

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.T.RAVIKUMAR

THURSDAY ,THE 25TH DAY OF JUNE 2015 / 4TH ASHADHA, 1937

CRL.A.No. 523 of 2011

AGAINST THE JUDGMENT IN SC 1087/2003 of ADDITIONAL SUB COURT,
KOLLAM

AGAINST THE ORDER/JUDGMENT IN CP 110/2001 of JUDICIAL MAGISTRATE
OF FIRST CLASS, PARAVOOR

APPELLANT/ACCUSED:

THULASEEDHARAN, S/O.MADHAVAN
CHARUVILA PUTHEN VEEDU,
SETTLEMENT COLONY,, NEAR KALLUVATHAKKAL PARA,
CHIRAKKARA, EDAVATTAM CHERRY,
KALLUVATHUKKAL VILLAGE,, KOLLAM DISTRICT.

BY ADV. SRI.C.RAJENDRAN

RESPONDENT:

STATE OF KERALA
THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SMT.LALIZA.T.Y.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 25.06.2015, THE
COURT ON THE SAME DAY PASSED THE FOLLOWING:

JUDGMENT

This appeal is directed against the judgment of conviction and consequential sentence of the appellant for the offences under sections 450, 366(A) and 376 of the Indian Penal Code passed by the Court of Additional Assistant Sessions Judge, Kollam in S.C.No.1087/2003. The appellant/accused was sentenced to undergo rigorous imprisonment for a period of two years under section 450, IPC, to undergo rigorous imprisonment for a period of one year under section 366(A), IPC and under section 376, IPC to undergo rigorous imprisonment for a period of 7 years and to pay a fine of ₹10,000/-. In default of payment of fine he was ordered to undergo rigorous imprisonment for a further period of six months.

2. The case of the prosecution in succinct is as follows:-
On 5.6.2000 at one'O clock the prosecutrix, PW1 who was a minor was sleeping along with PWs 3 to 6 in the southern room of Charuvila Puthen house in the Settlement Colony belonging to her uncle the accused/appellant trespassed into the said room

and took the prosecutrix and stuffed clothes in her mouth and took her to the nearby house which was under construction and committed rape on her at the south western room of the said house. On 6.6.2000 PW2, her mother took her to Paripally Police Station and PW16, then then S.I. of Police recorded the F.I.Statement from PW1 and on its basis Ext.P13 FIR was registered. After the investigation PW17 laid the charge against the accused/appellant before the Court of the Judicial First Class Magistrate, Paravur and the learned Magistrate took the case on file and registered as C.P.No.110/2001 and committed it to the Court of Sessions, Kollam and it was taken on file as S.C.No.1087/2003 and made over for trial and disposal to the Court of the Additional Assistant Sessions Judge, Kollam. Evidently, on the appearance of the appellant charge under sections 450, 366(A) and 376, IPC were framed and read over and explained to him and he pleaded not guilty and he claimed to be tried. The prosecution has examined PWs 1 to 17 and marked Exts.P1 to P13 besides identifying MO1 series and MO2 to prove the charge against him. After the closure of the evidence of prosecution he was examined under section 313,

Cr.P.C and he denied all the incriminating circumstances put to him. Finding that the appellant was not entitled to get an acquittal under section 232, Cr.P.C and he was asked to enter on his defence. Thereupon, the appellant got DW1, his own mother examined. No documentary evidence was adduced on his side. After evaluating the evidence on record the trial court entered into the finding that the prosecution has succeeded in proving the commission of offences under sections 450, 366(A) and 379 IPC and consequently convicted him for the aforesaid offences and sentenced him as aforesaid.

3. I have heard the learned counsel for the appellant and the learned Public Prosecutor.

4. As noticed hereinbefore, the prosecutrix was examined as PW1 in this case. She deposed that she was then studying in 7th standard and was then aged 13 years. She deposed that she went to her uncle's house along with PWs 5 and 6 as PW4, her grandmother alone was there on that day. She also deposed that they kept talking each other till 12'O clock and thereafter slept on the floor. Her sisters, PW5 was on her right side and PW6 was on her left side. The thatched house

having a door made of coconut leaves called 'chetta'. While all of them were sleeping the accused came there and took her and he put cloth on her mouth and took her to the nearby house which was then under construction. She woke up and the accused revealed his identity and handed over a torch to her and she lighted it and saw him. After taking her to his house she was taken in the south western room of the said house, he removed her skirt and jetty and committed rape on her. She would also depose that she resisted and suffered a grave pain and feeling bleedings and thereafter the appellant-accused took her to the very house from where she was taken and she slept along with others. She deposed that she did not reveal the same to others till night as she was afraid. In the morning her mother went to the cashew factory and her father who was a loading employee went for work. She went to take bath and washed her clothes. Later, in between 10 and 11 a.m PW11, who is her uncle's daughter came there and she revealed the incident to her. In the evening when PW2, her mother came home PW11 told her about the incident. Thereupon, PW2 called PW1 and narrated the incident to her. PW2 then took PW1 to Paripally

Police Station and PW16 recorded Ext.P1 statement and registered Ext.P13 FIR. Her mother (PW2) took PW1 to the hospital. PW9, Doctor Vijayalakshmi examined her. PW2 is the mother of PW1 and PW3 is her sister. PW2 would depose that on 6.6.2000 when she returned home after the work PW11 divulged the incident to her. He deposed that thereafter, she took PW1 to the Police Station and thereafter to the hospital. PW2 categorically deposed that PW1 was only aged 13 years at the time of occurrence and she was then studying in the 7th standard. PW3 who is the sister of PW2 would depose that PW1 along with PWs 5 and 6 came to the house and all of them had a long conversation till night and thereafter slept on the floor. She would further depose that she was accompanied PWs 1 and 2 to the Police Station and she would also depose that PW1 was then aged 13 years and she was then studying in the 7th standard. PW4, the grandmother of PW1 would depose that PW1 and others came to her residence to give accompany to her and on that night she alone was there. She deposed that she was living there along with her son, daughter-in-law and they went to attend the funeral of one of their relatives and she was alone

in the house. She would also depose that they chatted till night about 12'O clock and then started sleeping on the floor. She came to know about the rape on the next day. PWs 5 and 6 who accompanied PW1 would depose to the effect that after reaching there at about 9 p.m they had a long conversation till 12'O clock and thereafter all of them laid on the floor to sleep. They came to know about the rape only on the next day. They would also depose that PW1 was sleeping between PWs 5 and 6. PW9, Doctor Vijayalakshmi examined PW1 on 7.6.2000 and she issued Ext.P3 Wound Certificate. She deposed that she examined PW1 on 7.6.2000 at about 12.40 a.m and found that there was evidence of sexual intercourse. She would further stated that on examination it was found that the vaginal orifice of PW1 would admit two fingers easily and further deposed that she did not notice any sign of violence on her body. In the cross examination she would stated that the factum of admission of two fingers in the vaginal orifice would reveal that the victim had sexual intercourse occasionally. PW8, Doctor Prathapan examined the appellant-accused who was arrested on 16.6.2000 and he conducted potency test and issued Ext.P2 Potency

Certificate to the effect that the appellant-accused was capable of performing sexual acts. PW10 was the Headmaster of Kalluvathukkal U.P. School and he deposed that Ext.P4 extract of Admission Register of PW1 was given by him. He also deposed that going by Ext.P4 the Date of Birth of PW1 is 20.5.1988. PW11 would depose that on 6.6.2000 she was studying in Kalluvathukkal U.P. School in the 7th standard and when she came to PW1's house and on finding PW1 in a gloomy style and she enquired about the same and thereupon PW1 revealed to her the fact that she was raped by the appellant. She would also depose that it was she who informed the matter to PW2, the mother of PW1. PW12 is the attesting witness to Ext.P5 mahazar whereby MO1 series of clothes of PW1 were recovered from the house of PW1 on 7.6.2000. PW13 is the attesting witness to Ext.P6 scene mahazar prepared on 6.6.2000 whereby MO2 sOË] was seized from the house of the appellant-accused. Both PWs 12 and 13 admitted their signatures respectively in Exts.P5 and P6. PW16 was the Sub Inspector of Police, Parippaly Police Station on the relevant period. He deposed that on 6.6.2000 at about 11 p.m. PW1 came to the police station along with PW2

and recorded Ext.P1 F I Statement of PW1 and on its basis registered Ext.P13 F I R. He would also depose that along with two policemen PW1 was sent to Kollam Victoria Hospital. In fact, it was PW14 who prepared Ext.P6 scene mahazar and seized the clothes of PW1 under Ext.P5 mahazar. PW14 arrested accused-appellant on 10 a.m on 16.6.2000. PW17 obtained extract of Admission Register from Kalluvathukkal U.P. School on 17.7.2001. It was PW14 who laid the large. A scanning of the evidence would reveal that PW1 was sleeping between PWs 5 and 5 on 5.6.2000. According to her while she was sleeping there the appellant came there and lifted her after putting clothes on her mouth and thereafter revealing to his identity and handed over a torch to her and she lighted the same and identified the person who lifted her as the appellant. Evidently, thereafter she did not raise any alarm. A scanning of the evidence would reveal that with respect to the commission of the offence oral testimony of PW1 is the sole direct evidence. The fact that PW1 had recent sexual intercourse as revealed from PW9 with Ext.P3 Wound Certificate. Ext.P7 is the chemical analysis of MO1 series and MO2. Ext.P7 would reveal that Item

No.1(MO2) one saffron coloured single dhoti with black, green, white and brown borders and Item No.5 one old grey coloured panties with blue coloured elastic band contained human spermatozoa and semen. The evidence of PWs 1 and 2 would show that at the time of incident PW1, the prosecutrix was studying in the 7th standard and she was aged only 13 years. The learned counsel for the appellant contended that the evidence of PW9 and the evidence of PW1 herself would not actually reveal any strong resistance from PW1 and therefore, it is evident that she was a consenting party to the sexual intercourse. In short, according to the learned counsel the version of PW1 and the evidence of PW9 with Ext.P3 Wound Certificate would reveal that she was subjected to sexual intercourse not without her consent.

4. In the light of the said contention and in the light of the evidence of PWs 1 and 2 and in the light of the provisions under section 376, IPC in this case the age has to play a decisive role in relation to the charge of section 376, IPC against the appellant. There can be no doubt that in the case of a girl below 16 years of age, even if she is a willing a party had

not resisted the intercourse it would not take the action of sexual intercourse outside the offence under section 376, IPC. The fundamental and vital question that could be answered in a case of this nature by the court is whether the prosecution has succeeded in proving the fact that the prosecutrix was below the age of 16 years at the time of occurrence. If the answer to the said question is in the affirmative the fact whether sexual intercourse was done with consent would pale into insignificance. But, at the same time, the first question to be considered is whether there was sexual intercourse in this case as alleged by the prosecution. In this case, admittedly, the prosecutrix was examined as PW1 and she deposed that on 5.6.2000 at about 12'O clock after having a long chat she along with PWs 3 to 6 slept on the floor of the house in question and in fact, she was lying in between PWs 5 and 6 at about 1'O clock the appellant-accused entered in to the room and put clothes in her mouth and lifted her and reached his house which was under construction and took her to its south western room and removed skirt and jetty and committed rape on her. Apart from the prosecutrix there is no eye witness to the incident. She was

taken to the hospital and PW9, Dr. Vijayalakshmi examined PW1 and issued Ext.P3 Wound Certificate. True that, while cross examining PW1 a question was put to her whether the appellant was implicated in this case to escape scolding for having sexual intercourse with the person whom she married later. It is to be noted that even then, name of such person was not put to PW1. Be that as it may, evidently, PW1 repudiated the said suggestion. That apart, despite the cross examination of PW1 nothing could be elicited to discredit her version that she was taken to the house of the appellant and from there the appellant had a sexual intercourse with her. Though the learned counsel for the appellant submitted that a scanning of the evidence would reveal that PW1 was a consenting party and in such circumstances, the action in having sexual intercourse with her consent would not amount to commission of offence of rape. As stated hereinbefore, the question whether it was done with consent would call for consideration and assume relevance only if it is found that she was not then below the age of 16 years. PW1 deposed that at the time of occurrence she was studying in the 7th standard and she was only aged 13 years. PW2, the

mother of PW1 also deposed to the effect that PW1 was studying in the 7th standard and she was aged only 13 years at the time of occurrence. PW10, the then Headmaster of Kalluvathukkal U.P. School deposed to the effect that he issued Ext.P4 extract of Admission Register on 6.10.2009. PW1 was examined on 7.6.2000 by PW9, Dr.Vijayalakshmi. Ext.P3 Wound Certificate would reveal that on such examination the age of PW1 was assessed by PW9 and it is stated therein that and description of the girl brought for confirmation of rape before her is a 'short structured girl of about 13 years'. It is stated in Ext.P3 that the vaginal smear and vaginal swab were taken and report thereon would reveal that no spermatozoa was seen. After referring to the said report it is stated that a possibility of sexual intercourse could not be ruled out even then. Though it is further stated therein that there is no evidence of external violence it is noted therein that vaginal orifice admits two figures easily. Thus, it is evident that PW1 who deposed that she was taken to the house by the appellant and he had with a sexual intercourse with her despite the perusal of the report on the examination of vaginal smear and vaginal swab PW9

deposed that the absence of spermatozoa could not ruled out the possibility of sexual intercourse. Therefore, another question would also crop up for consideration as to whether the absence of spermatozoa is sufficient to cast a doubt on the case of the prosecution that the appellant had sexual intercourse with PW1.

5. The question whether the mere absence of spermatozoa is sufficient to cast a doubt as to the correctness of the prosecution was considered by the Hon'ble Apex Court in **Prithi Chand v. State of Himachal Pradesh** reported AIR 1989 SC 702. The paragraph 10 in **Prithi Chand's** case is relevant in the context of the contentions and it reads thus:

“Lastly, it was argued by reference to A.W.Khan v. State, AIR 62 Cal 641, Gorakh Daji Ghadge v. State of Maharashtra, 1980 CriLJ 1380 (Bom) and Padam Bahadur Darjee v. State of Sikkim, 1981 CriLJ 1317 (Sikkim) that since a girl was of tender age the possibility of her wrongly involving the appellant cannot be ruled out and this possibility is strengthened by prior enmity, absence of spermatozoa and infirm medical opinion. We have already examined the argument of enmity as well as the so-called infirmity in medical evidence. Mere absence of spermatozoa cannot cast a doubt on the correctness of the prosecution case.”

6. In the said circumstances, in the light of the decision in **Prithi Chand's** case the mere absence of spermatozoa by itself would not be a reason to cast doubt in the correctness of the prosecution case. A perusal of the aforequoted paragraph would reveal that in that case there was infirmity in the medical evidence. In this case as noticed hereinbefore, PW9 stated in Ext.P3 that a girl brought before her for confirmation of rape was 'short structure girl of about 13 years' and thereafter, after perusing the report on the examination of vaginal smear and vaginal swab to the effect that no spermatozoa was seen. She opined that possibility of sexual intercourse would not be ruled out. It is certainly in tune with decision of the Hon'ble Apex Court that mere absence of spermatozoa could not be the reason for casting doubt on the correctness of the prosecution case. Apart from the oral testimony PW1 that the appellant has sexual intercourse with her on that day. In the context of the oral testimony of PW1 that the appellant has sexual intercourse with her Ext.P7 has to be looked into. Ext.P7 report would reveal that two packets were forwarded to the laboratory for examination packet No.1

contained Item No1 one saffron coloured single dhoti with black, green, white and brown borders. Black strains were also seen. In fact, Item No.1 is MO2 ലൂക്കി seized under Ext.P6 mahazar. Item Nos. 2 to 5 therein contained in Item No.2 are respectively one skirt which was blue in colour with reddish brown and green printed floral designs, one blue colored long blouse, one rose colored petticoat and one old grey coloured panties with blue coloured elastic band. Ext.P7 would reveal that on analysis the human spermatozoa and semen are detected on Items 1 and 5. As noticed hereinbefore, Item No.1 in Ext.P7 is MO2 ലൂക്കി and Item No 5 therein is the packets which is an item included in MO1 series. PW12 is the attesting witness to Ext.P5 mahazar whereunder MO1 series were recovered. He would admit his signature in Ext.P5. In the chief examination he would depose:

“Seethu വിന്റെ വീട്ടിൽ വെച്ചാണ് തയ്യാറാക്കിയത് വസ്ത്രങ്ങൾ ഒന്നും

ഞാൻ കണ്ടിട്ടില്ല. ഒപ്പിടാൻ പറഞ്ഞു. ഒപ്പിട്ടു.“

True that while being cross examined even after admitted that the said mahazar was prepared in the house of Seethu(PW1). He deposed that he had not seen the clothes. He would further

say that he signed on Ext.P5 mahazar because he was asked to sign. PW13 is the attesting witness to Ext.P6 mahazar whereby MO2 sOĖ] was recovered admitted his signature in Ext.P6. In the chief examination he deposed thus:

‘തുളസി Police-കാർക്ക് തുളസി യുടെ വീട്ടിൽ നിന്ന് ഒരു കൈലി എടുത്തുകൊടുക്കുന്നതു കണ്ടു. അപ്പോൾ തയ്യാറാക്കിയ മഹസ്സറിൽ ആണ് ഒപ്പിട്ടത്.’

True that during the cross examination he deposed that he did not recollect the colour of the ലുകി. But at the same time, the suggestion whether what was brought is a bedsheet or an old cloth. He replied that it was ലുകി. The evidence of PW13 would reveal that MO2 was recovered from the house of the appellant and he himself handed it over to the police and that PW12 had signed in the mahazar prepared from therein regard to the recovery of the said ലുകി. Ext.P7 would thus reveal that MO2 ലുകി

which was recovered from the house of the appellant which was in fact handed over by the appellant contained human spermatozoa and semen. PW12 while being examined in chief deposed to the effect that Ext.P5 was prepared from the house

of Seethu (PW1) and he had signed in the mahazar which was prepared from there in relation to the recovery of clothes. Even during the cross examination he would depose that Ext.P5 was prepared from the house of Seethu (PW1). In such circumstances he deposed during the cross examination that he had not seen the clothes. The mere statement that he had not seen the clothes in such circumstances would not discredit his evidence to the effect that he had signed on Ext.P5 which was prepared from the house of PW1, Seethu in regard to the recovery of clothes. PW15 is the investigating officer who recovered MO1 series. He was the Circle Inspector of Police, Parippally police station during the relevant point of time. He had taken over the investigation on 7.6.2000 and he prepared Ext.P5 mahazar. He deposed that on 7.6.2000 at about 11 a.m PW2 handed over the dresses worn by PW1 at the time of the incident and that they were recovered under Ext.P5 mahazar. He would also depose that a skirt, petty coat, jetty , torch and ലൂക്കി were sent to the court in From No.151(a). Ext.P9 is the property list pertaining to the same. He identified MO1 series, 4 in numbers. PW14 would also depose that MO2 ലൂക്കി was

recovered from the house of the appellant and it was also sent to the court in Form No.151(a) under Ext.P11. He would also depose that after intimating the arrest of the appellant to his uncle Mohanan the appellant was taken for medical examination and after subjecting him to examination Ext.P2 Potency Certificate was issued. Ext.P2 would reveal that the appellant was capable of performing the sexual intercourse. Though a suggestion was put to PW15 that MO2 ലുക്കി was not actually handed over to him by the appellant and that it was not a ലുക്കി belonging to the appellant-accused PW15 he repudiated those suggestions and asserted that MO2 is the ലുക്കി taken and handed over to him by the appellant from his house. PW1 deposed that after taking her to his house the appellant disrobed her and had a sexual intercourse with her after mounting on her. She would depose that thus:-

"എന്റെ പാവാടയും jetty ഉം ഊരി. എന്നിട്ട് (പതി എന്റെ പുറത്ത് കയറി കിടന്നു. എന്നെ ബലാൽസംഗം ചെയ്തു. ഞാൻ കരഞ്ഞ് നിലവിളിച്ചു. എതിർപ്പ് (പകടിപ്പിച്ചോ (Q) (പകടിപ്പിച്ചു (A) എന്നിക്ക് രക്തംപോയി. മൂത്രം ഒഴിക്കുന്ന ഭാഗത്ത് നിന്നാണ് രക്തം പോയത്. എന്നിക്ക് വേദന എടുത്തു. ഞാൻ നിലവിളിച്ചു. കൈകാര്യങ്ങൾ കഴിഞ്ഞിട്ട് എന്റെ വീട്ടിൽ കൊണ്ടാക്കി."

7. Though she has stated that after the said incident bleeding occurred and no injury was noted by PW9 the evidence of PW1 was to the effect that after having sexual intercourse with her she was taken to the house of PW4 by the appellant himself and thereafter she had a bath. One aspect which was noted by PW9 also to be noted in this case. PW9, Dr.Vijayalakshmi noted in Ext.P3 and further deposed while being examined as PW9 that vaginal orifice of PW1 admits two fingers easily and during the examination which would suggest that she had sexual intercourse occasionally. Thus, it is evident that after examining PW1, especially the vaginal orifice, PW9 deposed that the result of the examination would reveal that PW1 had sexual intercourse occasionally. In such circumstances, merely because PW1 had not described the actions performed on her by the appellant it cannot be said that she had not deposed that the appellant had sexual intercourse with her. In this context the aforequoted portion from her version would reveal that she had specifically deposed to the effect that her skirt and jetty were removed and thereafter the appellant

mounted on her and committed rape. There is no reason to disbelieve the version of PW1 especially when the defence could not elicit anything from her to discredit her version that the appellant had sexual intercourse with her. Ext.P7 would support the case of the prosecution that the appellant had sexual intercourse with PW1. As noticed hereinbefore, MO2 ലൂക്കി was worn by the appellant and in MO2 ലൂക്കി which was worn by the appellant and MO5 Jetty which was worn by PW1 at the time of occurrence on examination were reportedly contained human spermatozoa and semen, going by Ext.P7. In the said circumstances, as noticed hereinbefore, the mere absence of spermatozoa in the vaginal smear and swab cannot be a reason for casting any doubt with respect to the occurrence of the case of the prosecution that the appellant had sexual intercourse with PW1.

8. When once it is found that the appellant had sexual intercourse with PW1 the vital question is whether what was the age of PW1 at the time of occurrence. As noticed hereinbefore, she deposed that she was studying in the 7th standard and she was aged 13 years at the time of occurrence.

PW2, who is the mother of PW1 would also depose that PW1 was studying in the 7th standard and she was then aged 13 years. PW10, the Headmaster of Kalluvathukkal U.P. School who issued Ext.P4 extract of the admission register would depose that going by the same the Date of Birth of PW1 is 20.5.1988. The learned counsel appearing for the appellant submitted that PW2 while being examined deposed that PW1 was born in the year 1987 but, during the re-examination it was brought out that the Date of Birth of PW1 is 20.5.1988. In this context it is to be noted that even if it is taken that she was born in the year 1987 at the time of occurrence she was under the age of 16, as the incident occurred on 5.6.2000. PW9, Dr. Vijayalakshmi before whom PW1 was brought for confirmation of rape also assessed the age of PW1 and described PW1 as 'a short structured girl of about 13 years'. The learned counsel for the appellant contended that those evidences are not sufficient to prove the age of PW1 in the absence of non-production of the Birth Certificate.

9. In the light of the contentions the question to be decided is whether the mere absence of non-production of a

birth certificate can be a ground for brushing aside the case of the prosecution that the prosecutrix was under the age of 16 years at the time of the alleged incident. In this context it is relevant to refer to the decision of the Hon'ble Apex Court in **Deelip Singh alias Dilip Kumar v. State of Bihar** reported in 2005(1) SCC 88. In the said case also the birth register was not produced and proved. A scanning of the said decision would reveal that the failure to produce birth certificate by itself cannot be a reason for holding that the age of the prosecutrix could not be proved by the prosecution if the school register evidencing the age of the prosecutrix is available and if it was proved by person competent to prove the same and if that is supported by the assessment made by the Doctor who examined the concerned victim the absence of the non-production of birth register could not be taken as fatal to the prosecution and also as a ground for holding that the prosecution had failed to prove the the age of the prosecutrix. In this case apart from the evidence from the prosecutrix (PW1) her mother, PW2 had also deposed that PW1 was studying in the 7th standard and was aged 13 years at the time of occurrence.

Ext.P4 Admission Register was proved through PW10, the Headmaster of the school where the prosecutrix was then studying. He proved the Date of Birth of PW1 and going by the same the age of the prosecutrix was under 16 years on the relevant date. Add to it, PW9, Dr.Vijayalakshmi who examined PW1 when she was brought for confirmation of rape assessed the age of PW1 and she described PW1 as 'a short structured girl aged about 13 years'. That is the volume of evidence adduced by the prosecution to prove the age of the prosecutrix at the relevant point of time to establish the position that she was then aged under 16 years I do not find any illegality in the conclusion arrived at by the learned Sessions Judge that at the relevant point of time the prosecutrix was aged below 16 years and that the prosecution has succeeded in proving the said fact an important aspect. From the evidence on record which was analysed hereinbefore, I have already found that the prosecution has succeeded in proving that on 5.6.2000. The appellant had sexual intercourse with PW1, the prosecutrix the evidence of the prosecutrix, her mother, the evidence of PW10 with Ext.P4 Admission Register and the evidence of PW9 with Ext.P3 Wound

Certificate was sufficient to establish that the prosecutrix, PW1 was under the age of 16 years on 5.6.2000.

10. When once it is established that the prosecution has succeeded in establishing that on 5.6.2000 the prosecutrix was under the age of 16 years and that day the appellant had sexual intercourse with PW1, the prosecutrix the question whether it was done with the consent of the prosecutrix would pale into insignificance in the light of the provision sixthly to section 375, IPC. Going by the said section a sexual intercourse with or without the consent of a woman under 16 years would attract the offence of section 375, IPC punishable under section 376, IPC. That position of law as on 5.6.2000 was that in a case where sexual intercourse was done by a person with or without the consent of woman under 16 years in terms of clause sixthly to section 375, IPC it would tantamount to rape punishable under section 376, IPC. From the evidence on record, which were discussed as above I have no hesitation to hold that the learned Sessions Judge was correct in holding that the appellant had sexual intercourse prosecutrix, PW1 and that PW1 the prosecutrix was under the age of 16

years and in such circumstances in terms of clause sixthly of section 375, IPC he has committed offence under section 375, IPC punishable under section 376, IPC. Though, the learned counsel for the appellant attended to canvass the position that a close scrutiny of evidence of PW1, the evidence of PW9 with Ext.P3 Wound Certificate would reveal that no kind of resistance was shown by the prosecutrix and in fact, she was a willing party for the sexual intercourse I have no hesitation to hold that such aspects are absolutely immaterial in deciding the culpability of the appellant herein. When the position of law is that a sexual intercourse with or without the consent of a woman under 16 years in terms of clause sixthly to section 375, IPC amount to rape punishable under section 376, IPC, in volume of argument to establish that the sexual intercourse was done with the consent of the prosecutrix would not take the action outside the scope of section 375,IPC punishable under section 376,IPC. The long and short of the discussion as above is that the judgment of the learned Sessions Judge finding the accused guilty under section 375, IPC and convicting him under section 376, IPC suffers from no legal infirmity or perverseness

warranting an appellate interference.

11. The learned counsel for the appellant submitted that taking into account the aforesaid circumstances the sentence imposed on the appellant is excess and it warrants interference. The Hon'ble Apex Court in the decision in **State of M P v. Balu** reported in 2005(1) SCC 108 considering the question of awarding sentence true that the theory of deterrence is also discussed in the decision. The Hon'ble Apex Court held that the courts are expected to properly operate the sentence insisted to himself such sentence for proving offence as may served as a deterrent for commission of like offences by others. It is further held in the said decision that unless adequate or special reasons for reducing the sentence lesser than 7 years could be recorded for a proven offence under section 375, IPC punishable under section 376, IPC that could not be lesser than 7 years. In this case as found hereinbefore, the prosecutrix was only 13 years and she was studying in the 7th standard it was on such a school going student that the appellant had committed the act of rape. I am of the view that awarding a sentence below 7 years in this case would be

ridiculously low and it could not commensurate with a gravity of offence of rape committed on such a manner. In short, I am of the view that what is awarded to the appellant is nothing but a comeuppance. In that view of the matter the sentence imposed on the petitioner also calls for no interference. In the result, this appeal fails and it is dismissed.

sd/-

C . T . RAVIKUMAR

JUDGE