case; wherein the allegations were of a period after the girl attained 16 years of age. There can be no prejudice argued from the charge levelled and it is asserted that the conviction is proper and so is the sentence imposed.

4. PW1 was the victim and the allegations raised in

the above case are the last of the allegations spoken of by the victim in the FIS. According to the FIS, after the incident of Rajeev, having taken her to the house of the accused herein and both having had sexual intercourse with her; after a month the accused herein had sexual intercourse with her four or five times in the same house. When the victim resisted in accompanying the accused to the vacant house, the accused used to ask her why she does not oblige him, while every time she obliged Rajeev. She was also threatened with disclosure of her escapades, to her father. She spoke of the repeated incidents of rape by the accused having occurred between

last December and February, ie: in 2007-2008. Before Court also, she spoke in tune with the statement made to the police in the year 2008. She elaborated that the accused was the friend of Rajeev and it is from the earlier incident, that she got acquainted sexually with the accused. She categorically said that she had been taken to the house of the accused five times and that this relationship had resulted in the pregnancy. She also spoke of her hesitation in obliging the accused, when she was threatened with disclosure, to her father. Before Court, she also spoke of having told the accused, who was the employer of her father, about the pregnancy when he had once come to her residence to call her father. He promised to do whatever possible, but later, he met with an accident and was in the hospital.

5. PW2, the Panchayath Member, along with some

others went to the victim's house and later, the police took a statement from her; the FIS, which was produced as Ext.P1. The victim also admitted the statement before the Magistrate, which was marked as Ext.P2. There was a discrepancy in

Ext.P2, since she had not mentioned the last few incidents before the Magistrate. However it is to be noted that the just prior FIS, contain a graphic description, in tandem with which, she deposed before

Court also. She admitted her date of birth to be 12.07.1991, which is also proved by PW21, the Secretary of the Grama Panchayath who produced the Birth Register and the certified copy of the extract as Ext.P14. The pregnancy of the minor child was first noticed by her own uncle, one Ambujakshan, who expired before the trial. It was Ambujakshan, who informed PW2, prompting her to visit

the house of the victim, along with two others. PW2 suspected pregnancy, especially on observing the noticeable bulge on the belly of the minor girl. She filed Ext.P3 petition before the S.I of Police which prompted the FIS and the FIR, as recorded and registered by PW15.

6. The victim was examined by PW11 who deposed

that the child was in an advanced state of pregnancy, of 8 months when she was examined on 19.07.2008. Ext.P7 is the medical certificate issued which clearly details the history, as molestation for one and half years by five named persons, of which one person was the accused in this case. The victim was shifted to a safe home and later she delivered a baby boy as deposed by PW13, the

Doctor who assisted the delivery. PW20, the Secretary of Cochin Corporation produced the birth certificate of the child. The evidence of the witness is of a sterling quality and additionally the testimony also establish the allegation of repeated rape.

7. PW3 is the mother of the victim, who came to

know of the molestation of her daughter and the subsequent pregnancy only after about 8 months. When she came to know about it, she questioned her daughter and she was told that it was the accused who was responsible. PW3 also spoke of having conveyed the pregnancy of her daughter to the accused, who promised to take care of everything and implored her not to divulge the facts to anybody. Later, PW3 came to their house and the police

put law into motion. PW4 is the father, who feigned ignorance of the pregnancy of her daughter, till the police came home. But that does not in any manner create any doubt in our minds as to the allegations raised by the victim. PW16, is the brother of the victim who was employed with Rajeev, a friend of the accused who used to live nearby. PW 19 and 22 are the investigating officers who testified, as to the investigation carried out.

8. Further corroboration is available in so far as the scene of occurrence having been clearly established in the above case; which was alleged to be the scene of occurrence in the earlier case also, but not

established in that separate trial. PW5, is Thomas @ Jomon who was the driver of the accused during 2007. In 2008, through the accused, a house was purchased by him, standing in nine and a half cents of land. He also said that at the time when he purchased the house, it was vacant and that it was sometime in the January of 2008, that the purchase was made and the deed was executed in

the month of June. He also deposed that the accused was entrusted with the job of tress-work on the sit out of

the residential building, clearly establishing the possession of the accused. PW6, is a person residing in the neighbourhood of that house, who was acquainted with both PW5 and the accused. She spoke of the said house belonging to Sugathan, later purchased by a police man and then by the accused. After the accused purchased the house, he used to regularly come to that house and she had seen the accused with a 50 year old woman at the house; which by itself does not incriminate the accused.

9. PW8, is another person residing in the

locality who is acquainted with PW5 and also attested Ext.P4 mahazar of the scene, pointed out by the victim. PW20, the I.O, prepared the mahazar of house No.VII/367 situated in Puthenvelikkara Panchayath. PW14, Secretary of the Panchayath produced Ext.P10 ownership certificate which shows the house, to be in the ownership of PW5,

Thomas S/o Ouso. PW17, is the Village Officer who

prepared Ext.P11 site plan of the house of PW5. The evidence herein clearly establishes the ownership of the house on PW5 and the possession of the house, by the accused. This evidence was not led in the earlier case, which resulted in the acquittal of the accused, a serious lapse of the prosecution. In this context, we also have to notice PW18; the mother of the accused herein, who was to be included in the witness list of another case, was examined here. True, the witness turned hostile but still

the lapse in proper conduct of prosecution, stands out.

10. The repeated acts of rape having been proved,

we are called upon to decide whether there was kidnapping or illegal confinement of the victim in the house of the accused. As far as the charge under S.342 is concerned, in cross-examination, the victim was asked a specific question as to whether she was forcefully made to reside at any place, to which the answer was a categoric NO. The charge under Section 342, hence fails. As far as S.366A is concerned it has to be emphasised that there is no evidence regarding the ownership of the car or the fact of the accused having taken the victim in a particular car. The registration number of the car was not revealed at the time of FIS, nor was the registration particulars produced by the prosecution. PW7 was examined to prove

that her husband had purchased a car bearing registration No. KL7-AK-1529, from the accused. This was

the registration number spoken of by PW1, in her deposition; which was not stated in the FIS. The time when such purchase was made was stated by PW7 to be 2007 and then she corrected herself, that it was not in 2007, but did not refer to a particular year. The present owner of the car is not clear and PW7 does not speak of her husband having sold the car. In this context, one has to

notice the seizure of the car allegedly made in the presence of PW9. Ext.P5 is the mahazar attested by PW9, who also affirmed the seizure of a car bearing

No.KL07- AK-1529, a Ceilo car. The deposition however is that it was seized from the road side without any indication of the person from whom it was seized. The mahazar also does

not indicate such seizure having been made from the possession of a particular person. We cannot find the allegation of kidnapping in the car to have been proved. True the rape occurred in the house, which was in the possession of the accused, but that cannot necessarily prove that the victim was taken there, or enticed to go there. The specific case of the prosecution that she was taken to the crime scene, in a particular car, in the ownership of the accused, has not been established. The victim could have voluntarily gone there, in which event

her testimony should be to that effect, with the additional evidence of her voluntary act being in the wake of a threat or enticement; which is not urged.

11. We acquit the accused of the charges under S.342 and S.366A. We confirm the conviction under S.375 and uphold the sentence imposed under S.376. The criminal appeal stands partly allowed.

12. We have noticed the evidence led in each case and ordered the appeals, based on such evidence led. The evidence in one, cannot be reckoned in another and in

that circumstance the prosecution should

though in the wake of the Protection of Children from Sexual Offences Act, 2012, the Hon'ble Supreme Court has recently, in Nawabuddin v. State Of Uttarakhand (2022) 5 SCC 419 held that there can be no leniency shown to the accused committing offences against children, especially considering the objective of that Act. The offences

alleged here are prior to the POCSO Act, but the depravity of the offence alleged, is neither lessened by the absence of a special enactment to prevent atrocities against children nor aggravated by its mere enactment. The society cannot tolerate such offences and it is this societal conscience that led to the POCSO Act. The Courts cannot offer mitigation to such offenders. But we make it clear that in

the case of Rajeev, the sentences shall run concurrently.

13. The Crl.M.C shall stand closed as infructuous. Sri. Anoop, who is appointed as State Brief, has represented the accused in two appeals and he shall be given remuneration in both the appeals separately. Ordered accordingly. Sd/- K.VINOD CHANDRAN, JUDGE Sd/- C.JAYACHANDRAN, JUDGE Sp/uu/mrcs/jma

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