

"C.R. "

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR.JUSTICE ZIYAD RAHMAN A.A.

WEDNESDAY, THE 8TH DAY OF SEPTEMBER 2021 / 17TH BHADRA, 1943

CRL.A NO. 1208 OF 2016

AGAINST THE JUDGMENT DATED 16.10.2014 IN SC 564/2013 OF ADDITIONAL
DISTRICT COURT & SESSIONS COURT (FOR TRIAL OF CASES RELATING TO
ATROCITIES & SEXUAL VIOLENCE AGAINST WOMEN & CHILDREN), ERNAKULAM

(CRIME NO.90/2013 OF Kunnathunadu Police Station, Ernakulam)

APPELLANT/S:

NARAYANAN

S/O KUNJAPPAN, AGED 53 YEARS,
MAROTTIKATTUKUNNEL HOUSE, MAZHUVANNOOR VILLAGE,
NELLAD KARA, NOW RESIDING AT RENTED HOUSE AT
NAREEKAL LAKSHMI, MAZHUVANNOOR KARA.

BY ADV SRI.LAVARAJ M.G.

RESPONDENT/S:

STATE OF KERALA

REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM - 682 031.

BY ADVS.

SMT.AMBIKA DEVI S, SPL.GP (ATROCITIES AGAINST WOMEN &
CHILDREN)

THIS CRIMINAL APPEAL HAVING COME UP FOR FINAL HEARING ON
31.08.2021, THE COURT ON 08.09.2021 DELIVERED THE FOLLOWING:

Crl.Appeal No.1208 of 2016 - 2 -

"C.R."

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

Crl.Appeal No.1208 of 2016

Dated, this the 8th September 2021

JUDGMENT

Vinod Chandran, J.

'Gamekeeper turns poacher' is how the Hon'ble Supreme Court described instances of rape on children by their own guardians (State of Himachal Pradesh v. Asha Ram, (2005) 13 SCC 766). In the instant case, the victim is a young girl and the accused is her father, a clear case of *'Protector turning predator'* as submitted by the learned Prosecutor.

2. The trial court convicted the accused based on the evidence led before it by way of fifteen exhibits and eleven witnesses. The defence marked one exhibit as a contradiction from the statement of PW4. Separate sentences for imprisonment for life under Sections 376 and 377 IPC and a fine amount of Rs.25,000/- each, with default sentence was imposed on the accused. The sentence was also ordered to be run concurrently. We heard the learned Counsel Lavaraj M.G. for the appellant and Smt. Ambika Devi, Special Government Pleader (Atrocities against women and children) appearing for the State.

Crl.Appeal No.1208 of 2016 - 3 -

3. The learned Counsel for the appellant submits that the victim does not have a consistent case and this reveals the falsity of the allegations. It is pointed out that the mother and brother of the victim turned hostile. There is gross delay in the registration of the crime. The child had an affair with another person, which was objected to by the father and the complaint raised was a mere backlash. Without admitting the allegations or accepting the evidence let in, the learned Counsel would also pray for indulgence insofar as the sentences, especially since the allegation of rape is an embellishment in the evidence before court. The appellant relied on Santosh Prasad @ Santosh Kumar v. State of Bihar, (2020) 3 SCC 443 to argue that when there are material contradictions in the evidence led by the prosecution and there is a delay in lodging an FIR, a conviction cannot be sustained. Bhudeb Uchai v. State of Tripura, 2020 KHC 4378 of the Tripura High Court, State of Uttarakhand v. Subash, 2019 KHC 5450 and Indra Mani Thapliyal v. State of Uttarakhand, 2013 KHC 3138; both Division Bench decisions of the Uttarakhand High Court, were relied on to set aside the conviction and alternatively to argue for mitigation insofar as the sentence is concerned.

Crl.Appeal No.1208 of 2016 - 4 -

4. The learned Special Government Pleader on the other hand, would caution us, relying on Asha Ram, from showing any indulgence to such depraved people, who turn their lascivious eye on their children, that too of tender age. It is also pointed out that the legislature keeping in mind the increase of such crimes of depravity, brought in comprehensive amendments bringing various sexual acts under the definition of rape and substantially enhancing the punishment, to even death in cases of abject depravity; *interalia* of minor children being subjected to rape by their guardians. Ravi v. State of Maharashtra, (2019) 9 SCC 622 declared that a purposive interpretation of the penal provisions has to be made, especially keeping in mind the subsequent amendments brought in by the legislature, even if such offences are committed before such amendments. It is pointed out that the mother was only shielding the father especially since she had signed on the FIS given by the daughter. Though in the FIS only digital penetration was alleged by the victim; before the Doctor, she alleged penile penetration also. There is no delay in making the complaint since the child had put forth the threat of suicide levelled by her father, as having dissuaded her from disclosure. She also spoke of the crime to her family and there is no

Crl.Appeal No.1208 of 2016 - 5 -

challenge to the explanation, in the cross-examination. The explanation proffered, if not challenged, there can be no ground raised on that aspect as has been held in State of U.P. v. Nahar Singh, (1998) 3 SCC 561. Yanab Sheikh v. State of W.B., (2013) 6 SCC 428 is also relied on.

5. Ext.P4 is the FIS given by PW4 on 12.02.2013. PW4's family moved into the present accommodation a month back, and before that, they were at a different rental accommodation, where they lived for about six months. She is one among the six siblings and her elder sister was married off; the remaining are two elder brothers and two younger sisters. Her eldest brother is employed and the other brother is also a school going child. The allegation was that one day when she was sleeping alone in the kitchen her father came to her, drunk. He caught hold of her, touched her all over, especially on the breasts. Her clothes were removed and he pressed on various parts of her body. He also touched her vagina and inserted his finger many times into the vagina. She protested and threatened that she would disclose it to her mother, and at this point, her father threatened to commit suicide if she does so. She alleged that the molestation was repeated by her father many times even when her mother was present in the house. She also spoke of a time

Crl.Appeal No.1208 of 2016 - 6 -

when her mother and brother were away concerning a bereavement. She was alone in the house with her younger sisters and father for three days when molestation of like nature was repeated. When her elder sister came home, she divulged her travails to her. The sister then took PW4 to her marital house and then PW4 returned after three months just before the examinations. She resumed school and on the first day, due to her long absence, she had to meet the Headmaster. When the Headmaster enquired about her absence, she told him of what transpired. She admitted that she was not molested in the present residence. She spoke about the molestation to her brother, PW7, who informed the same to the mother and elder sister. She lamented that every day her father comes home drunk and she did not divulge her travails only because of the threat levelled by her father. She claimed that the harassment commenced and continued when the family was staying at Veettoor; before they moved to the present residence. She also claimed that she had spoken to her mother about the molestation, which was not taken seriously.

6. PW4 in her evidence spoke in tandem with the FIS but made some embellishments. She deposed that she was molested between May and September of 2012 and then the three days when her mother was away to call on a bereaved family.

Crl.Appeal No.1208 of 2016 - 7 -

She also said that she was so harassed till 2013, which was later corrected as in 2012. While in the FIS, she said she was with her sister for three months, before court she said she was away only for two weeks. She also claimed that when she was at her sister's house, her parents had shifted their residence to Mazhuvanoor, where she had made a statement to the police. While describing the molestation, in addition to digital penetration she alleged penile penetration too. She categorically stated that after the very first incident, she had informed the same to her brother, ie. the one named Mithun, PW7, who informed the fact to their mother. After she divulged the reason for her absence to the Headmaster, personnel from the Child-line had interacted with her. Later, the police came home to record her statement. She also asserted that she gave a statement before the Magistrate, but none was produced. She claimed that both her sisters were now staying at Sevika Samajam. In cross-examination, she said that she was harassed by her father in 2012 and not up to 2013. She claimed that she was taken to her sister's marital home after the last incident. However, she does not remember the day on which she was taken to her sister's home or the day she resumed school. She denied having stated to the police that she was with her sister for three months (marked

Crl.Appeal No.1208 of 2016 - 8 -

as Ext.D1) and claimed that she only told the police of staying at her sister's home for two weeks. She alleged that she had disclosed the penile penetration to the police. In cross-examination, she claimed that she was with her family for two months before she went to her sister's place and during those two months, she had not attended school. She denied any relationship with one Biju; to a suggestion made by the defence.

7. The complaint arose when the victim first disclosed the incident to the Headmaster of the school, who was examined as PW3. PW3 identified the accused standing in the dock, who was the father of a student of his school. He attested the date of birth of the student to be 28.01.2000 as per the register maintained at the school, an extract of which was produced as Ext.P3. He stated that from November 2012 the student was continuously absent from class and hence her name was removed from the rolls. Later, in February 2013 the student came back to the school and was readmitted. When she was asked the reason for her continued long absence, it was informed to him that she was subjected to harassment by her father and hence was shifted from her parental residence to her sister's marital home. The HM immediately informed the Child-line, from where the personnel came to the school and

Crl.Appeal No.1208 of 2016 - 9 -

talked to the student. PW3 affirmed that one Shiny from Child-line visited the school. Then, a CI and two policemen came to the school and enquired with the student, ie: the victim. In cross-examination, he clarified that the Child-line officials talked to the victim on the first day when she resumed studies. On the next day, the student was allowed to attend the classes as directed by the Child-line official and it was on that day the policemen questioned her. He asserted that the victim had spoken of the harassment directly to him. The absence of the student commenced from 27.11.2012, according to the HM. A contradiction was marked insofar as the HM having told the police that when enquiries were made, the class teacher and other teachers informed him about the sexual harassment. He clarified that when the student came to the school after a long absence, the class teacher brought her to him and the student spoke of the sexual harassment directly to him.

8. The FIS was on 12.02.2013 at 5.30 PM, presumably on the date on which the victim returned to school after a long absence. She was examined by PW1 doctor on 15.02.2013 when she was accompanied by a Woman CPO and the mother, the latter of whom had given consent. The history given by the child was stated to be '*father having sexually harassed her*

Crl.Appeal No.1208 of 2016 - 10 -

on every day in the months of November-December 2012'(sic). The harassment was also stated to be '*vaginal digital exploration and penile penetration'(sic)*. The examination findings were that there was no general or genital injury but the hymen showed an old tear and the vagina admitted two fingers. On the strength of the findings on examination, the doctor opined that there was no evidence of recent sexual harassment, but indications are of penetration. The certificate was marked as Ext.P1. PW2 is the doctor who examined the accused and certified his potency. PW5 is the owner of the residential building at Veettoor where the alleged incidents occurred; which house was rented out by the family of the victim.

9. PW6 is the mother of the victim and the wife of the accused, who turned hostile. She refused to toe the line of the prosecution, despite having accepted that she signed on the FIS after her daughter. The mother said that her eldest daughter had told her about the accused having said something to the victim, and when she enquired with her husband, he denied any harassment of their daughter. She denied the statements put to her from the Section 161 statement, which were marked as Exts.P6 and P6(a). The contradictions indicated that she was aware of the father

Crl.Appeal No.1208 of 2016 - 11 -

having approached their daughter at night, in the kitchen to sexually harass her. In cross-examination, PW6 stated that PW4 had never spoken of the incident to her. But she added that her son and daughter had spoken to her about the incident. She asserted that the victim had a relationship with one Biju, who was the door checker of a bus and her husband was enraged about the same. PW7 was the minor son of PW6, who also turned hostile before court. He stated that his sister had informed him that their father caught hold of her and he had spoken of the same to his mother and eldest sister. However, he said that there was no sexual harassment spoken of by his sister. The contradictions were marked as Ext.P7 series from the Section 161 Statement. In cross-examination, PW7 stated that before his sister was taken to Kottarakkara, there was no quarrel between his father and the sister. He said that the victim went to their elder sister's house in October and returned in February. PW7, who was studying with the victim in the same school, did not affirm the relationship between the door checker and his sister and merely said that he has seen her talking to the said person.

10. PW8 is the WCPO, who recorded the FIS (Ext.P4). She specifically stated in cross-examination that there was no penile penetration spoken of by the victim while giving

Crl.Appeal No.1208 of 2016 - 12 -

the FIS. In re-examination, PW8 states that on 15.02.2013 penile penetration was spoken of by the victim. The victim also told PW8 that earlier she purposefully hid the said fact because her father had threatened to commit suicide. PW9 is the SI of Police, who deputed PW8 to take the FIS of the victim on a report dated 12.02.2013 received from the Juvenile Police Unit. He registered Ext.P9 FIR, based on Ext.P4 FIS. He commenced investigation on the very next day and arrested the accused, the memo of which was marked as Ext.P10 and the inspection memo as Ext.P11. After producing the accused before court as per Ext.P13 remand report, he transmitted the files to the CI of Police Kunnathunad. In cross-examination, he admitted that in the initial report there was no allegation of 'sexual relationship' (presumably intercourse) and hence the child was not sent for medical examination. The said initial report of the District Juvenile Unit of the Police is not produced before Court. PW10 is the investigating officer (I.O), who carried out the investigation and filed the final report.

11. The evidence led on certain aspects can be said to be inconsistent. Considering the nature of the allegations and the relationship between the parties, this Court has to carefully scrutinize the evidence to find whether the

Cr1.Appeal No.1208 of 2016 - 13 -

inconsistencies are gross enough to doubt the credibility of the prosecutrix and disbelieve her on the specific allegation of sexual molestation. PW4 did not speak of a penile penetration at the first instance when FIS was recorded and the only allegation was of digital penetration. The learned Prosecutor has emphasized the medical report, which was three days later, on 15.02.2013 (Ext.P1). Before Court also PW4 deposed about a penile penetration. The history recorded by PW1, deposed verbatim by the doctor, includes penile penetration. PW8, the WCPO who recorded the FIS, categorically stated in the cross-examination that the victim did not speak of a penile penetration on the first day when the FIS was recorded. In re-examination, she said that on 15.02.2013, ie: the date on which the victim was taken for medical examination; she informed the WCPO that on the first day the accused had carried out penile penetration. But on the day of recording FIS, she did not disclose it, for the reason of the threat of suicide levelled by her father. This is a threat spoken of by the victim, also as an explanation for the delay in registration of the FIR. But we see that there is inconsistency insofar as the disclosure was made to her family.

Cr1.Appeal No.1208 of 2016 - 14 -

12. PW4, in the FIS alleged that her father threatened her with suicide if she disclosed the molestation. But in the FIS itself, she also said that she had spoken of the same to her brother, PW7, who had communicated it to the mother, PW6 and her eldest sister. She repeated the same before the court. The evidence of PW6, though declared hostile, as is trite, need not be eschewed in its entirety. Though she refused to toe the prosecution line, in cross-examination for the accused, she speaks of having been informed of the '*incident*' by her son and daughter. The mother does not clarify what the '*incident*' was and it can be safely inferred that there was an incident as spoken of by the victim. PW7, the brother also speaks of the victim having told him about the incident, which was conveyed to PW6, the mother. We do not find any credence insofar as the threat said to have been levelled by the father to ensure the silence of the daughter. PW4, the victim, definitely informed her family immediately after the incident.

13. At the first instance, the prosecutrix had no case of penile penetration. When an allegation of sexual molestation is made against the father, that too, of penetration with fingers, we fail to see why the penile penetration aspect should alone be hidden for fear of the

Crl.Appeal No.1208 of 2016 - 15 -

perpetrator committing suicide. That allegation was made for the first time on 15.02.2013, when she was examined by the doctor, PW1. This was after two days of reporting of the offence and PW9 explains that in the initial report by the District Juvenile Unit of the Police, there was no allegation of sexual intercourse. Considering all these circumstances and the failure to produce the initial report of the Juvenile Unit, we are compelled to find the allegation of penile penetration to be an embellishment, which cannot be reckoned as against the accused and he cannot be charged for the offence of rape under section 376 IPC, as it stood at the time of commission of offence.

14. On the question of sexual molestation specifically of digital penetration, we have the evidence of the prosecutrix. The appellant however would emphasize the evidence of the mother and the brother, PW6 and PW7. As we noticed, both of them turned hostile, but that does not result in the rejection of the entire evidence of the said witnesses. It is trite that the principle of '*Falsus in Uno Falsus in Omnibus*' has no application to this land and the evidence of hostile witnesses need not be totally eschewed. We rely on the decision of the Division Bench in Muhammed Faisal T.P @ Faisal v. Inspector of Police, 2021 (4) KHC 13

Crl.Appeal No.1208 of 2016 - 16 -

(DB). PW6, the mother though denied the entire allegation of molestation, in cross-examination, stated that both her son and daughter informed her about the '*incident*'. Hence it cannot be said that the mother was unaware of the '*incident*'; which can be reasonably inferred to be that alleged by the victim. PW7, the brother of the victim, again speaks of his sister having complained of their father having caught her (കയറിച്ചിട്ടായി എന്നോട് പറഞ്ഞു); which again is a clear innuendo of a sexual advance as understood in the vernacular. He also informed the same to his mother and eldest sister. PW7 denied an allegation of sexual harassment having been informed to him but the innuendo of what was complained of, as spoken of by himself, puts his denial in peril. PW7 also denied any quarrel with the father and also refused to toe the defence version of the victim having a clandestine relationship with the checker of the bus. Quite in contradistinction, PW6 spoke of her daughter's relationship and the infuriated father having broken a mobile through which the victim maintained contact with Biju.

15. Despite our finding that penile penetration is an after-thought and embellishment, concerning digital penetration, the evidence of the prosecutrix is very clear. The hostile witnesses are close relatives of the accused and

CrI.Appeal No.1208 of 2016 - 17 -

the victim, all of the same family being parents and children. The mother and brother of the victim obviously wanted to save the father from punishment. The reaction of the mother at the first instance was not favourable to the victim; the daughter who was subjected to molestation by her own father. The family first moved the victim from their residence and discontinued school; which also could be for the reason of the clandestine affair suggested by the victim. But the defence did not get any support from PW7, the brother of the victim, who otherwise supported the accused, his father. More pertinently, the defence did not think it fit to lead evidence to establish the case set up by putting the eldest brother and sister in the box, one of whom was married off and the other employed as an Accountant. The incident spoken of by the mother, PW6 and the allegation of the victim against their father as spoken of by the brother, PW7, corroborates the victim's version of molestation having occurred but not to the extent of rape as defined under section 375 IPC,

16. There is an inconsistency concerning the time the victim spent in her elder sister's house, which we find to be not very significant insofar as the findings on the actual offence is concerned. The HM had spoken of the child

Crl.Appeal No.1208 of 2016 - 18 -

having not come to school from 27.11.2012 onward. The evidence of PW4 regarding the sexual molestation and the communication of the same to her family members would have caused some instability in the family. This would have also caused the family members of the victim to keep her away from school and then shift her residence temporarily. It is only natural that when such an incident is reported within the family, there is an attempt to sweep the entire matter under the carpet to avoid humiliation, ostracization and the resultant ignominy. Obviously, truth came out of the inner folds of the family, only when the child resumed studies and blurted out her explanation for the continued absence, which absence was long enough to result in her expulsion.

17. As was found a decade and a half back in Asha Ram (supra), it is very unlikely for a woman to make a false allegation of rape, especially against her father. Even now we find the societal norms to be identical and no girl would, by making such false allegations expose the entire family to shame and invite condemnation and ostracization of the society. There, the allegation was that the estranged mother had instigated the daughter, which was found to be a mere story set up, but not established. Here the mother and brother turned hostile; but portions of their evidence

Cr1.Appeal No.1208 of 2016 - 19 -

offered corroboration to the evidence of the victim. We find the evidence of the victim concerning sexual molestation to be credible and convincing; short of penile penetration. We do not find any delay in lodging the FIR and the sequence of events as detailed by us provides a more than satisfactory and compelling explanation for the delay in registration of the FIR. The delay if at all, occurred at the hands of the family, which is only natural and the crime came out when the victim spoke to an outsider, the HM of her school, at the first instance when she resumed studies after a long absence of about three months. Santosh Prasad @ Santosh Kumar (supra) has no application. Bhudeb Uchai and Subhash (both supra) were cases in which the evidence of the victim was found to be inconsistent and uninspiring.

18. We would now consider the argument raised by the State based on Ravi (supra). Even though the offence here was committed before the amendments brought to the Protection of Children from Sexual Offences Act, 2012 and also the IPC; in considering the sentencing of the accused, this court has to keep in mind the latest legislative policy providing for harsher punishments in cases of such depravity, where '*protectors turn predators*', is the forceful argument. By an amendment in 2019, the sentence for 'aggravated sexual

Crl.Appeal No.1208 of 2016 - 20 -

assault', under the POCSO Act has been increased from ten to twenty years and imprisonment for life is expressly stated to be imprisonment for the remainder of the life of a person. Significant emphasis was made in the said decision, to the 'death sentence', which was also introduced, for an offence of aggravated penetrative sexual assault *interalia* on a child below 12 years.

19. Ravi (supra) was a case in which a toddler of two years was kidnapped and sexually assaulted for over 4 to 5 hours till she breathed her last. The Hon'ble Supreme Court was considering an appeal from a death sentence awarded by the trial court and confirmed by the High Court. In confirming such a death sentence, the court noticed the amendments brought in by reason only of multiplying incidents of child sexual abuse, indicating a prevalence of the inhuman mindset and barbaric approach to young victims. The judicial precedents rendered before the recent amendment ought to be viewed with a purposive approach so that the legislative policy and the judicial approach, are well harmonized was the dictum. The learned Judges noticed Bachan Singh v. State of Punjab, (1980) 2 SCC 684 and Machhi Singh v. State of Punjab, (1983) 3 SCC 470, which laid down guidelines in imposing death sentence. Death sentence is permissible for the offence

Crl.Appeal No.1208 of 2016 - 21 -

under Section 302 on which also the accused therein was charged under. Only since the deceased victim was a toddler of two years who was also sexually assaulted; the Hon'ble Supreme Court referred to the subsequent amendments to find the offence of murder, in that case, to be the rarest of rare, warranting death penalty. If the murder was after the amendment, the age of the victim would have required consideration of the death penalty and even before the amendment section 302 provided for the death penalty but only in the rarest of rare cases. The earlier decisions in Bachan Singh and Machhi Singh (both supra) according to the learned judges 'serve as the foundation stone of contemporary sentencing jurisprudence'(sic) which had to be harmonized with the legislative policy emanating from the amendments providing more stringent and rigorous punishments; even of death.

20. The said principle has no application here since in the cited decision death sentence was a punishment under Section 302 and for finding it to be the rarest of the rare; the multiplying instances of sexual assault against minor children was noticed; on account of which the legislature too had enhanced the punishment for such offences. What the Prosecutor would have us do, in this case, where the

Crl.Appeal No.1208 of 2016 - 22 -

conviction is under Section 377 IPC, is to impose the maximum punishment of life considering the amendments made to the POCSO Act, enhancing the punishment to 20 years or life and even death in cases where the child is below 12 years of age. The reasoning seems to be that, an identical offence committed after the amendment, by a father on his daughter, a minor child, could be imposed with a death sentence under the POCSO Act. Foremost, here though the child is stated to be minor, there is no evidence, legally acceptable, as to the age of the victim. The accused was acquitted of the charge under the provisions of the un-amended POCSO Act, for the reason of no credible evidence being available as to the exact date of commission and definitely nothing to prove such commission after the date on which that Act came into force. The charge that remains against the accused is only of Section 377 IPC. The punishment provided in the IPC, is of imprisonment extending to ten years or life imprisonment. If we were to award life, then of course there is no quarrel for the Prosecutor. If we were to avoid life, then there could be nothing more than 10 years. But if we take into account the enhanced punishment of 20 years, then we have no option but to award life; despite wiser counsel against that. Then we would be legislating and rendering otiose, the sentencing

Crl.Appeal No.1208 of 2016 - 23 -

policy as reflected in the penalty provided for that offence. We do not find any such proposition, as argued by the Prosecutor, emanating from the decision relied on. We also do not find any application of the dictum of the said decision in the facts of this case regarding the sentence permissible on that count.

21. On the findings above regarding the evidence, we find that the accused can be convicted only under Section 377 IPC, which we do, affirming the conviction on that count entered by the trial Court. We set aside the conviction under Section 376 IPC. Now we come to the aspect of sentencing. We are conscious of the fact that this is a case of the father having molested his daughter. The learned Counsel for the appellant pleads for leniency in the sentence and points out his advancing age; nearing his sixty's. The accused and PW6 have six children. The allegation was of repeated molestation, at the earlier rented residence where they had stayed for six months. On 12.02.2013 when the FIS was recorded, it was also stated that the family had shifted residence just a month back. Hence the offence would have been committed between June and December of 2012. Before Court, PW4 said the period was between May and September of 2012; a slight diversion. But in chief examination itself,

Cr1.Appeal No.1208 of 2016 - 24 -

PW4 said that on the morning after the first day she was molested, she informed the fact to her brother PW7, who spoke of it to their mother, PW6. She stopped going to school by the end of November 2012; ie: from 27.11.2012 as deposed by the HM. There is an inconsistency concerning the period she spent at the marital home of her sister, away from her family. She says it was only two weeks before Court, while in the FIS she says she was with her elder sister for three months. PW7 says that the victim went to the sister's house in October and came back in February. When the family was informed at the very first instance, the shifting of residence would have been by way of a safeguard. We are convinced that the crime alleged was committed but not with the severity and frequency projected. This raises a 'residual doubt' in our minds, which the Hon'ble Supreme Court has found to be a state of mind existing somewhere between 'beyond reasonable doubt' and 'absolute certainty'. We respectfully rely on Ashok Debbarma v. State of Tripura, (2014) 4 SCC 747.

22.Ashok Debbarma (supra) was *inter alia* considering the death sentence awarded to the appellant and the concept of 'residual doubt' was raised as a mitigating factor in the consideration of whether the case was one of the rarest of

Crl.Appeal No.1208 of 2016 - 25 -

the rare kind. The concept originated in the United States and the Court observed: *"'Residual doubt' is a mitigating circumstance, sometimes used and urged before the jury in the United States and, generally, not found favour by the various courts in the United States"*(sic). This is for the reason that having instructed the Jury to find the accused guilty beyond reasonable doubt, there cannot be a further instruction at the time of sentencing that the higher standard of elimination of 'all doubts' should have been employed [*Franklin v. Lynaugh* 487 US 164 (1988)]. Proof beyond reasonable doubt was expressed in the following words in *Krishnan v. State, (2003) 7 SCC 56:*

"[d]oubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an overemotional response. Doubts must be actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case". (SCC p. 63, para 23)

Ashok Debbarma spoke thus on these concepts : *'In our criminal justice system, for recording guilt of the accused, it is not necessary that the prosecution should prove the case with absolute or mathematical certainty, but only beyond*

Crl.Appeal No.1208 of 2016 - 26 -

reasonable doubt. Criminal courts, while examining whether any doubt is beyond reasonable doubt, may carry in their mind, some "residual doubt", even though the courts are convinced of the accused persons' guilt beyond reasonable doubt." (sic) The Court further elaborated on 'residual doubt' as per the following extract:

"33. In *California v. Brown*, 93 L Ed 2d 934: 479 US 538 (1987) and other cases, the US courts took the view, "residual doubt" is not a fact about the defendant or the circumstances of the crime, but a lingering uncertainty about facts, a state of mind that exists somewhere between "beyond a reasonable doubt" and "absolute certainty". The petitioner's "residual doubt" claim is that the States must permit capital sentencing bodies to demand proof of guilt to "an absolute certainty" before imposing the death sentence. Nothing in our cases mandates the imposition of this heightened burden of proof at capital sentencing.

34. We also, in this country, as already indicated, expect the prosecution to prove its case beyond a reasonable doubt, but not with "absolute certainty". But, in between "reasonable doubt" and "absolute certainty", a decision-maker's mind may wander, possibly in a given case he may go for "absolute certainty" so as to award death sentence, short of that he may go for "beyond reasonable doubt". Suffice it to say, so far as the present case is concerned, we entertained a lingering doubt as to whether the appellant alone could have executed the crime single-handedly, especially when the prosecution itself says that it was the handiwork of a large group of people. If that be so, in our view, the crime perpetrated by a group of people in an extremely brutal, grotesque and dastardly manner, could not have been thrown upon the appellant alone without charge-sheeting other groups of persons numbering around 35. All the element test as well as the residual doubt test, in a given case, may favour the accused, as a mitigating factor."

Crl.Appeal No.1208 of 2016 - 27 -

23. We are quite conscious of the fact that the concept of 'residual doubt' was reckoned by the Hon'ble Supreme Court in the aforesaid decision as a mitigating factor to avoid death sentence. We would respectfully adopt the said concept, even in the present case of rape as a mitigating factor in sentencing. As we observed, there is evidence of sexual molestation; but not with the severity and frequency as spoken of by the prosecutrix. The family also has a different version and there is the compelling factor of the prosecutrix having informed the family after the very first instance and the family having shifted her residence. These aspects give rise to the residual doubts as spoken of by the Hon'ble Supreme Court and hence we are compelled to modify the sentence. We think that the sentence can be modified to 10 years under Section 377 of the I.P.C. while upholding the fine imposed by the trial court with a default sentence as ordered in the impugned judgment. The conviction and sentence under Section 376 of I.P.C. are reversed. The Criminal Appeal stands partly allowed.

Sd/-

K.Vinod Chandran,
Judge

Sd/-

Ziyad Rahman A.A.,
Judge

dkr/-