



2025:KER:62139

CRL.A No.1938/2024

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE GOPINATH P.

MONDAY, THE 18TH DAY OF AUGUST 2025 / 27TH SRAVANA, 1947

CRL.A NO. 1938 OF 2024

CRIME NO.20/2020 OF Kolavallur Police Station, Kannur

AGAINST THE JUDGMENT DATED 31.08.2024 IN SC NO.184 OF 2021
OF SPECIAL JUDGE, FAST TRACK SPECIAL COURT, MATTANNUR

APPELLANT:

MANOJ
AGED 44 YEARS
S/O. KUNJIRAMAN @ POKKAN, CHAKKERI KUNNATH
HOUSE, POYILLOOR, KANNUR DISTRICT, PIN - 689510

BY ADV SRI.VISHNUPRASAD NAIR

RESPONDENT:

STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF
KERALA, ERNAKULAM, PIN - 682031

OTHER PRESENT:

SMT. SEENA.C (PP)

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON
16.10.2024 AND HAVING BEEN FINALLY HEARD ON 18.08.2025 THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**‘C.R’****JUDGMENT**

This appeal has been filed challenging the conviction and sentence imposed on the appellant in S.C.No.184/2021 on the file of the Fast Track Special Court, Mattannur.

2. S.C.No.184/2021 arises out of Crime No.20/2020 of Kolavallur Police Station, Kannur district, which was registered alleging commission of offence under Section 376(2)(l) of the Indian Penal Code, 1860 (hereinafter referred to as *‘the IPC’*), on the allegation that, on 24.12.2019, between 9 PM and 10 PM, the appellant/accused committed rape on PW1, a deaf and dumb lady, in the courtyard on the eastern side of the house of CW13, bearing No. TP V1/2017 at Poyiloor in Thrippangottur Amsom. On the final report being filed, the Chief Judicial Magistrate, Thalassery took the matter on file as CP 09 of 2020. After compliance with all formalities, the matter was committed to the Sessions Court, where charges were framed for the offence punishable under Section 376(2)(l) of the IPC.

3. It is the case of the prosecution that a few days after the alleged incident, PW2 (niece of PW1) found PW1 in a sad and



sorrowful mood, and on enquiry, PW1 divulged the case of sexual assault and rape committed by the appellant/accused, and thereafter, based on the information given by PW2, the FIR was lodged at the Kolavallur Police Station, Kannur district. The prosecution examined PWs 1 to 10 and marked Exts. P1 to P8 documents. On closure of prosecution evidence, the appellant/accused was questioned under Section 313 of the Code of Criminal Procedure (hereinafter referred to as '*the Cr.P.C.*'). Thereafter, both sides were heard under Section 232 Cr.P.C and on finding no reason to acquit the accused at that stage, the defence was called upon to adduce evidence, if any. On the side of the defence, DW1 was examined primarily to show that there was previous enmity between the family of the victim and the family of the appellant/accused and that the victim was continuously following the accused, asking him to marry her.

4. On consideration of the materials and the deposition of the witnesses, the trial court concluded that the prosecution had succeeded in proving that the appellant/accused had committed the offence punishable under Section 376(2)(l) of the IPC and convicted him for the said offence. After hearing the appellant/accused on the



question of sentence, the trial court sentenced the appellant/accused to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 75,000/- and in default to undergo rigorous imprisonment for a further period of 3 months for the offence punishable under Section 376(2)(l) of the IPC.

5. Sri. Vishnuprasad Nair, the learned counsel for the appellant, contends that the appeal has to be allowed on a short point. He submits that this is a case where the victim was a deaf and dumb person. It is submitted that, going by the mandate of the provisions contained in Section 164 the Cr.P.C (as amended by Act 13/2013 with effect from 03.02.2013), the statement of the victim recorded under Section 164 Cr.P.C. was treated as the examination-in-chief. It is submitted that the statement of the victim recorded under Section 164 Cr.P.C. indicates that the victim was unable to answer even the basic questions, such as the name of her father, the name of her house, etc. It is submitted that the statement of the victim recorded under Section 164 Cr.P.C. also indicates that though the services of an interpreter were available, the interpreter was not able to decipher what the victim was saying, and the Court then proceeded to record the statement of the victim by seeking the help



of PW2, who was none other than the first informant in the case. This, it is submitted, is clearly against the mandate of the judgment of the Supreme Court in ***State of Rajasthan v. Darshan Singh, (2012) 5 SCC 789***. It is submitted that ***Darshan Singh*** (*supra*) arises from the judgment of the Rajasthan High Court entitled ***Darshan Singh v. State of Rajasthan, 2006 KHC 2644***. It is submitted that the judgment of the Rajasthan High Court, which was approved by the Supreme Court, also refers with approval to the judgment of a Division Bench of this Court in ***Alavi v. State of Kerala, 1982 KLT 287***. It is submitted that the principle that can be culled out from the above decisions is that while the Court may take the help of a person who is conversant with the day-to-day affairs of the deaf and dumb witness to decipher what is being stated in the box, the Court must be careful to see that a person who is an interested witness, that is, a witness who has either taken part in the investigation or who has become willing to tender evidence on behalf of the prosecution, should not be used for the said purpose. It is submitted that in the facts of the present case, since the interpreter was unable to decipher or understand the deaf and dumb witness, the Court proceeded to request PW2, who was the first informant



and who was also ready to tender evidence on behalf of the prosecution, to interpret/decipher the statements of PW1 while recording the statement of the victim under Section 164 of the Cr.P.C. It is submitted that this statement was later treated as the examination-in-chief of PW1 in terms of the provisions contained in sub-section (5-A)(b) of Section 164 of the Cr.P.C., and this clearly was impermissible in law. The learned counsel for the appellant/accused also submits that the charge framed by the Court was defective, as it was the consistent case of the prosecution that the appellant/accused had committed the offence on the false promise of marriage. It is submitted that even in the final report, it is the case of the prosecution that the appellant/accused had committed the offence on the false promise of marriage, whereas in the charge framed by the Court, the allegation was that the appellant had committed rape. The learned counsel for the appellant also placed reliance on the unreported judgment of the Madras High Court in ***Ravichandran v. State*** (judgment dated 22.09.2022 in Crl.A No.65/2020). He contends that the right of the appellant/accused to conduct an effective cross-examination was also denied in the facts and circumstances noticed above. The



learned counsel for the appellant/accused also placed reliance on the judgment of a Division Bench of the Sikkim High Court in ***Dawagyal Lepcha v. State of Sikkim, 2023 KHC 5858***, and contends that the entire procedure adopted by the trial court in the facts and circumstances of this case was flawed and the conviction of the appellant/accused is liable to be set aside. The learned counsel also submits that though a deaf and dumb person is a competent witness, in the facts and circumstances of the case, the Court ought to have either required the witness (PW1) to give evidence in a manner that would make it intelligible to the Court by writing or by signs. It is submitted that, in the facts and circumstances of the case, it is clear that the witness (PW1) was unable to give evidence in a manner that would make it intelligible even in writing or by signs.

6. Learned Public Prosecutor submits that on the contentions raised by the learned counsel appearing for the appellant/accused, this appeal is not to be allowed. It is submitted that the learned Magistrate who recorded the statement of PW1 under Section 164 of the Cr.P.C. had correctly followed the provisions of Section 119 of the Indian Evidence Act, 1872 (hereinafter referred to as '*the Evidence Act*'). It is pointed out that



the learned Magistrate had ensured the presence of an interpreter, and the entire process was also videographed. It is submitted that the learned Magistrate had also recorded that the witness (PW1) was giving the statement voluntarily. It is submitted that the learned Magistrate had also recorded the statement of the victim that she had been sexually assaulted and raped by her neighbour, and it was only thereafter that the learned Magistrate went on to seek the assistance of PW2 to interpret the statements of the victim (PW1). It is submitted that, since the learned Magistrate had recorded the fact that PW1 had been subjected to sexual assault and rape by her neighbour even without the help of PW1, even if this Court were to eschew the contents of the statement recorded with the help of PW2, the basic ingredients of the offence punishable under Section 376(2) (1) of the IPC had been established in the facts and circumstances of the case. It is submitted that PW2, who is living with the victim (PW1), was fully capable of understanding every statement made by the victim, and she has also corroborated the prosecution's version as PW2. It is submitted that PW2 cannot be characterised as an interested witness, as in such circumstances, especially when the witness was not trained in sign language, only the immediate family



members will be able to decipher the statement of the witness. It is submitted that, if an accused person escapes from the clutches of law based on mere technicalities, the same would be an affront to the rule of law and should not be permitted. It is submitted that the medical examination report is also consistent with the allegation of rape. It is also submitted that if at all, this Court were to find that there was some defect in the proceedings before the trial court, including in the matter of framing of charges and the recording of statement under Section 164 of the Cr.P.C., the appellant/accused is not entitled to an acquittal and the matter has to be remanded for fresh consideration of the trial court.

7. Learned counsel appearing for the appellant/accused has submitted, in reply, that the learned Magistrate, having recorded that the interpreter could not decipher the statement of the victim, could not have recorded that the victim (PW1) had stated that she had been subjected to sexual assault and rape by her neighbour. It is submitted that the fact that the interpreter appointed by the Court at the time of taking the statement under Section 164 of the Cr.P.C. could not decipher the statement of the victim, coupled with the fact that the victim could not answer basic questions put by the Court,



indicates that this is a case where there is absolutely no evidence to convict the appellant/accused. It is submitted that the medical examination report (Ext.P2) does not support the case of the prosecution. It is submitted that even though the medical examination report records that the hymn was 'posterially torn', it was otherwise intact, and it has been recorded that the tear was partial and is an old tear which had healed. It is submitted that the findings of the medical examination are thus not consistent with the history of alleged sexual assault, and there was no evidence of recent vaginal penetration. It is also pointed out that the statement recorded from the doctor at the time of the investigation also does not indicate any sexual assault. It is submitted that though the appellant/accused cannot rely on the statement recorded from the doctor (PW3), it is certainly a matter that can be considered by this Court.

8. Having heard the learned counsel appearing for the appellant and the learned Public Prosecutor and after pursuing the records, I am of the view that this appeal is liable to be allowed as the trial in this case is vitiated. Consequently, the conviction of the appellant is liable to be set aside.



9. Section 164 of the Cr.P.C (after the amendment by Act 13 of 2013 with effect from 03.02.2013) corresponding to Section 183 of the Bharatiya Nagarik Suraksha Sanhita (hereinafter referred to as '*the BNSS*'), to the extent it is relevant, reads thus:-

“164. Recording of confessions and statements:-

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xxxxxxxxxx

(5) Any statement (other than a confession) made under Sub-Section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.

(5-A)(a) In cases punishable under section 354, section 354A, section 354B, section 354C, section 354D, sub-section (1) or sub-section (2) of section 376, section 376-A, section 376-AB section 376-B, section 376-C , section 376-D, section 376-DA, section 376-DB, section 376-E or section 509 of the Indian Penal Code, the Judicial Magistrate shall record the statement of the person against whom such offence has been committed in the manner prescribed in sub-section (5), as soon as the commission of the offence is brought to the notice of the police;

Provided that if the person making the statement is temporarily or permanently mentally or physically disabled, the Magistrate shall take the assistance of an interpreter or a special educator in recording the statement;

Provided further that if the person making the statement is temporarily or permanently mentally or physically disabled, the statement made by the person, with the assistance of an interpreter or a special educator, shall be videographed.

(b) A statement recorded under clause (a) of a person, who is



temporarily or permanently mentally or physically disabled, shall be considered a statement in lieu of examination-in-chief, as specified in section 137 of the Indian Evidence Act, 1872 such that the maker of the statement can be cross-examined on such statement, without the need for recording the same at the time of trial.”

A reading of the above provision indicates that a statement recorded from a person who is temporarily or permanently mentally or physically disabled shall be considered as a statement in place of examination-in-chief as specified in Section 137 of the Evidence Act.

10. The statement recorded from the victim under Section 164 of the Cr.P.C. in this case reads thus:

“Solemnly affirmed on the 20th day of January, 2020

As per the order of CJM No.C562/2020 dated 20.01.2020, the witness named, Chithra, aged 41 years, D/o. Madhavan was produced before me on 20/1/2020 at 5.20 PM for recording her statement under Section 164 of Cr.P.C

Statement of Chithra under Section 164 Cr.P.C

The witness is a deaf and dumb witness. Hence interpreter was present.

Interpreter Anand Sebastian, S/o. Sebastian, Panamvilakathu Veedu, Karode PO, Trivandrum District was present.

Interpreter sworn in

He administered oath to the witness.

Witness sworn in

പേര് എന്താണ് ?

പേര് പറയാൻ പഠിച്ചിട്ടില്ല.

വയസ് എത്രയായി ?

40 വയസ് ആയി.

അച്ഛന്റെ പേരെന്താണ്?

she could not state.

വീടുപേര്?

she could not state .

സ്ഥലം എവിടെ ആണ്

she could not state

In order to ascertain whether the statement is given voluntarily, the following questions were put to the witness.

പോലീസ് ചോദ്യം ചെയ്തിരുന്നോ?

അതെ

എപ്പോഴാണ് പോലീസ് ചോദ്യം ചെയ്തത്?

she did not answer .

സ്വന്തം ഇഷ്ടപ്രകാരം മൊഴി തരാൻ വന്നതാണോ?

അതെ

From the above answers I am satisfied that the statement is given voluntarily. Hence proceeded to record the statement.

സംഭവത്തെക്കുറിച്ച് എന്താണ് പറയാൻ ഉള്ളത്?

എന്നെ വാ വാ എന്ന് വിളിച്ച് വീടിന്റെ അടുത്തുള്ള സ്ഥലത്തു വെച്ചു. ഞാൻ പോകുന്നില്ല എന്ന് പറഞ്ഞപ്പോൾ എന്റെ കൈ പിടിച്ചു വലിച്ചു. അടുത്ത വീട്ടിൽ കൊണ്ട് പോയി. എന്നെ കെട്ടിപിടിച്ചു. വീടിന്റെ പുറത്തു കിടന്നു. നിലത്തു കിടന്നു. എന്നെ നശിപ്പിച്ചു. വീടിന്റെ കറച്ചപ്പുറത്തുള്ള ആളാണ്.

Since the interpreter could not properly understand,



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the relative who is present in the court was called.

She was called.

She is named Sarika, aged 27 years, D/o. Ashokan, Thayyulathil House, Central Poyilore.

The witness's sister's daughter.

She was administered oath.

എന്നെ കൈ പിടിച്ചു വലിച്ചു കൂട്ടികൊണ്ടുപോയി. അനീഷ് ന്റെ വീട്ടിലേക്കാണ് കൊണ്ട് പോയത്. അവിടെ ആരും ഇല്ല. ഡ്രസ്സ് അഴിച്ചു . എന്റെ ഡ്രസ്സ് അഴിച്ചു തന്നിട്ട് എന്നെ മുറ്റത്തു കിടത്തി. എന്നെ ബലാത്സംഗം ചെയ്തു 2 ദിവസം അങ്ങനെ ചെയ്തു. മുൻഭാഗം എന്റെ ഉള്ളിലേക്ക് കയറ്റി. എന്റെ മുലക്ക് പിടിച്ചു. ഉമ്മ വെച്ചു. പുറകിലും ചെയ്തു. മാനക്കുറവ് ചെയ്തു . മാനഹാനി ചെയ്തു .

കൂടുതൽ എന്തെങ്കിലും പറയാൻ ഉണ്ടോ?

ഒന്നുമില്ല.

മൊഴി വായിച്ചു കേട്ട് ശരി.

Sd/-

ചിത്ര ടി

Truly interpreted by me.

Sd/-

Anand Sebastian

Resource Teacher,

Kannur North BRC

Samgra Shiksha Kerala

The above statement contains full and true content of the statement made by the witness. The statement was read over to the witness through the interpreter and found correct.

Sd/-

(seal of the court)"



11. Sections 118 and 119 of the Evidence Act, (*which are identical to the provisions in Sections 124 & 125 of the Bharatiya Sakshya Adhiniyam, 2023*) read thus:-

“118. Who may testify.-

All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation. -- A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

119. Witness unable to communicate verbally.-

A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court, evidence so given shall be deemed to be oral evidence:

PROVIDED that if the witness is unable to communicate verbally, the Court shall take the assistance of an interpreter or a special educator in recording the statement, and such statement shall be videographed.”



A reading of Section 118 of the Evidence Act indicates that the Learned Magistrate ought to have assessed the competence and ability of PW1 to depose, even at the stage of recording the statement under Section 164 of the Cr.P.C. While it is clear that the learned Magistrate had followed the mandate of the provisions of sub-section 5-A of Section 164 of the Cr.P.C. and had made available the services of an interpreter, and the entire process was also videographed, the fact remains that the interpreter was unable to interpret or decipher the statement of the victim, and the statement was finally recorded with the aid of PW2, who is none other than the first informant in this case and a person who was later examined as a witness for the prosecution.

12. A Division Bench of this Court had considered this question in **Alavi** (*supra*) and held as follows:-

“13. In the deposition of Pw. 4 Saidalavi before the chief examination begins it is seen recorded as follows by the Court of Session:

“This is deaf and dumb witness. But when questioned by signs he can read and understand from the movement of our lips, bands and gestures and he gives reply also by gestures which are understandable.”

After the above note the answers to the questions put in chief examination are recorded. What is then recorded is:



"Cross - Defence counsel states that he is unable to cross-examine the witness by means of gestures."

Then a question is seen put in cross-examination. But after the question, what is recorded is:

"The gestures given in reply are not legible."

Para 9 of the judgment of the Court of Session reads:

"Pw. 4 is Saidalavi whose answers to the questions in chief-examination by gestures and signs, were recorded by me. But it so happened, that the questions put by the defence counsel could not be properly understood by the witness and therefore he could not give any answers to the said questions. Therefore, the evidence of Pw. 4 cannot be acted upon."

The indication in S.282 of the Code of Criminal Procedure 1973 is that the court can make use of the services of an interpreter to assist the court to examine a witness. In this case, it is not clear from the judgment or the deposition of Pw. 4 as to who assisted the court to elicit the answers given in the chief-examination. Admittedly, the witness Saidalavi is deaf and dumb. Pw. 3, his mother, has stated this fact. In that case, if he is to be examined, that can only be with the help of an expert or some person who is very much familiar with the witness. If somebody else is available, it is better the services of a person who is a witness in the case is not made use of to interpret his evidence or to converse with him. In Ah Soi v. King Emperor (AIR 1926 Cal. 922) it has been held that a witness who took active part during the investigation of the case and who gave evidence before the committing Magistrate and who was willing to give evidence on the side of the prosecution in the sessions trial should not be chosen as interpreter. The Calcutta High Court said that this is opposed to the elementary ideas of justice. Going by the records in this sessions case, it cannot be said that the



Sessions Judge had the assistance of any expert or any person familiar with Pw. 4 for his examination. As the learned Sessions Judge cannot be expected to have anything more than a layman's knowledge in conversing with a deaf and dumb person it was highly improper on his part to have embarked upon the examination of Pw. 4 without the help of an expert or a person familiar with his mode of conveying ideas to others in day-to-day life. It is in evidence that Pw. 4 used to get something by washing buses So not only Pw. 3 but some others in the locality might also have been able to decipher the gestures of Pw. 4 and converse with him. If the Court of Session had chosen to make use of the services of any such person, the evidence of this only eyewitness could have been made use of in the case."

A Division Bench of the Rajasthan High Court in **Darshan Singh** (*supra*) considered the provisions of Section 119 of the Evidence Act and referred the decision of this Court in **Alavi** (*supra*) and held as follows:-

"13. A Division Bench of the Kerala High Court in Kadungoth Alavi v. State of Kerala reported in 1982 CriLJ 94 while impressing upon the need to examine a deaf and dumb witness with the help of an expert or some other person, who is very much familiar with the witness has observed,

"As the learned Sessions Judge cannot be expected to have anything more than a layman's knowledge in conversing with a deaf and dumb person it was highly improper on his part to embark upon the examination of PW 4 without the help of an expert or a person familiar with his mode of conveying ideas to others in day to day life."

The Kerala High Court dealing with the question of statement of deaf and dumb witness to be recorded by somebody else referring to the Calcutta High Court's case in Ah Soi, 1926 (27)



CriLJ 805 (supra) observed as follows:

"If somebody else is available, it is better the services of a person who is a witness in the case is not made use of to interpret his evidence or to converse with him. In Ah Soi v. King Emperor, AIR 1926 Cal 922 : 1926 (27) CriLJ 805, it has been held that a witness who took active part during the investigation of the case and who gave evidence before the committing Magistrate and who was willing to give evidence on the side of the prosecution in the Sessions trial should not be chosen as interpreter. The Calcutta High Court said that this is opposed to the elementary ideas of justice."

Thus, before recording the statement of deaf and dumb witness, the court is required to ascertain that he possess the requisite amount of intelligence, and that he understands the nature of oath. Not only this, but he is also required to record the satisfaction to that effect. The court is required to ascertain, if the witness either by writing or sign can make intelligible of what he has to speak. If he is able to communicate his statement perfectly by writing. It will be more satisfactory method of taking evidence. When such a witness is not able to write, then he can make sign showing what he wants to say. If, it is by signs, those signs must be recorded and not only the interpretations of those signs. It is necessary to enable the appellate court to know whether the interpretation of the sign is correct or not. It is not safe for a court to embark upon the examination of a deaf and dumb witness on his own without the help of an expert or a person familiar with his mode of conveying ideas to others in day to day life. However, such a person should not be an interested person, who had participated in the investigation and who is also a witness in the same trial.

14. In the instant case, the learned trial Court did not make any effort to ascertain prelims like her intelligence, the understanding of oath, capacity to communicate by writing. Irrespective of the fact that application was made by the witness herself to arrange for an expert, no efforts were made in this direction. Instead he on his own by deciphering the



gesture of the witness proceeded to record the statement. There is nothing to show to what extent her father PW 1 Jaswant Singh extended assistance in recording of her statement. It appears that her statement has been recorded with his assistance, on this count alone her statement cannot be admitted in evidence. It is not in dispute that PW 1 Jaswant Singh participated during the investigation and also appeared as a witness in the same trial. It appears from her statement that she had written telephone number of her father on a paper in English. If, it is so, she could have been asked to give her statement in writing, otherwise with the help of expert. We are of the view that the learned Judge having not taken the requisite precautions in recording the statement of a deaf and dumb witness, rendered the statement inadmissible. Thus, the conviction of the appellant cannot be sustained on the testimony of PW 16 Mst. Geeta.”

The decision of the Rajasthan High Court in ***Darshan Singh*** (*supra*) was affirmed by the Supreme Court in ***Darshan Singh*** (*supra*). It was held:-

“16. We have also gone through the entire evidence and concur with the findings recorded by the High Court. Basic argument which has been advanced by both the parties before us is on the admissibility and credibility of sole eye - witness Geeta (PW 16). Admittedly, Geeta (PW 16) had not been administered oath, nor Jaswant Singh (PW 1), her father who acted as interpreter when her statement was recorded in the court. In view of provisions of S.4 and S.5 of the Oaths Act, 1969, it is always desirable to administer oath or statement may be recorded on affirmation of the witness. This Court in Rameshwar S/o Kalyan Singh v. The State of Rajasthan, AIR 1952 SC 54, has categorically held that the main purpose of administering of oath to render persons who give false evidence liable to prosecution and further to bring home to the witness the solemnity of the occasion and to impress upon him the duty of speaking the truth, further such matters only touch



credibility and not admissibility. However, in view of the provisions of S.7 of the Oaths Act, 1969, the omission of administration of oath or affirmation does not invalidate any evidence.

17. In M.P. Sharma and Others v. Satish Chandra, District Magistrate, Delhi and Others, AIR 1954 SC 300, this Court held that a person can "be a witness" not merely by giving oral evidence but also by producing documents or making intelligible gestures as in the case of a dumb witness (See S.119 of the Evidence Act) or the like.

18. The object of enacting the provisions of S.119 of the Evidence Act reveals that deaf and dumb persons were earlier contemplated in law as idiots. However, such a view has subsequently been changed for the reason that modern science revealed that persons affected with such calamities are generally found more intelligent, and to be susceptible to far higher culture than one was once supposed. When a deaf and dumb person is examined in the court, the court has to exercise due caution and take care to ascertain before he is examined that he possesses the requisite amount of intelligence and that he understands the nature of an oath. On being satisfied on this, the witness may be administered oath by appropriate means and that also be with the assistance of an interpreter. However, in case a person can read and write, it is most desirable to adopt that method being more satisfactory than any sign language. The law required that there must be a record of signs and not the interpretation of signs.

19. In Meesala Ramakrishnan v. State of A.P., 1994 (4) SCC 182, this Court has considered the evidentiary value of a dying declaration recorded by means of signs and nods of a person who is not in a position to speak for any reason and held that the same amounts to a verbal statement and, thus, is relevant and admissible. The Court further clarified that 'verbal' statement does not amount to 'oral' statement. In view of the provisions of S.119 of the Evidence Act, the only



requirement is that witness may give his evidence in any manner in which he can make it intelligible, as by writing or by signs and such evidence can be deemed to be oral evidence within the meaning of S.3 of the Evidence Act. Signs and gestures made by nods or head are admissible and such nods and gestures are not only admissible but possess evidentiary value.

20. Language is much more than words. Like all other languages, communication by way of signs has some inherent limitations, since it may be difficult to comprehend what the user is attempting to convey. But a dumb person need not be prevented from being a credible and reliable witness merely due to his / her physical disability. Such a person though unable to speak may convey himself through writing if literate or through signs and gestures if he is unable to read and write. A case in point is the silent movies which were understood widely because they were able to communicate ideas to people through novel signs and gestures. Emphasised body language and facial expression enabled the audience to comprehend the intended message.

21. To sum up, a deaf and dumb person is a competent witness. If in the opinion of the Court, oath can be administered to him / her, it should be so done. Such a witness, if able to read and write, it is desirable to record his statement giving him questions in writing and seeking answers in writing. In case the witness is not able to read and write, his statement can be recorded in sign language with the aid of interpreter, if found necessary. In case the interpreter is provided, he should be a person of the same surrounding but should not have any interest in the case and he should be administered oath.”

Given that the learned Magistrate utilized the services of PW2 to record the statement of PW1 under Section 164 of the Cr.P.C., and



considering that PW2 was the first informant in this case and was also a witness examined for the prosecution, it becomes evident that the law as can be gathered from *ratio* of ***Alavi*** (*supra*) and ***Darshan Singh*** (*supra*) has been violated. Both the aforesaid decisions categorically hold that while the services of an individual who is familiar with the witness can be utilized to interpret his/her statements (particularly when the trained interpreter is unable to comprehend what the witness is trying to communicate), such an individual should not be a person who actively participated in the investigation of the case and was willing to provide evidence on the side of the prosecution during the trial.

13. As previously mentioned, considering the provisions of Section 164 of the Cr.P.C., the statement recorded from the victim under that section was treated as the examination-in-chief, except for a question posed to PW1 regarding the identity of the appellant/accused at the trial before the Sessions Court. While the learned Sessions Judge expressed satisfaction with the qualifications of the interpreter whose services were provided during further examination/cross-examination of PW1 at the trial before the Sessions Court, the learned Magistrate did not conduct a similar



evaluation regarding the qualifications of the interpreter whose services were utilised at the time the statement under Section 164 of the Cr.P.C was recorded from the victim. This discrepancy is noteworthy, as the statement under Section 164 of the Cr.P.C. was substituted for the examination-in-chief under the provisions of Section 164 (5-A)(b) of the Cr.P.C. Furthermore, PW1 was not trained in the use of sign language, rendering the interpreter's interpretation of PW1's signs, at the very least, challenging. It is also unclear as to how the interpreter whose services were utilised by the Sessions Court was able to interpret the signs/gestures used by PW1 when she was examined before that Court.

14. A Division Bench of the High Court of Sikkim had to consider an almost identical situation in ***Dawagyal Lepcha*** (*supra*). It was held that in situations identical to the one that presents itself before this Court, the trial judge must adopt a proactive role. It was held:-

“13. In Munna Pandey v. State of Bihar, (2023 SCC OnLine SC 1103) the Supreme Court has held as follows;

“53. Sarkar (1999, 15th pp. 2319 etc.) says that a Judge is entitled to take a proactive role in putting questions to ascertain the truth and to fill up doubts, if any, arising out of inept examination of witnesses.



But, as stated by Lord Denning in Jones v. National Coal Board, 1957 (2) All ER 155 (CA), the Judge cannot "drop the mantle of a Judge and assume the robe of an advocate".

54. Of course, the Judge should not be a passive spectator but should take a proactive role as emphasized by Phipson (Evidence, 1999, 15th Ed, para 1.21 as under: - "When the form of the English trial assumed its modern institutional form, the role of the judge was that of a neutral umpire. This is still broadly the position in criminal cases. In civil cases, the abandonment of jury trial except in a few exceptional cases led to some dilution of this principle. The wholesale changes in 1999 of the rules governing civil procedure has emphasized the interventionist role of the modern judge. Whereas formally the tribunal was a 'reactive judge (for centuries past at the heart of the English Common Law - concept of the independent judiciary) instead we shall have a proactive judge whose task will be to take charge of the action at an early stage and manage its conduit."

(Emphasis supplied)

55. This Court in State of Rajasthan v. Ani @ Hanif, 1997 (6) SCC 162, made very relevant and important observations as under: -

"11. ...S.165 of the Evidence Act confers vast and unrestricted powers on the trial court to put "any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant" in order to discover relevant facts. The said section was framed by lavishly studding it with the word "any" which could only have been inspired by the legislative intent to confer unbridled power on the trial court to use the power whenever he deems it necessary to elicit truth. Even if any



such question crosses into irrelevancy the same would not transgress beyond the contours of powers of the court. This is clear from the words "relevant or irrelevant" in S.165. Neither of the parties has any right to raise objection to any such question.

12. Reticence may be good in many circumstances, but a Judge remaining mute during trial is not an ideal situation. A taciturn Judge may be the model caricatured in public mind. But there is nothing wrong in his becoming active or dynamic during trial so that criminal justice being the end could be achieved. Criminal trial should not turn out to be a bout or combat between two rival sides with the Judge performing the role only of a spectator or even an umpire to pronounce finally who won the race. A Judge is expected to actively participate in the trial, elicit necessary materials from witnesses in the appropriate context which he feels necessary for reaching the correct conclusion. There is nothing which inhibits his power to put questions to the witnesses, either during chief examination or cross - examination or even during re-examination to elicit truth. The corollary of it is that if a Judge felt that a witness has committed an error or a slip it is the duty of the Judge to ascertain whether it was so, for, to err is human and the chances of erring may accelerate under stress of nervousness during cross-examination. Criminal justice is not to be founded on erroneous answers spelled out by witnesses during evidence - collecting process. It is a useful exercise for trial Judge to remain active and alert so that errors can be minimised."



(Emphasis Supplied)

56. In the above context, it is apposite to quote the observations of Chinnappa Reddy, J. in *Ram Chander v. State of Haryana, 1981 (3) SCC 191*: -

"2. The adversary system of trial being what it is, there is an unfortunate tendency for a judge presiding over a trial to assume the role of a referee or an umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortions flowing from combative and competitive element entering the trial procedure. If a criminal court is to be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth..."

(Emphasis supplied)."

In the same judgment, the High Court of Sikkim has laid down the manner in which the trial court should proceed with the examination of witnesses to whom the provisions of Section 119 of the Evidence Act may be applicable.

15. The Madras High Court in ***Ravichandran*** (*supra*) referred to the judgment of the Supreme Court in ***Darshan Singh*** (*supra*) on the effect of the provisions of Section 119 of the Evidence Act and held as follows:-



"13. The Hon'ble Supreme Court in State of Rajasthan vs. Darshan Singh alias Darshan lal reported in (2012) 5 SCC 789 while considering Section 119 of the Indian Evidence Act prior to the insertion of the proviso in the year 2013 held as follows:

"26.When a deaf and dumb person is examined in the court, the court has to exercise due caution and take care to ascertain before he is examined that he possesses the requisite amount of intelligence and that he understands the nature of an oath. On being satisfied on this, the witness may be administered oath by appropriate means and that also with the assistance of an interpreter. However, in case a person can read and write, it is most desirable to adopt that method being more satisfactory than any sign language. The law requires that there must be a record of signs and not the interpretation of signs.

29. To sum up, a deaf and dumb person is a competent witness. If in the opinion of the court, oath can be administered to him/her, it should be so done. Such a witness, if able to read and write, it is desirable to record his statement giving him questions in writing and seeking answers in writing. In case the witness is not able to read and write, his statement can be recorded in sign language with the aid of interpreter, if found necessary. In case the interpreter is provided, he should be a person of the same surrounding but should not have any interest in the case and he should be administered oath."

14.

15. One may note that though the main part of Section 119 of the Indian Evidence Act speaks about witness who is



unable to speak, the proviso that was incorporated in the year 2013 states about a witness who is unable to communicate verbally. As per section 119, if the witness is unable to speak, he may give evidence by writing or by signs. But, such writing must be written and the signs made in open Court and the evidence so given shall be deemed to be oral evidence. Since the language employed in the main part of the Section and in the proviso are different, they do not obviously convey the same meaning. A person can verbally communicate even if he is unable to speak. The Black's Law dictionary defines " Verbal, adj.(15c) 1. Of, relating to, or expressed in words". Thus verbal communication in the context of Section 119 is by words in writing. Therefore, the proviso is applicable only to such category of persons who are unable to speak and unable to verbally communicate through writing. Therefore, it follows that it applies only to persons who give evidence by signs.

16. From the above discussion and the decisions cited above, we can sum up the principles relating to examination of witnesses who are unable to speak under Section 119 of the Indian Evidence Act, as follows:

a. The endeavour of the Court must be to record the evidence, by giving questions in writing and seeking answers in writing, if the witness is able to read and write. Only if the witness is unable to read and write, the courts should record the evidence by signs.

b. If the evidence is recorded by signs, the view of the Courts, (prior to amendment) was that the signs must be recorded as such and they should not be any interpretation of the signs. The Hon'ble Apex court, in Darshan Singh case cited supra held that the interpreter is necessary while recording the evidence of witnesses who give evidence by



signs. The legislature thought it fit to make it mandatory for the Courts to take the assistance of an interpreter and videograph such evidence, in line with the pronouncements of the Hon'ble Apex court.

c. The meaning of word "unable to communicate verbally" in the proviso to Section 119 of the Indian Evidence Act means unable to communicate in writing and can communicate only through signs. It is for those category of persons who are unable to speak and can't communicate in writing that the proviso would apply. As per the proviso the Courts shall take the assistance of the interpreter and such recording of such statement shall be videographed. This is a mandate that the Courts have to strictly comply that. This Court in Mariyadoss cited supra held that the trial Courts should get an undertaking affidavit from the videographer that he will not disclose the proceedings to anybody and that he will not retain a copy of the proceedings. The relevant portion has been extracted above."

16. From the legal principles established in ***Alavi*** (*supra*), ***Darshan Singh (Supreme Court)*** (*supra*), and ***Dawagyal Lepcha*** (*supra*), it is evident that the Magistrate's decision to record the victim's statement (under Section 164 of the Cr.P.C) in this case by utilizing the services of PW2, who was the first informant and also a witness for the prosecution, is legally untenable. Furthermore, upon reviewing the victim's deposition before the Sessions Court, it becomes apparent that the appellant accused was unable to effectively cross-examine PW1. Given that the



foundation of the prosecution case rests on the victim's statement under Section 164 of the Cr.P.C, which was taken as the examination-in-chief in accordance with the provisions of Section 164(5-A)(b) of the Cr.P.C, and since the recording of that statement was not in accordance with the law as noticed earlier and further since the appellant's counsel was clearly not in a position to cross examine PW1 (in the facts and circumstances of this case), I am inclined to allow this appeal. Consequently, this appeal is allowed, and the conviction and sentence imposed on the appellant in S.C.No.184/2021, on the file of the Special Judge, Fast Track Special Court, Mattannur, will stand set aside. Given that the fundamental defects in the proceedings cannot be remedied by remand, I am not inclined to remand this case for a fresh trial. Since I have already directed that the appellant be released from custody by a separate order immediately after this judgment was dictated, no further direction is issued for his release from custody.

17. The proceedings in this case underscore the necessity of establishing a standardised procedure for recording the statements or depositions of witnesses to whom the provisions of Section 118/119 of the Evidence Act, which are identical to Section 124/125



of the Bharatiya Sakshiya Adhiniyam, 2023 (hereinafter referred to as '*the BSA*'), apply. To prevent any miscarriage of justice it is also essential that the recording of statements in accordance with the provisions of Section 164 of the Cr.P.C., especially in cases where the provisions of Section 164(5-A) (b) apply, are standardised.

18. In accordance with the directives issued by the Supreme Court on 11.1.2022, in Miscellaneous Application No. 1852/2019 in Crl.A. No. 1101/2019, this Court issued guidelines for recording evidence of vulnerable witnesses through Notification No. D1-7/17562/2022 dated 12.04.2022. Subsequently, following further directives issued by the Supreme Court on 7.11.2024, in Miscellaneous Application No. 1852/2019 in Crl.A. No. 1101/2019, this Court issued another notification dated 21.12.2024 bearing the same number and date. The definitions of 'vulnerable witness' in the guidelines issued through both notifications indicate that the guidelines will also extend to individuals suffering any disability as defined under the provisions of the Rights of Persons with Disabilities Act, 2016, and other categories specified therein. While all courts are required to strictly adhere to the guidelines issued through the December 2024 notification until they are replaced by



other instructions or statutory provisions, it is imperative, in the specific circumstances of this case, to issue additional directions to ensure that the proceedings before the trial courts are not compromised in any manner, as evidenced in this case. Therefore, in addition to the guidelines contained in the December 2024 notification, the following directions are hereby issued for strict compliance:

(i) The Magistrate or the Trial Judge, as the case may be, shall mandatorily record his/her satisfaction regarding the competence of the witness under Section 124 of the BSA (corresponding to Section 118 of the Evidence Act);

(ii) The Magistrate or the Trial Judge, as the case may be, shall consider whether a witness who is unable to speak can give evidence in any other manner in which he/she can make it intelligible as contemplated by the main part of Section 125 of the BSA (corresponding to Section 119 of the Evidence Act). If the Magistrate or the Trial Judge, as the case may be, concludes that the services of an interpreter/special educator as contemplated by the proviso to Section 125 of the BSA, are required, he/she shall proceed to ensure that the services of



such interpreter/special educator are made available;

(iii) The Magistrate or the Trial Judge, as the case may be, shall mandatorily record his/her satisfaction regarding the qualifications and competence of the interpreter and must also record his/her satisfaction that the interpreter can understand the signs and gestures being made by the witness and that the witness can understand the signs and gestures being made by the interpreter;

(iv) In cases where the provisions of Section 125 of the BSA apply, the Magistrate or the Trial Judge, as the case may be, shall invariably record the demeanour of witnesses as contemplated by Section 315 of the BNSS (corresponding to Section 280 Cr.P.C);

(v) If the interpreter is unable to interpret the signs and gestures of the witness, the Magistrate or the Trial Judge may utilise the services of a person familiar to the witness who is conversant with the mode and manner that the witness employs to convey ideas to others in day-to-day life. However, care must be taken to ensure that such a person is not an



interested person who took an active part during the investigation of the case or a person who is/was willing to give evidence on the side of the prosecution.

(vi) The Magistrate/the Trial Judge shall administer oath or affirmation to the witness the, interpreter /special educator (if appointed) and also to the person who is conversant with the mode and manner that the witness employs to convey ideas to others in day-to-day life if the services of such a person are utilised by the Court in the manner contemplated by Section 125 of the BSA.

It is once again clarified that the directions issued above are in addition to and not in derogation of any instruction contained in the Notification bearing No.D1-7/17562/2022 dated 21.12.2024 issued by this Court. The Registry of this Court shall take necessary steps to ensure that these directions are brought to the notice of all trial courts subordinate to this Court forthwith.

sd/-

**GOPINATH P.
JUDGE**

ats/AMG/ajt/acd



2025:KER:62139

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APPENDIX OF CRL.A 1938/2024

PETITIONER ANNEXURES

Annexure 1	A TRUE COPY OF THE WEDDING INVITATION CARD
Annexure 2	A TRUE COPY OF THE TREATMENT SUMMARY DATED 8/6/2025 ISSUED BY THE NEUROLOGIST, THALASSERY CO-OPERATIVE HOSPITAL SOCIETY LTD. NO. C.1021