IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR.JUSTICE ZIYAD RAHMAN A.A.

THURSDAY, THE 23RD DAY OF SEPTEMBER 2021 / 1ST ASWINA, 1943

CRL.A NO.644 OF 2016

AGAINST THE JUDGMENT IN S.C.NO.324/2014 DATED 29.06.2016
OF THE SPECIAL COURT FOR THE TRIAL OF OFFENCES AGAINST CHILDREN
(ADDITIONAL SESSIONS COURT-I), MANJERI, MALAPPURAM

[CRIME NO.210/2013 OF PANDIKAD POLICE STATION, MALAPPURAM]

APPELLANT/ ACCUSED:

MADHU, S/O NARAYANAN,
KUZHIYEKKAL HOUSE, VETTEKKODE, PULLANCHERY,
MANJERI-676122.

BY ADVS.
SRI.K.M.FIROZ
SMT.M.SHAJNA
SRI.P.C.MUHAMMED NOUSHIQ

RESPONDENT/ COMPLAINANT/STATE:

THE STATE OF KERALA,
REPRESENTED BY THE INSPECTOR OF POLICE, PANDIKKAD,
THROUGH THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM, KOCHI-682031.

BY PUBLIC PROSECUTOR SMT.SHEEBA THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 17.09.2021 THE COURT ON 23.09.2021 DELIVERED THE FOLLOWING:

"C.R"

K.Vinod Chandran & Ziyad Rahman, JJ.

Crl.A.No.644 of 2016

Dated, this the 23rd September 2021

JUDGMENT

Vinod Chandran,J.

When a man abandons his wife and children, roving vultures wait to prey on not only the abandoned woman, but also the helpless children. In this case we have a *'poojari'/'komaram'* (priest/oracle in a temple) taking the abandoned woman and the three children under his wing, only to repeatedly molest the elder girl child, that too in the presence of her siblings. We wonder which God would accept the obeisance and offerings of such a priest or make him a medium?

2. We have heard learned Counsel Sri.K.M.Firoz for the appellant/accused and Smt.Sheeba Thomas, learned Public Prosecutor for the State.

3. Sri.Firoz took us through the charge to point out that there is a misjoinder of charges. The Protection of Children from Sexual Offences Act, 2012 ['POCSO Act' for brevity] was brought into effect from 14.11.2012 and the incident on which the first charge is levelled is prior to

the POCSO Act and requires a committal proceeding under the Cr.P.C. This is unlike the later allegation, which raises a charge under the POCSO Act, where the Special Court could take cognizance of it under Section 33 of the POCSO Act. It is also pointed out that clubbing of the charges has resulted in grave prejudice to the accused, since the POCSO Act by Sections 29 and 30 raises a presumption against the accused. The rigour of a defence under the POCSO Act, which casts a reverse burden on the accused, prejudices him insofar as the charge under the IPC with respect to the sole incident alleged prior to the POCSO Act. It is argued from the evidence of PW1, the prosecutrix and PWs.6 and 10, the two house owners, that there is no question of the offences being committed in the respective residential buildings as alleged, for reason of the inconsistent facts brought forth in the evidence of these witnesses. The deposition of PW1 does not specify the date and only speaks of having joined the accused after the final exams of the academic year 2012. Hence there could not have been such an incident on 16.02.2012, before the close of the academic year. PW6 also says that the accused had taken the house on rent in 2012 and the victim joined him after six months.

4. There is also no allegation of a rape, i.e., a penetrative sexual assault, having been committed in the second house, even as per the deposition of PW1. PW1's evidence is not believable and she is not a credible witness. She admitted that she falsely stated the names of her parents to the police when they were first picked up by the police. The inconsistencies in her evidence as to how the sexual assault was committed also require the evidence to be treated with abundant caution. The doctor has deposed in tune with the medical certificate, Ext.P1, that the examination was in 2012. The time shown in Ext.P1 is not clear and if it is 11.45 a.m, the very story of initiation of the crime would fall apart since PW15 is said to have been informed of the wandering woman and children at 4.15 p.m. The dress of the accused was seized and sent for medical examination; but no report has been produced nor was the dress brought in evidence, which requires this Court to take an adverse inference since the child was apprehended on the next day of the last alleged sexual act. There are glaring inconsistencies in the Section 164 statement of PW1 and that is relevant under Section 11 of the Evidence Act. Last but not the least the mother was not

examined, despite her presence in Court at the time of trial.

5. The learned Prosecutor relied heavily on the evidence of PW1, the prosecutrix; fully corroborated by PW7. The medical evidence as available in Ext.P1 further corroborates the testimony of the prosecutrix. As against the anomaly of date and time, the learned Prosecutor points out the crime number shown in Ext.P1 and the time when the FIR was registered. The 164 statement of the victim and deposition of PW1 are not date specific and the allegation is of the assault having been committed on several dates and several times. *Chitharanjandas v. State of West Bengal [AIR 1963 SC 1696]* is relied on to argue that no date need be specified. As to the contradiction in Section 164 statement, it was never confronted to the victim. The only inconsistency is insofar as Section 164 statement having recorded sexual assault by two other persons at the instigation of the accused. PW1 in her deposition clearly stated that she did not say so. The learned Prosecutor also submits that there is no prejudice caused due to the absence of committal proceedings. In the teeth of the clear evidence of PWs.1 and 7, the presumption under the POCSO

Act need not be invoked. There is also no evidence led by the defence to claim prejudice in discharging the reverse burden. In addition, it is pointed out that the accused has made a total denial, of even the joint residence with the mother and children, under Section 313. The deposition of PWs 6 & 10, the house owners specifically established that fact. This is an additional circumstance against the accused, since he has stated a deliberate falsehood, a clear sign of a guilty mind. The mother of the children was not examined, though present in Court, since she showed signs of mental disturbance and the prosecution did not want her to mount the box in such a condition.

6. The ground of absence of committal proceedings as against the offence alleged on 16.02.2012 cannot be sustained. The learned Counsel has pointed out a number of decisions of which we only refer to the relevant. ***Moly v. State of Kerala (2004) 4 SCC 584*** is a case in which the enactment under which the offence was alleged, did not have a provision similar to Section 33 of the POCSO Act. This was the reason why, despite a designation as Special Court under that enactment, the Hon'ble Supreme Court interfered with the proceedings. The finding was that,

though designated a Special Court, as per the statute, the designation can only be of a Court of Session. In that circumstance the provisions under the Cr.P.C would have to be scrupulously followed. Even applying the dictum, we find the same not applicable to trial of offences alleged under the POCSO Act. By Section 33, *'a Special Court was empowered to take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence, or upon a police report on such facts'* (sic). The other ground of prejudice having been caused for clubbing of charges, also cannot be sustained. First of all, merely by alleging prejudice, without anything stated as to how such prejudice was caused, the accused cannot seek for a reversal of the conviction. Then, in any event Section 28(2) takes care of the specific ground; which is extracted hereunder:

> "28(2) While trying an offence under this Act, a Special Court shall also try an offence other than the offence referred to in sub-section (1), with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial".

We say this, despite, ***Moly (supra)*** being found *per incuriam* by a three judge bench on reference made, in ***Rattiram v. State of M.P (2012)4 SCC 516***. The larger bench held:

> *"66. Judged from these spectrums and analysed on the aforesaid premises, we come to the irresistible conclusion that the objection relating to non-compliance with Section 193 of the Code, which eventually has resulted in directly entertaining and taking cognizance by the Special Judge under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, does not vitiate the trial and on the said ground alone, the conviction cannot be set aside or there cannot be a direction of retrial and, therefore, the decision rendered in State of M.P. v. Bhooraji (2001) 7 SCC 679 lays down the correct law inasmuch as there is no failure of justice or no prejudice is caused to the accused".*

The POCSO Act enables such other offences to be tried without committal proceedings if it is to be tried in the same trial. The grounds of prejudice urged fails also for the reason that it is merely imaginary. We reject it at the outset on the above reasoning and also on the appellant having merely *'cried foul'* without the particular prejudice caused or the specific failure of justice, having been stated or substantiated.

7. Now we venture to deal with the evidence on merits. On 01.03.2013 at about 4.15 p.m, Circle Inspector of Police (PW15), Vanitha (Women) Cell, Malappuram was

informed by a Child-line personnel that a woman and four children were wandering at a place called Kunnummel. PW15, along with two Woman Civil Police Officers (WCPOs); one of whom was examined as PW13, went to the spot and brought them to the Vanitha Cell. On enquiry it was revealed that the woman rescued, showed signs of acute mental illness and displayed violent tendencies. The elder child was questioned when she revealed that the woman was her mother's sister and that they were staying along with the accused who was a 'komaram' (Oracle) in a temple. The child also revealed that the accused who was living along with the woman, had sexually molested her for the last one year. Immediately the child was taken to the Manjeri Police Station and produced before the Station House Officer with a report marked as Ext.P10. PW9, the Sub Inspector of Police, based on Ext.P10 report, registered Ext.P9 FIR. The woman turned out to be the biological mother of the three children and showed signs of mental illness. On the orders of the CJM, Manjeri, she was taken to the Mental Health Centre at Kuthiravattom, Kozhikode along with the youngest child. The other children, on directions of the Child Welfare Committee (CWC), were admitted to the Government

Juvenile Home at Vellimadukunnu. The evidence of PW15 was fully corroborated by the evidence of PW13, who also heard the victim speaking about the allegations of sexual assault on her, by the accused.

8. PW1 is the victim, who speaks of having stayed along with her two siblings and mother, with the accused and his son. Her parents were estranged and the three children were staying with the mother in a rented accommodation. Her mother developed a relationship with one Reji, who put her and her sister in an Orphanage, from where they were attending school. Her brother was staying with their mother. After the final examination of the 6th Standard, both the girl children were taken out of the Orphanage, by the accused and brought to a house rented out from PW6. When the two girl children reached the house, their mother and brother were found to be residing there with the boy child of the accused. It is when they were staying in the house of PW6, that the atrocities against PW1 commenced.

9. The accused along with his child and the mother of PW1 used to sleep upstairs, while the three siblings slept in a room downstairs. The accused at that time was a

priest in a temple and usually came home drunk in the night. He used to regularly assault the mother and children and also used to sexually molest PW1. She categorically stated that she was sexually molested numerous times. In the night, the accused used to knock on their door; which, her brother used to open out of fear, since otherwise the accused created a ruckus. Inside the room, the accused used to stifle her cries with a cloth pushed into her mouth and immobilize her, by tying her hands on the back. Then he used to tear off her dress and do obscene things to her. She specifically stated, he used to lie on her breasts and insert his genitals into hers. The accused used to repeatedly do it each night and also on several nights. If she does not comply, he used to beat her with a stick. She complained to her mother, who merely asked her to suffer, since the accused comes home drunk. Then, they shifted to another house, a single storeyed one, where the atrocities continued. They stayed there only for a few days. Later, when the mother and children were waiting at the bus stop for the accused to arrive, the Police accosted them and took them to the Police Station. She specifically stated that the names of her parents were wrongly stated on the

specific instruction of the accused. She deposed that she informed the Malappuram Police about the sexual harassment, she was subjected to, by the accused at the house of PW6 and PW10.

10. She not only withstood searching cross-examination but resisted the suggestions with an uncanny resilience; probably arising only out of the abject ravage her body was subjected to. In cross-examination she said that she was not molested on the first day, when she was brought to the house of PW6. Then a specific question was put by the defence as to 'after how many days the accused molested her', to which she replied 'after one week'. She resisted an attempt to elicit a specific date or time, which is only natural since during that time she was not even going to school. When she was questioned whether she had spoken to anybody else, she stoutly denied it and added that the accused had threatened to kill her if she divulged what she is subjected to. She also said that she suffered injuries and when she was questioned as to why she did not approach a doctor, she answered that it was out of fear of the accused. Again, the defence questioned the girl, whether anybody saw her being sexually assaulted to which

she categorically stated that her brother witnessed it. PW7 is the brother, who spoke in tandem with the evidence of PW1. The instances of, the accused knocking on the door, entering inside, stifling his sister with a cloth pushed into her mouth, tearing of her clothes and committing the sexual act while the two siblings cowered in fear, at the corner of the room, was spoken of by the brother (PW7) too, another minor child. The other sibling who too might have witnessed the act is a still younger child. PW1 also spoke of herself, the other children and the mother being picked up from the roadside by the Police and she admitted to have not only wrongly stated her parents' name but also about her native place; for fear of the accused.

11. PW2 is the doctor who examined the prosecutrix and Ext.P1 is the report of medical examination. In Ext.P1 and the deposition, the date of examination was stated to be 01.03.2012; an obvious mistake. Ext.P1 shows the crime No.201/13 which establishes the year. Further, as pointed out by the learned Prosecutor, the woman and children were picked up at 4.15 p.m, as per the deposition of PW13 and PW15. The FIR at Ext.P9 was registered at 9.00 p.m (21.00 hours) and the report of medical examination was after

that, at 11.45 p.m. The time noted in Ext.P1 is also 11.45 p.m and there is nothing anomalous in the time recorded. The doctor categorically spoke of the genitalia of the victim admitting two fingers and the hymen having been torn irregularly. The opinion was clearly that the victim showed evidence of sexual acts.

12. PW3 verified the potency of the accused and found that there was nothing to suggest that he was incapable of performing the sexual act. PW4, H.M of a school produced the certified copy of the extract of the Admission Register of PW1, which showed the date of birth of PW1 to be 23.08.1998. PW5 is the Secretary of the Grama Panchayat, who proved the ownership of the two residential houses where the alleged offences were committed. Ext.P4 is the ownership certificate of PW6 and Ext.P5, the ownership certificate of PW10. PW6 deposed that he is known by the name 'Kunjanikakka', which was the reference made by PW1. He stated that a tiled two storeyed building was rented out to the accused in 2012. The accused standing in the dock was identified and it was his statement that the accused lived there, with his wife and children for one year. The neighbours used to tell him about frequent quarrels arising

from the rented house for which reason he forced vacation of the same. He also said that there were two girl children living in the house and they came there after about six months from the commencement of the rental arrangement. PW10 is the owner of the second house. He deposed that the house, having an asbestos roof, was rented out to the accused, identified to be one standing in the dock; who stayed there for about a week along with two girl children and two boys.

13. PW8 prepared the sketch plans of both the houses, marked as Ext.P7 and P8. PW9 is the Sub Inspector of Police, who registered the FIR. PW11 is the victim's biological father who admitted that the three children were born to him in his marriage with their mother. He also vouched that he was estranged from his wife and after that the children were staying with their mother. Strangely enough, the prosecution did not elicit the date of birth from the father. This lapse is one we encounter daily and we have today raised a suo motu case on this aspect of the indifference and incompetence displayed by the Prosecutors resulting in the offenders going scot free. PW12 is the WCPO who took the victim's statement from the Juvenile Home

and PW14, the Magistrate who took the 164 statement of PW1 and 7, respectively marked as Ext.P11 and P12. PW16 was a witness to the scene mahazar (Ext.P13) and PW17 re-registered the FIR (Ext.P1). PW18 and PW19 are the Investigating Officers.

14. The first question to be considered is whether the age of the victim has been proved. A Division Bench of this Court in *Rajan v. State of Kerala, 2021 (4) KLT 274* has held that certified copy of the extract of the Admission Register of a school cannot be valid proof of date of birth. The learned Prosecutor points out that as per the Juvenile Justice (Care and Protection) Act, 2015 there is only requirement of a Birth Certificate issued from the school for proving the age of a juvenile in conflict with law which can be adopted for the victim in a rape case as held by the Hon'ble Supreme Court in *Jarnail Singh v. State of Haryana [2013) 7 SCC 263]*. We have to notice that the offence herein was committed long before the JJ Act, 2015 came into force. As on the date of commission of the offence, Juvenile Justice (Care and Protection of Children) Rules 2007 under the repealed Act was in force. As per the Rules existing then, *inter alia*

the Birth Certificate of the school first attended was held to be valid proof in ***Jarnail Singh.*** In ***Alex v. State of Kerala 2021 (4) KLT 480*** it was held that since the POCSO Act does not contain a provision to determine the age of a victim, the proof has necessarily to be in accordance with the rigour of the requirement as insisted by the earlier JJ Act and Rules, which were adopted by the decision in ***Jernail Singh.*** Para 20 of ***Alex(supra)*** is extracted here under:

> *"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'."***

The certified copy of the extract of the admission register falls short of proving the date of birth of the victim since it is not one issued by the school first attended.

15. We have already held there was no prejudice caused to the accused for reason of clubbing an offence under Section 376(2) with an offence under the POCSO Act, going by the specific provision in Section 28(2) of the POCSO Act. In fact, the offence of rape committed on a minor aged below 12 years would attract Section 376 of the IPC and the provisions of the POCSO Act. In that circumstance, when the offences, which arise from the very same act, are tried together and the age of the victim is not proved, it is not as if the offence under the IPC charged against the accused would fall to the ground since no committal proceedings have been carried out under the Cr.P.C. Ordinarily, the offence under Section 376 IPC would have to be subjected to committal proceedings under the Cr.P.C. When taking cognizance of a charge under the POCSO Act, the designated Special Court is empowered to try any offence, charged at the same trial. Otherwise, every trial under the POCSO Act will have to wait till the committal

proceeding is over and that would defeat the very purpose of the enactment which envisages speedy disposal of the cases. It cannot also be the position that once the age is not proved, the offence under Section 376 would fail for reason of no committal proceedings having been taken under the Cr.P.C.

16. The charge speaks of an instance on 16.02.2012 and several, between 16.02.2013 to 28.02.2013. In fact, the very first report made by PW15, Ext.P10, on the basis of which FIR was registered, speaks of continuous physical and sexual assault for a period of one year; without specifying any dates. Section 164 statement and the deposition of the prosecutrix, PW1, is also to the said effect. The prosecutrix at no time specified any dates. The prosecutrix spoke of the sexual assault having commenced in the house rented out from PW6 and continued in the house rented out from PW10; occupied only for a short period. The prosecutrix was also specific insofar as she having been taken out from the Orphanage after her final exams in the 6th Standard, which can be safely inferred to be in the middle of 2012. The evidence of PW6 is that he gave the house on rent to the accused in 2012 and after about six

months, the two girl children joined the family residing in that house. PW10's evidence is also to the effect that the family of the accused stayed in his house for about a week by the end of February. Though the charge specifically speaks of certain dates, we do not see such dates having been stated by anybody. The defence has also not cross-examined any of the witnesses, including the I.O on the dates specified in the charge. The charge, though with specified dates, is explicit and is of continued sexual assault of the penetrative kind on the victim by the accused, who is in the status of her guardian. Analysing Section 221(2) of the earlier Code, which *in pari materia* provision is available in Code of Criminal Procedure, 1973 as Section 212(1), the Hon'ble Supreme Court in ***Chittaranjan Das*** held:

> "It is true that sub-section (2) specifically deals with two kinds of offences and makes a provision in respect of them, but that is not to say that in every other case the time must be so specifically mentioned as to indicate precisely the date and the time at which the offence was committed".

Mere irregularity in charge does not prejudice the accused so long as he was aware of what was expected to be defended. We quote from the decision of a Division Bench of

this Court in *Surendran v. State [2021 (3) KLT 205]*:

> *"22. A4 raised the allegation specifically relying on Vinubhai R Patel [2018 (2) KLT OnLine 3123 (SC) = (2018) 7 SCC 743]. In Dalbir Singh v. State of U.P [2004 (1) KLT OnLine 1300 (SC) = 2004 (5) SCC 334] which was relied on in the cited decision, a three Judge Bench resolved the conflict between two Division Bench decisions of the Hon'ble Supreme Court. In 1994 considering an appeal against conviction under S.302, it was concluded that the charge was not established. Examining the question whether conviction could be under S.306 for which no charge was framed; it was held that having regard to the evidence adduced by the prosecution, the cross-examination of witnesses as well as the questions put under S.313 Cr.PC, it was established that the accused had enough notice of the allegations which could form the basis of the conviction under S.306. Later in 1997 on the identical issue, referring to S.322 it was found that the two offences are of distinct and different categories; ie: homicidal death and abatement of suicidal death. The three Judge Bench approved the earlier decision in Lakhjit Singh v. State of Karnataka [1993 (1) KLT OnLine 1065 (SC) = 1994(Suppl.1)SCC 173], referring to Chapter XXXV of Cr.PC which deals with irregular proceedings and their effect. S.464 was noticed to find that any error, omission or irregularity in the charge including any misjoinder of charges shall not result in invalidating the conclusion or order of a competent Court unless the appellate or revisional Court finds a failure of justice having been occasioned thereby. What is 'relevant to be examined is whether the accused was aware of the basic ingredients of the offence for which he is being convicted and whether the same facts sought to be established against him were explained to him clearly and whether he got a fair chance to defend himself' (sic. Para 17)".*

17. One other contention raised by the learned Counsel for the appellant is that at least in the second house, there is no specific statement by PW1, as to a penetrative sexual assault having been committed on her. We immediately reject the contention since the victim had spoken of the repeated acts committed on her in graphic detail. She also speaks of herself being subjected to such acts repeatedly on a day and continuously on several days in both the rented premises. We do not think that at every point, when repeated penetrative sexual assault is alleged, there should be a graphic description by the victim, in Court, of the details of such assault. In addition to the trauma of being subjected to a penetrative assault, that too by a person far older in age and having the status of a guardian, the Courts cannot but insist on the trauma being re-visited when examined in Court for the purpose of a successful prosecution. However, that cannot lead to an insistence that when continuous and repeated sexual assault forms the gravamen of the accusation; the witness should be called upon to state every detail of each of such traumatic instances of abject depravity. We cannot, at all, countenance the ground raised on that count by the learned

Counsel for the appellant.

18. The learned Counsel for the appellant has a further contention regarding the omissions, pointed out from the statement of the prosecutrix, recorded by the Magistrate under Sec. 164 of Cr.P.C. It is the contention that the omission of important facts affecting the probability of the case, is a relevant fact under Sec.11 of the Evidence Act to judge the veracity of the accusations. The learned Counsel relies on ***Laxman v. State of Maharashtra, 1974 3 SCC 704; Ram Kumar Pande v. State of M.P., (1975) 3 SCC 815*** and ***Sujit Biswas v. State of Assam, (2013) 12 SCC 406*** to counter the argument raised by the learned Prosecutor that the prosecutrix, in the box, was never confronted with the statement. It is submitted that the procedure under Sec.145 of the Evidence Act even if not complied with, the court has a duty to examine the omissions and inconsistencies pointed out.

19. ***Laxman (supra)*** was a case in which, omissions were pointed out in previous statements made before the Executive Magistrate and in the enquiry during committal proceedings. There, the omission was insofar as the inculpatory circumstance against one of the accused not

having been mentioned by the eye witness in the previous statements. The court considered the issue as to extent to which the eye witness had seen the incident and how much can be reasonably attributed to conjecture, surmises or imagination on his part. The learned Judges specifically referred to the observation of Prof.Munsterberg in a book titled, 'On The Witness Stand', based on experiments conducted of unexpected pre-planned episodes being enacted before persons who were then asked to recount it. The result in recantation, was that there were actions attributed to the participants of which not even the slightest trace existed and the essential parts were completely eliminated from memory. The Professor concluded so:

> *"We never know whether we remember, perceive, or imagine". Witnesses cannot, therefore, be branded as liars in toto and their testimony rejected outright even if parts of their statements are demonstrably incorrect or doubtful. The astute Judge can separate the grains of acceptable truth from the chaff of exaggerations and improbabilities which cannot be safely or prudently accepted and acted upon. It is sound common-sense to refuse to apply mechanically, in assessing the worth of necessarily imperfect human testimony, the maxim "falsus in uno falsus in omnibus".*

20. ***Ram Kumar Pande*** and ***Sujit Biswas (both supra)*** were cases in which a crucial fact was not mentioned

in the FIR. FIR, was noticed to be a previous statement which can strictly be used only to contradict or corroborate the maker. In ***Ram Kumar Pande,*** the father of the murdered boy made a first information statement and an important fact regarding the occurrence was omitted, which was held to be affecting the probability of the case and relevant under Sec.11 in judging the veracity of the case. ***Sujit Biswas*** followed ***Ram Kumar Pande***. A statement recorded under Sec.164 can be used for corroboration and contradiction. It has to be noticed that the defence did not confront the prosecutrix with any of the statements, but one. That one statement, was the sexual molestation by two others, brought by the accused, which was denied by the victim. PW14, the Magistrate who recorded it, having marked the statement at Ext.P11, we looked into the same. The first statement made before the police and the deposition before court of the victim does not reveal such an allegation. The prosecutrix also denied making such a statement before the Magistrate. We do not think that this is an omission which could lead to the very veracity of the accusation being doubted. *Falsus in Uno Falsus in Omnibus* is a principle which is not accepted in India and as the

learned Professor observed *'the astute judge in considering, the necessarily imperfect human testimony, sifts the grains of truth from the chaff of exaggerations and improbabilities, to decide on what is prudently acceptable'*.

21. The victim admits that she disclosed incorrect details of parents before the police, which is explained to be out of sheer fear of the accused. As to two others having molested her, she denied the statement. The Magistrate also was not questioned on this aspect and even if we assume the statement was made; it could only have been due to an over anxiety on the part of the victim, who was subjected to repeated sexual acts of abject depravity by a person more than twice her age and who was in the status of a guardian; with no aid received from the mother, who was indifferent to the protest raised by the poor victim. The essentials of repeated sexual molestation and the manner in which it was carried out has been consistently stated by the victim at the initial stage to the police, who rescued her from the streets and then to the Doctor and the Magistrate; which also has been deposed before court. There is no question of any adverse inference

being drawn since absence of scientific evidence, as revealed from the dress, cannot by that alone result in the acquittal of the accused. We find no reason to accept the contention raised by the appellant based on Section 11 of the Evidence Act since we find the victim to be a credible witness and the slight deviation in previous statement to be not significant enough to discredit her or her testimony.

22. PW1, prosecutrix, was picked up from the street with her two siblings and the son of the accused; shepherded by an almost insane mother. The mental state of the mother, a shame on society, is quite understandable from the stress of having been abandoned, with three children and no means of food or shelter; for which alone the children were subjected to physical, mental and sexual torture. No mother can remain sane in the said circumstances. We also do not find any reason to fault the prosecution for having not examined the mother in Court; grossly unnecessary in the teeth of the evidence of PW1 and PW7. The graphic description of PW1 is fully corroborated by PW7, her brother, who unfortunately witnessed rape on his sister, that too repeatedly and by their guardian.

23. The medical evidence also does not aid the defence. Had the medical examination proved the virginity of the prosecutrix, then definitely it would have aided the accused. However, the examination having revealed that the prosecutrix had been habituated to sexual act, definitely it corroborates the testimony given by her. In addition, as rightly pointed out by the learned Prosecutor, the deliberate falsehood stated by the accused under Section 313, points to his complicity and reveals the guilty mind. The accused said that he does not know the mother of the prosecutrix while there was overwhelming evidence as to the accused residing with the mother and children and his own child, as a family. We find no reason to accept any of the contentions of the appellant. We find that the evidence establish that the victim was subjected to repeated rape by the accused, that too of the penetrative kind. Though the age of the victim was not proved, she was a school going child, temporarily kept away from her studies. She, along with her mother and siblings, was sheltered by the accused, who stands in the status of her guardian. On the question of the charge, under the POCSO Act, the age of the victim having not been proved, the accused has to be acquitted of

the charges under the POCSO Act. There cannot be a conviction also under Section 376(2) IPC for the same reason. However, the offence of rape having been proved, the accused is liable to be convicted under Section 376(1). Considering the special relationship the accused had with the victim and the status of a guardian, we are of the opinion that the maximum sentence of life imprisonment would have to be imposed on the appellant. We hence partly allow the appeal, acquitting him of the charges under the POCSO Act and under Section 376(2) IPC; but convict him under Section 376(1) IPC and sentence him with life imprisonment. Ordered accordingly.

Sd/-
K. Vinod Chandran
Judge

Sd/-
Ziyad Rahman A.A.
Judge

vku/-

APPENDIX OF CRL.A.No.644/2016

APPELLANT'S ANNEXURE

ANNEXURE	**TRUE COPY OF THE JUDGMENT DATED 29.6.2016 IN SESSIONS CASE NO.324/2014 ON THE FILE OF THE SPECIAL COURT FOR THE TRIAL OF OFFENCES AGAINST CHILDREN (ADDITIONAL SESSIONS COURT-1) MANJERI.**