IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN

WEDNESDAY, THE 10TH DAY OF NOVEMBER 2021 / 19TH KARTHIKA, 1943

CRL.A NO. 1056 OF 2016

AGAINST THE JUDGMENT IN SC 117/2016 OF SPECIAL COURT FOR TRIAL OF OFFENCES UNDER POCSO ACT & CHILDREN'S COURT (ADDL.SESSIONS COURT-1) KALPETTA, WAYANAD

(CRIME NO.555/2015 OF MEPPADI POLICE STATION, WAYANAD)

APPELLANT/ACCUSED:

K.RAGHAVAN
AGED 38 YEARS, S/O. KUNHIRAMAN, VADUVANCHAL, NALLANNUR COLONY, THINAPURAM, MOOPPANADU, VYTHIRY P.O., WAYANADU.
BY ADV R.N.SAJITHA(K/485/2005)

RESPONDENT/COMPLAINANT:

STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.
BY ADV SMT.AMBIKA DEVI S, SPL.GP ATROCITIES AGAINST WOMEN & CHILDREN & WELFARE OF W & C

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 27.10.2021, THE COURT ON 10.11.2021 DELIVERED THE FOLLOWING:

CR

K.Vinod Chandran & C.Jayachandran, JJ.

Crl.A.No.1056 of 2016

Dated, this the 10th November 2021

JUDGMENT

Vinod Chandran,J.

Forensic and semantics apart, child molestation is a shame on society; but if the allegations are false, it is lethal to the life of the accused, more so if the accused is a parent; even if he is eventually acquitted. Here we have the case of a child raising such accusation against her father with the active support of the stepmother; sheer instigation by the latter, pleads the accused.

2. The case was scheduled for hearing earlier and on consecutive days there was no appearance. We hence had to direct the State Legal Services Authority to contact the accused to ascertain whether he required legal assistance. The appellant, who was contacted in the prison, gave us the details of the lawyer he engaged. Later Smt.Sajitha R.N. appeared on behalf of the accused and informed us that a more experienced lawyer whom she entrusted the case with, is now unable to appear. Considering the nature of the offence, we thought it fit that an *amicus curiae* be appointed and we

requested Smt.Sai Pooja, who regularly appears before us, to assist the Court. Smt.S.Ambikadevi, Special Government Pleader (Atrocities against Women and Children) appeared for the State.

3. Adv. Sai Pooja argued that the date of the alleged act is not specified and there is delay in reporting the offence. The testimonies were read over to pertinently challenge the versions of PWs.1 and 2, the prosecutrix and her step mother. The discrepancies pointed out creates a serious doubt in any reasonable mind, argues learned Counsel. The prosecution has failed to corroborate the version of the prosecutrix; which is warranted since the discrepancies require such corroboration. The medical evidence is sketchy and there is absolutely no evidence of a penetrative sexual assault. The letter said to have been written first by the stepmother to the class teacher has not been produced despite the Police having seized it. Likewise, the complaint to the Childline is suppressed from the Court. The crime mentioned is only of one instance and both the witnesses do not remember the date. A casual reference to earlier instances was not followed up by the prosecution or deposed by the witnesses. The period spoken of by the witnesses is vague and so are the actions of the accused not clearly stated. What

actually occurred is not clear from the evidence of the prosecutrix. It is submitted that there is no injury proved on the genitals of the victim and the testimony of the victim is a tutored testimony. The *malafide* intention to somehow remove the accused from the house, is clear from the embellishments of PW2. The scene plan does not show two entrances into the house and the incident spoken of differs at every stage. There is nothing to attract the POCSO Act. The foundational facts required to be proved are the age and the penetrative sexual act, which the prosecution has miserably failed to prove.

4. The learned *amicus curiae* would rely on the following decisions: *Santosh Prasad @ Santosh Kumar v. State of Bihar [(2020) 3 SCC 443*] held that when there are material contradictions in the evidence of the prosecutrix and when there is delay in lodging the FIR, a conviction cannot be entered. *Kappinaiah v. Emperor [AIR 1931 Madras 233*] found a statement made of ravishment, immediately after the incident, not to be part of *res gestae* and inadmissible under Sec.6. In *Royson v. State of Kerala [2017 KHC 1056*] suppression of material facts in the FIR was declared to be very serious and fatal. In *Justin @ Renjith v. Union of India & Others [2020 (6) KHC 546*] a learned Single Judge of this Court held that

the prosecution is not absolved of its duty to establish foundational facts merely by reason of the presumption cast on the accused by S.29 & 30 of the POCSO Act. Adv.Sajitha argued that the prosecution miserably failed to prove the charges and the guilt of the accused has not been brought home, beyond all reasonable doubt. The first information is in three installments - one by a voluntary statement to the mother, the second to the teacher and then to the police officer. It is clear that PW1 was used as a tool to some how remove the accused from the residence. The medical evidence also does not corroborate the allegations levelled.

5. The Special G.P asserts that PW1 spoke of penetration and emphasize the helpless state she was in, at the relevant time, since her leg was fractured. The narration of molestation, to the stepmother is *res gestae* under S.6 of the Evidence Act. The incident which led to the complaint was at noon and immediately thereafter at 5.45 p.m, there was a disclosure. In her testimony the prosecutrix spoke of three instances of the father having ravished the seven year old girl. The trial Judge had seen the child and that is enough proof of minority especially since the child was only seven years old. Placing reliance on *2013(7) SCC 263 (Jarnail Singh v. State of Haryana)* the learned Counsel seeks

reconsideration of *Alex v. State of Kerala* [*2021 (4) KLT 480*]. The Special Prosecutor also relies on the following judgments to urge reconsideration: *Abuzar Hossain @ Gulam Hossain v. State of West Bengal* [*(2012) 10 SCC 489*],*Parag Bhati (Juvenile) through Legal Guardian-Mother-Rajni Bhati v. State of Uttar Pradesh and Another* [*(2016) 12 SCC 744*] and *Sanjeev Kumar Gupta v. The State of Uttar Pradesh and Others* [*(2019) 12 SCC 370*]. *State of Himachal Pradesh v. Asha Ram* [*(2005) 13 SCC 766*] & *Wahid Khan v. State of Madhya Pradesh* [*(2010) 2 SCC 9*] were relied on to contend that the testimony of a rape victim has the same sanctity of an injured witness and can be solely relied on to base a conviction without any corroboration. *Chittaranjan Das v. State of W.B.* [*AIR 1963 SC 1696*] is urged to argue that the charge framed should give a reasonably sufficient notice as to the case against the accused and there is no requirement to specify the dates.

6. Ext.P1 is the FIS as stated by PW1, the prosecutrix, in the presence of PW2. PW1 was staying with her father, stepmother and a younger sibling. At that time she was studying in the 1st Standard in Arappatta School and she had injured her leg when she was playing at the school. Due to the injuries she was absent from school and at home. Her father, the accused, was looking after her and she was

sleeping with him. A few days before, when she was lying on a cot with her father, he removed her undergarments and rubbed her genitals with his genitals. She told her stepmother, and subsequently, she was sleeping with her stepmother. It was also casually stated that such instances had occurred previously. The statement was signed by PW2, the stepmother.

7. Prosecutrix was examined as PW1. Even after the *voire dire* the Court recorded the testimony as questions and answers. She spoke of the circumstances, the death of her biological mother and her stay with her father, stepmother and the younger sibling. She spoke of her injury and the fact that her father was looking after her when she was injured. A leading question was asked as to whom she was sleeping with; to which she answered, her father. Then again a question was asked as to what her father did when she was lying with him. She answered that while they were lying in the front room, the father inserted his genitals into her genitals. She felt pain and cried and her mother was at that time in the kitchen. She was asked as to why she remained silent; which is unnecessary promoting, since she already said that she was crying. Any way she answered that she did not speak because she was afraid of her father. When she was asked a specific question whether she told her mother, she replied that she

did, when her father went out to a shop. The defence suggestion regarding instigation by the stepmother was denied by the child. The suggestion that she omitted to talk of penetrative sexual assault to the police and the doctor was also denied.

8. PW2 is the mother, who corroborated PW1 with respect to their living circumstances. PW2 also spoke of the injury of PW1 and her absence from school. While PW1 said that she was looked after by her father, when she was incapacitated by an injury; PW2 said that she was looking after PW1 along with the accused. Her deposition was that PW1 told her that the accused removed PW1's undergarments and laid down on her body at noon and she was told about that when the accused went out to a shop at around 5.45 p.m. She stated that when the incident occurred, she was in the kitchen, situated outside the living quarters and when she tried to enter, both the entrances at the front and back of the house were locked. She had also attempted to inform the school authorities. According to her, she wrote a letter to the teacher informing that she has something to be conveyed. Two teachers reached her home, but the accused was present and hence she could not talk to them. Later the Childline personnel took the child to a Government home and still later

FIS was given, which was signed by PW2. In cross, she said she was not present when CW8, Doctor, examined the victim. PW2 said she did not give any separate complaint to the police, but had given a complaint to the Childline Co-ordinator. The complaint so made was two weeks later to the incident. The statement that PW1 was not able to enter the house since it was locked was suggested as omitted to be stated before the police. In cross-examination she also admitted that Ext.P1 FIS was read over to her and she was not available in the room when it was recorded. In re-examination, it was stated that when FIS was recorded, her younger child cried and she went to the next room. It was then deposed in re-examination that she was available when the victim was examined by the Doctor; quite contrary to her categorical admission in cross.

9. PW3 is the teacher of PW1, who confirmed the injury suffered by PW1. She also affirmed that PW2 sent her a letter through another student asking the teachers to come to their residence. When the teachers approached PW2 and PW1, at their residence, the accused was present and, hence, PW2 indicated that no enquiry be made. In cross-examination PW3 said that the letter sent by PW2 was handed over to the Headmistress and the police had seized the same. The I.O,

PW13, feigned ignorance about the said letter. However, he admitted the complaint to the Childline Co-ordinator, which has not been produced.

10. PW4 is the witness to the scene mahazar. PW6 conducted potency examination on the accused. PW7 is the Headmistress of the school, who produced certificate of the date of birth of the victim, marked as Ext.P5. PW8 prepared the scene plan and PW9 is a social worker, who attested Ext.P3 scene mahazar. PW9 said that, in a counselling PW1 had revealed that she was molested by the accused. PW10 is the Woman Civil Police Officer (WCPO) who recorded the FIS. She insisted that PW2 was present during the recording of FIS, which was specifically denied by PW2. PW12 is the WCPO who recorded the S.161 statement of PW1. PW13 is the I.O.

11. The first contention is regarding the date of birth of the child. At the outset we have to observe that the argument that the learned trial Judge had seen the victim and that would suffice; cannot at all be countenanced. As far as the evidence led, the certificate produced at Ext.P5, proved by PW7, the Headmistress of the school in which the victim was studying, is not one declared to be, the school first attended. It is not even the extract of the school register and the H.M merely certifies the victim to be a student of

the school during the academic year 2015-16 and the date of birth as 28.06.2009 as per the school records. This according to us falls short of proving the date of birth of the victim. The learned Special G.P has sought reconsideration of the earlier decisions of this Court specifically ***Alex*** (supra).

12. ***Rajan v. State of Kerala [2021(4)KLT 274]*** first considered the issue based on a certificate from the school first attended. The contention of the accused was that it does not stand the test of S.76 of the Indian Evidence Act, not being even a secondary evidence as contemplated under S.63. The Division Bench, relying on ***Jarnail Singh v. State of Haryana*** [*(2013) 7 SCC 263*] and ***Mahadeo v. State of Maharshtra*** [*(2013) 14 SCC 637*] held that the certificate from a school first attended as provided for in Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 would suffice. The argument that the Rules of 2007 being not in force; there cannot be any reliance placed on the said rules, was negatived. It was held that since the Hon'ble Supreme Court referred to the Rules of 2007 and imported the same procedure in the case of minor victims, the certificate from the school first attended is sufficient proof of the age of the victim. In the said case the photocopy of a birth certificate issued by the Registrar of Births and Deaths,

attested by a Gazetted Officer was also produced. Looking at the Evidence Act, it was held that the Register of Births And Deaths, statutorily maintained is a public document as contemplated in S. 74 and the certified copy of the Extract from that Register, spoken of in S.76, is the certificate issued by the Registrar on an application made to the Registrar. It was held that the primary evidence under S.62 would be the 'Register' itself and secondary evidence, under S.65(e), the Certificate of Birth issued by the Registrar and not a photocopy of that document, even if it is attested by a Gazetted Officer.

13. The question again arose in ***Alex*** (supra) where Ext.P3 extract of the school register was produced to prove the age of the victim. It was held so in paragraph 20:

> *"20. Though under the Act of 2015, there is no requirement of the certificate to be from the School first attended, the Hon'ble Supreme Court has specifically referred to the Rules of 2007 and imported the same procedure in the case of minor victims as in the case of minor children in conflict with law. A Division Bench of this Court in Crl.Appeal No.50 of 2017 [Rajan K.C. v. State of Kerala] after referring to the Rules of 2007 and the Act of 2015, held: " we would think that the said rigour (in the Rules of 2007) has to be applied in cases where the determination of the age of a minor victim arises; so as to not prejudice the accused" (sic). The rigour noticed is of the requirement of the extract of the School Register to be from the school first attended. The Act of 2015 is one*

> ***intended for the protection of the juveniles in conflict with law, just as the criminal justice system ensures no prejudice being caused to the accused. The rigorous requirement made by the Hon'ble Supreme Court, while importing the requirement of the Rules of 2007, specifically of the date of birth of even a victim being determined with the certificate from the school first attended has to survive the repeal of the Rules of 2007 and we cannot be diluting the requirement. This also is in consonance with the principle of 'ante litem motam'.”***

Noticing the later enactment, being the Juvenile Justice (Care and Protection) Act, 2015, specifically S.94(2) requiring only a date of birth certificate from a school; it was cautioned that the same cannot be imported to determine the age of a victim under the POCSO Act. Reliance was placed on *Ravinder Singh Gorkhi v. State of U.P (AIR 2006 SC 2157)*, in which the Hon'ble Supreme Court declared so: *“We are, therefore, of the opinion that until the age of a person is required to be determined in a manner laid down under a statute, different standard of proof should not be adopted”* (sic-para38).

14. *Alex* (supra) held as follows, also relying on *Birad Mal Singhvi* :

> ***“22. On the above finding it has to be held that Ext.P3, extract of the Admission Register of the School, which was not the first school attended by the student, cannot be accepted as valid proof of***

age. We do not agree with the contention of the learned Special G.P that there was no challenge made in the cross-examination of the HM, PW3, and she was not even questioned as to the correctness of the date. The HM cannot be questioned on the correctness of the date since she has no personal knowledge of the date of birth of the victim. She can only vouch for the entry in the Register which would have been entered therein on the information supplied by either the guardian or the parents. The Register maintained by the School is not a public document. Ramesh @ Ramesh Kumar was a case in which the father of the victim had spoken of the age of the victim. Here, the mother was examined as PW4, who was not asked the date of birth of the victim, in chief-examination. We also reject the contention of the Senior GP that if the accused had questioned the document and raised a dispute, definitely the prosecution would have produced a valid birth certificate. The accused has no obligation to so invite the prosecution to establish the date of birth of the victim. It is the prosecution's bounden duty to establish every material fact and circumstance before the trial Court. In the above case, no such valid proof was offered and although the young victim was studying in a school, we are unable to find her age to be below 16 or even below 18; for reason of no valid proof offered. It is the failure of the prosecution and they cannot cover themselves up by alleging that the accused never raised a dispute. There is no significance in the mere marking of the document, since its probative value has to be established, which has to be by primary evidence, such as direct oral evidence (s.60 of IE Act) or documentary evidence (S.62 of IE Act) or secondary evidence in the form recognised by law (S.63 & 65 of the IE Act). If the document produced by the prosecution is not a public document or a certified copy of it, at least there should be oral evidence by a competent person.

23. Birad Mal Singhvi v. Anand Purohit [1988 Suppl. SCC 604] arose under the Representation of the People Act, 1951. It was held that the entry regarding date of birth contained in the school register and the secondary school examination has no probative value if

> ***no person on whose information the date of birth of the candidate was entered in the school records was examined. The entry contained in the admission form or the school register must be shown to be made based on the information given by the parents or a person having special knowledge about the date of birth of the person concerned. The date of birth of the candidate as contained in the document must be proved by admissible evidence ie: by the evidence of those persons who can vouchsafe the truth of the facts in issue. In the absence of any such evidence, the document has no probative value and the date of birth mentioned therein cannot be accepted. Hence, it can always be proved by the person who has direct knowledge of the fact in issue and who has, in the present case, passed on such information to be entered in the School Register. We reiterate, the mother was examined, but this crucial fact was not elicited. We find the document Ext.P3 and mere statement of HM, PW3, to be insufficient proof insofar as the date of birth of the victim is concerned."***

Since the extract of the school register was not of the school first attended, the certificate was found to be not sufficient proof of age. *Madhu v. State of Kerala [2021(6)KLT 45]* relied on *Rajan & Alex* (both supra) to find that the certified copy of the extract of the School Register cannot be sufficient proof of the age of the victim, if the same is not one issued by the school first attended.

15. The learned Special Prosecutor has relied on *Abuzar Hossain*, *Parag Bhati* and *Sanjeev Kumar Gupta* (all supra) to urge this Court to take a different view from the earlier Division Bench decisions. We cannot but notice that all these

decisions were with respect to the determination of age of an accused under the JJ Act, 2000 or the JJ Act, 2015. *Ravinder Singh Gorkhi* and *Birad Mal Singhvi* (both supra) specifically spoke of the necessity and sufficiency of proof, to be the one available in the statute itself. The POCSO Act does not provide for determination of age of a victim; as does the JJ Act in determination of the age of the juvenile-accused, who is a child-in-conflict with law. In this context, we cannot but notice that the fundamental principles of criminal jurisprudence requires every benefit to be conferred on the accused and no prejudice being visited on him/her. This is the principle on which is founded the determination of age of a juvenile accused, as has been specifically provided for in the JJ Act. In this context, we respectfully look at the concurring judgment in *Abuzar Hossain*, where the relevant fact of juvenile delinquency, often springing from poverty and unemployment was noticed and it was observed that a majority of these delinquents, would not have had an opportunity to go to school. The observations were made in the context of determining the scope of an inquiry under Section 7A of the JJ Act, 2000. It was held that an inquiry is not the same thing as declaring an accused to be a juvenile and there should be a liberal approach in ordering

an inquiry, which only requires a *prima facie* conclusion; lest there be miscarriage of justice and the advantage of a beneficial legislation denied to an unfortunate and wayward juvenile-delinquent.

16. In *Parag Bhati (Juvenile)* it was held that the principle of benevolent legislation attached to the JJ Act would apply only when the accused is held to be a juvenile on the basis of at least *prima facie* evidence. That was a case in which the date of birth recorded in School Certificates were held to be doubtful and the claim of juvenility of the accused was rejected by all the Courts including the Hon'ble Supreme Court. Their Lordships also cautioned against taking a casual or cavalier approach in deciding whether an accused is a juvenile or not, especially when the plea is '*more in the nature of a shield to dodge or dupe the arms of law*'(sic).*Sanjeev Kumar Gupta* (supra) rejected the claim of juvenility despite the matriculation certificate establishing that the accused was a minor. The Hon'ble Supreme Court looked at the date of birth entered in the school first attended, which tallied with the voluntary disclosure made by the accused for the purpose of obtaining Aadhaar Card and Driving License, to reject the claim of juvenility. None of these decisions are applicable in determining the age of a

victim under the POCSO Act. The benefit conferred on an accused in a statute cannot be imported into another statute so as to prejudice the accused in a prosecution under the other statute.

17. We bow to the proposition in *Jarnail Singh* and *Mahadeo* that the certificate from a school first attended as provided for in Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 would suffice. But we caution ourselves from stretching the dictum and diluting the rigour provided by the Hon'ble Supreme Court, in excess of the declaration made by the Apex Court, by making acceptable the certificate of extract of the admission register from a school, which is not the one first attended. We cannot import the provisions of the beneficial legislation; the JJ Act of 2015, aimed at conferring every benefit on the juvenile accused, to the POCSO Act for determination of the age of the victim; which in effect may prejudice the accused prosecuted under the POCSO Act. Hence, it was held that the rigour of the certificate from the school first attended as declared by the Hon'ble Supreme Court has to survive repeal of the Rules of 2007 and the fresh provisions, incorporated in the JJ Act, 2015 cannot be availed of to determine the age of the victim under the POCSO Act. We do not find any reason to take a

different view from the earlier decisions.

18. There are inconsistencies galore in the accusation and the testimonies proffered before Court. The charge itself is that, on a Sunday 'after 19.11.2015 and before 17.12.2015' and on several prior occasions the accused committed rape on his daughter. Ext.P1 FIS, is dated 17.12.2015 and in that proximate time, from the alleged incident, there is no specification of the exact date. There are only four Sundays coming within the dates indicated and it is very suspicious that the specific day on which the incident occurred has not been divulged. *Chittaranjan Das* was a case in which the charge was of a minor girl exposed to the risk of having sexual relationship with several persons and it was held that it will be unreasonable to expect that she would be able to specify precise dates on which particular individuals had intercourse with her. Here no such allegation of repeated instances or multiple perpetrators arise and the single instance, on which the complaint was made, occurred within the prior period of less than a month; very proximate to have forgotten the exact date.

19. Further in the FIS, the victim has stated that her father had removed her undergarments and rubbed his genitals on her genitals. The word used is *'Urathi'* in the

vernacular Malayalam, which means rubbed. She also says that she told her mother and subsequently she was sleeping with her mother. There is also a bland accusation that even before, her father used to do the same thing in the nights; which obviously was not disclosed to the mother. PW1 in her chief examination that too in answering leading questions stated so. The questions and answers translated are:

> **Who were you sleeping with?(Q) With my father.(A) When you were sleeping with the father what did he do? (Q) I was lying on the cot with my father in the front room. Then my father inserted into my genitals. Then I felt pain. Then I cried.(A) Previously has your father done the same thing?(Q) Yes. Twice my father has done it.(A)**

20. We quote from *Varkey Joseph v. State of Kerala 1993 Supp. (3) SCC 745:* *"The Counsel must leave the witness to tell unvarnished tale of his own account. Sample leading questions extracted hereinbefore clearly show the fact that the prosecutor led the witnesses to what he intended that they should say about the material part of the prosecution case to prove against the accused which is illegal and obviously unfair to the accused offending his right to fair trial enshrined under Art.21 of the Constitution. It is not a*

curable irregularity" (sic). **Coupled with this is what has been stated to the Doctor as available in Ext.P2. In Ext.P2 report on examination of the victim the history noticed is** "അച്ഛൻ ജെട്ടി ഊരി ഞായറാഴ്ച രാത്രി മൂത്രമൊഴിക്കുന്ന ഭാഗത്ത് തൊട്ടു.". **The translation is that: *'father removed my undergarments and touched my genitals'.* PW5 is the Doctor who examined PW1, who spoke of the history having been stated by the victim. The report on examination also indicates: 'hymen intact. Vagina admits tips of finger only. No external injuries noted'. In cross examination PW5 stated that the history was given by the child in the presence of her mother. The Doctor specifically pointed out that the history starts with 'father removed my undergarments' which indicates the history having been stated by the child herself. In the FIS on 17.12.2015 at 04.00 p.m and at the time of examination by the Doctor on the same day at 04.20 p.m, the child had given different versions about the alleged acts of her father. Before Court she gave yet another account of what occurred; asserting the penetration.**

21. Added to this is the account of PW2 before Court as to what transpired and the subsequent events. PW2 first stated that on the day when the alleged incident occurred at noon; on the same day in the evening, the victim told her that the accused pulled down the undergarments to her knees

and laid upon on her. Again a totally different account without any accusation of penetration. This is the account on which the learned Special G.P urges *res gestae*. ***Kappinaiah*** (supra) held that the statement by a woman immediately after she had been ravished does not form part of *res gestae* and it is inadmissible in evidence, under S.6. The alleged revelation made by the victim cannot be said to be part of the same transaction and is a mere narrative of the past. We also rely upon ***Krishan Kumar Malik v. State of Haryana, (2011) 7 SCC 130*** and make the following extract:

> 37. Section 6 of the Act has an exception to the general rule whereunder hearsay evidence becomes admissible. But as for bringing such hearsay evidence within the ambit of Section 6, what is required to be established is that it must be almost contemporaneous with the acts and there could not be an interval which would allow fabrication. In other words, the statements said to be admitted as forming part of res gestae must have been made contemporaneously with the act or immediately thereafter. …

The statement said to have been made by the victim to the stepmother cannot be accepted as *res gestae* and in any event, it differs considerably from what the victim herself said; which also differed at every instance.

22. PW2 also did not have a consistent case with respect to the attendant circumstance and also the subsequent events. It was the testimony of PW2 that while the alleged act was going on she was cooking inside a shed outside the

house. She had the younger child with her and when she wanted to go inside the house, both the doors at the front and back were locked from inside. The scene plan at Ext.P6 indicates only one door to the house and the I.O categorically stated that the house had only one entrance and exit. According to PW2 she had passed on a letter to the teacher in the victim's school and two teachers came to their house pursuant to that. PW3 is the teacher who corroborated that version. Admittedly PW3 was not informed of the allegations of rape when she came to the house of the victim. PW3 also stated that the letter sent by PW2 was handed over to the Headmistress, from whom the Police seized it. No such letter has been produced and the I.O feigned ignorance of such a letter. The further version of PW2, is that child-line personnel took PW1 from her school and PW1's statement was taken from the Home, to which she was admitted. However the FIS indicates that the statement was taken at the Police Station in the presence of PW2 and a Nun. PW2 does not have a case that she was present with the child, when the FIS was taken. In cross-examination PW2 stated that she was in another room when the FIS of PW1 was recorded which she confirmed; in re-examination, was for reason of her younger child having cried.

23. Likewise there is no consistent version as to

whether PW2 was with the child when she was examined by the Doctor. In cross-examination it was stated that, when PW1 was taken to the Doctor for examination, PW2 was not taken. The said statement cannot be countenanced since her consent was obtained by the Doctor in Ext.P2. In re-examination she stated that she had given consent and had accompanied PW1 to the Doctor. Yet another discrepancy is with respect to a complaint said to have been given to the child-line coordinator, who has not been examined nor such a complaint produced. PW2 states that she did not complain to the Police and she gave a complaint to the child-line coordinator, two weeks after the incident. The I.O, PW13 also says that CW2 (PW2) had given a complaint to the central-coordinator, in which case that is the first information received by the Police; which is suppressed from Court. We rely on *State of Andhra Pradesh V. Punati Ramulu (1994 Supp. (1) SCC 590* in which the first information was refused to be recorded at one police station for want of territorial jurisdiction. It was held so in para 5:

> *"… Once we find that the investigating officer has deliberately failed to record the first information report on receipt of the information of a cognizable offence of the nature, as in this case, and had prepared the first information report after reaching the spot after due deliberations, consultations and discussion, the conclusion becomes inescapable that the investigation is tainted and it*

> *would, therefore, be unsafe to rely upon such a tainted investigation, as one would not know where the police officer would have stopped to fabricate evidence and create false clues. …"*

In the present case also the first information passed on by way of a complaint by PW2 to the central-coordinator has not been produced and Ext.P1 can only be a statement in the course of investigation, which is hit by Section 162 Cr.P.C as held in *Punati Ramulu (supra).*

24. Now we come to the medical evidence and the arguments addressed on that count. The learned Counsel would take us to an authoritative text on "Forensic Medicine for the Police" by B Umadethan, a celebrated Forensic Expert, which speaks of: *'A woman with an intact hymen which admits only the little finger can be considered as a virgo intacta, a virgin. Prior vaginal intercourse can be absolutely ruled out'.* (sic) The medical examination as we noticed above shows an intact hymen and the vagina admits only the tip of the finger. There cannot be said to have been a penetrative sexual assault that too multiple instances as the accusation goes.

25. *Asha Ram* and *Wahid Khan* (both supra) declares the weight to be attached to the evidence of the prosecutrix. *Asha Ram* (supra) held that conviction can be founded on the

testimony of the prosecutrix alone, unless there are compelling reasons for seeking corroboration. The accusations in the above case made by the victim and her step mother are not consistent and it requires corroboration which we are unable to find, even from the medical evidence. *Wahid Khan* (supra) held that evidence of the prosecutrix stands on equal footing to that of an injured victim and if her evidence inspires confidence, corroboration is not necessary. We are unable to find inspiration in the prevaricating stance of the prosecutrix, on the same day before the Police and the Doctor, and then before Court where the allegations were elicited with leading questions. The account of the incident to the stepmother as spoken of by the latter also varies in content. There is serious doubt about the first information received by the Police. In the teeth of the inconsistencies pointed out by us and the incident having been elicited by way of leading questions, we find it difficult to uphold the conviction as entered into by the trial court. The prosecution has not proved the guilt of the accused beyond all reasonable doubt. The charge is vague and does not specify the date on which the alleged act of rape was committed despite the complaint having been raised within the month itself. The act complained of has not been consistently

stated, neither by the prosecutrix, nor by the stepmother to whom the victim complained. The testimony of the stepmother is full of holes and as a whole lacks credibility. We are, in the totality of the circumstances, constrained to give the accused the benefit of doubt and acquit him of the charges.

We place on record our appreciation for the diligent study and astute presentation of the case by Adv.Sai Pooja, Amicus Curiae. We allow the appeal reversing the judgment of conviction and setting at liberty the accused. He shall be released forthwith, if he is not wanted in any other case.

Sd/-
K. Vinod Chandran
Judge

Sd/-
C. Jayachandran
Judge

vku/jma/Sp-