**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT**

**THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR**

**&**

**THE HONOURABLE MRS. JUSTICE C.S. SUDHA**

**MONDAY, THE 12TH DAY OF JUNE 2023 / 22ND JYAISHTA, 1945**

**CRL.A NO. 233 OF 2022**

**AGAINST THE ORDER/JUDGMENT IN SC 589/2014 OF ADDITIONAL DISTRICT COURT & SESSIONS COURT-1, ALAPPUZHA.**

**APPELLANT/ACCUSED:**

**RAJU (C. NO. 3313)**
**S/O PAPPACHAN, CENTRAL PRISON,**
**THIRUVANANTHAPURAM THROUGH THE SUPERINTENDENT,**
**CENTRAL PRISON POOJAPPURA, THIRUVANANTHAPURAM,**
**WAS RESIDING AT VATTAYAZHATHIN VEEDU, AMBEDKAR COLONY, THURUTHIMEL MURI, CHERIYANAD VILLAGE,**
**KERALA STATE**

**BY ADV V.K.HEMA (STATE BRIEF)**

**RESPONDENT/COMPLAINANT:**

**STATE OF KERALA**
**REPRESENTED BY SUB INSPECTOR OF POLICE,**
**CHEGANNUR POLICE STATION.**

**SMT.AMBIKA DEVI S, SPL.G.P.**

**THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 12.06.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

**P.B.SURESH KUMAR & C.S.SUDHA, JJ.**

**----------**

**Crl. Appeal No.233 of 2022**

**----------**

**Dated this the 12th day of June, 2023**

**JUDGMENT**

**P.B.Suresh Kumar, J.**

This appeal is directed against the conviction of the appellant and the sentence imposed on him in S.C.No.589 of 2014 on the files of the Additional Sessions Court-1, Alappuzha. The appellant is the sole accused in the case.

2. The accusation against the accused in the case is that the accused used to beat his daughter, the victim with dangerous weapons while she was a juvenile; that the accused also committed rape on her at their residence on several occasions right from her childhood and that the last occurrence of sexual assault took place on 30.08.2013. The offences alleged were offences punishable under Sections 323, 324, 376(2)(f) and 376(2)(n) of the Indian Penal Code (IPC) and

Section 23 of the Juvenile Justice (Care and Protection of Children) Act, 2000.

3. On the accused pleading not guilty of the charges framed against him, the prosecution examined 12 witnesses as PW1 to PW12 and proved 16 documents as Exts.P1 to P16. The prosecution has also caused the witnesses examined on its side to identify MO1 to MO3 material objects. The report of the forensic science laboratory proved by the prosecution was marked in the proceedings as Ext.C1.

4. The accused was thereupon questioned under Section 313 of the Code of Criminal Procedure (the Code) as regards the incriminating evidence brought out by the prosecution against him. The accused denied the same and maintained that he is innocent. Since the trial court did not consider the case to be one fit for acquittal under Section 232 of the Code, the accused was called upon to enter on his defence. The accused, however, chose not to adduce any evidence.

5. Among the witnesses examined on the side of the prosecution, PW1 is the victim. She has proved Ext.P1 First

Information Statement. PW2 is the teacher in the Anganwadi attached to the Panchayat within whose jurisdiction the victim was residing. PW2 has proved Ext.P2 complaint sent by her to the District Mission Co-ordinator of State Poverty Eradication Mission. PW3 is a professor in Community Medicine attached to the Government T.D. Medical College, Alappuzha. PW4 is the District Programme Manager, Kudumbasree, Alappuzha. PW6 is the doctor attached to the Taluk Hospital, Chengannur. PW6 has proved Ext.P4 report of examination of the victim. PW9 is the doctor who had conducted potency examination on the accused. PW9 proved Ext.P7 certificate. PW10 is the Woman Civil Police Officer who recorded the First Information Statement. PW11 is the police officer who has registered the First Information Report and PW12 is the police officer who has investigated the case.

6. On an appraisal of the evidence on record, the trial court found the accused guilty of offences punishable under Sections 376(2)(f) and 376(2)(n) of IPC and Section 23 of the Juvenile Justice (Care and Protection of Children) Act, 2000. The accused was accordingly convicted and sentenced to

undergo imprisonment for the remainder of his natural life and to pay a fine of Rs.1,00,000/- and in default of payment of fine, to undergo simple imprisonment for two years for the offence punishable under Section 376(2)(f) of IPC. The accused was also sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1,00,000/- and in default of payment of fine, to undergo simple imprisonment for two years for the offence punishable under Section 376(2)(n) of IPC. He was also sentenced to undergo rigorous imprisonment for 6 months for the offence punishable under Section 23 of the Juvenile Justice (Care and Protection of Children) Act, 2000. The accused is aggrieved by the conviction and sentence and hence, this appeal.

7. Heard Adv.V.K.Hema, the learned counsel for the appellant as also Adv.Ambika Devi S., the learned Special Public Prosecutor.

8. The learned counsel for the appellant did not dispute the relationship between the accused and the victim. She did not also dispute the fact that the victim was residing with the accused all throughout. The argument advanced by

the learned counsel, on the other hand, is that the accusation is false. In order to establish the said fact, it was argued by the learned counsel that the victim was a matured woman aged 25 years at the time when she gave evidence and her evidence therefore needs to be scrutinized with caution as she had not complained about the alleged sexual assaults till she attained the age of 19 years. It was pointed out by the learned counsel that although the victim deposed that she had disclosed the alleged sexual assaults to one Molly, one of her relatives almost three years prior to the last occurrence, there is no satisfactory explanation for the delay in registering the crime. According to the learned counsel, the said delay is fatal to the prosecution case. The learned counsel relied on the decision of the Calcutta High Court in **Sakim Ali v. State of West Bengal,** 2022 KHC 3975, in support of the said argument. It was also pointed out by the learned counsel that despite the specific stand of the victim that she had disclosed the occurrences to her relative Molly, the prosecution has not examined the said person as a witness in the case. According to the learned counsel, Molly being a material witness in the

case, her non-examination casts serious doubts on the genuineness of the prosecution case. In order to reinforce the said contention, the learned counsel has relied on the decision of the Chattisgarh High Court in **Dharm Sai and Another V. State of Chhattisgarh,** 2006 KHC 2597. It was also pointed out by the learned counsel that going by Ext.P3 mahazar and Ext.P5 scene plan, the place where the occurrences took place is the north-western room of the house of the victim which does not have any doors at all. According to the learned counsel, the case of the prosecution that the accused has been committing rape on the victim since her childhood in a door-less room, is highly unbelievable, especially when there were admittedly two inhabitants in that house, the mother of the victim as also her brother. It was also submitted by the learned counsel that Ext.C1 FSL Report does not show any seminal plasma or stains even under ultra violet examination on MO2 mat on which the accused had allegedly raped the victim, to contend that the accusation is false. It was also submitted by the learned counsel that although it was shown by the prosecution that MO1 churidar top of the victim contains semen

and human spermatozoa, there is nothing to show that the same is that of the accused. It was also argued by the learned counsel that no DNA examination was conducted to prove that the semen and human spermatozoa found in MO1 are that of the accused, and had the DNA examination been conducted on the same, the real accused could have been identified. It was also pointed out by the learned counsel that although PW1 was medically examined by PW6 on 01.09.2013, a day after the alleged last occurrence, PW6 did not find any evidence of recent sexual act on her. It was submitted that it is to verify whether there is any evidence of recent sexual act, the vaginal swab and vaginal smear were collected and sent for chemical analysis. It was pointed out by the learned counsel that the prosecution has not made available the result of the medical examination conducted on the vaginal swab and vaginal smear. According to the learned counsel, suppression of the above vital evidence is highly suspicious. To bring home the said point, the learned counsel has relied on the decision of the Chattisgarh High Court in **Kishore Bahadur v. State of Chhattisgarh,** 2006 KHC 2567. It was also argued by the

learned counsel that the non-examination of the brother of the victim who was admittedly residing with the victim and the accused all throughout and who was cited as a witness in the case, is also fatal to the prosecution case. To reinforce the said point, the learned counsel has relied on the decision of Himachal Pradesh High Court in **Partap Singh v. State of H.P.,** 2003 KHC 2574. The upshot of the arguments advanced by the learned counsel is that the prosecution has failed to prove its case beyond reasonable doubt, and the accused is therefore entitled to be acquitted. At any rate, according to the learned counsel, it is a case where the accused is entitled to the benefit of doubt.

9. *Per contra*, the learned Special Public Prosecutor supported the conviction of the accused and the sentence imposed on him. We are not referring to the various arguments advanced by the learned Special Public Prosecutor in this regard as we propose to deal with the same elaborately in the latter part of this judgment.

10. We have perused the materials on record and considered the contentions put forward by the learned counsel

on the either side.

11. The point arising for consideration is whether the prosecution has established the guilt of the accused under Sections 376(2)(f) and 376(2)(n) of the IPC and Section 23 of the Juvenile Justice (Care and Protection of Children) Act, 2000 and if so, whether the sentence imposed on the accused is proportionate to the gravity of the guilt established.

12. The point: In order to prove the accusation of sexual assaults committed on the victim, the prosecution has only the evidence of the victim. It is trite that a conviction can be found on the testimony of a prosecutrix alone in a case under Section 376 of IPC, unless there are compelling reasons for seeking corroboration [See **State of H.P. v. Asha Ram**, (2005) 13 SCC 766]. No doubt, the evidence of the prosecutrix in such cases is of a sterling quality. In **Rai Sandeep v. State (NCT of Delhi)**, (2012) 8 SCC 21, the Apex Court had occasion to consider the question as to who can be said to be a sterling witness. Paragraph 22 of the judgment of the Apex Court in the said case reads thus:

> "In our considered opinion, the "sterling witness" should be of a

very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a “sterling witness” whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral,

> documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

It is evident from the aforesaid decision that a sterling witness is a witness whose evidence is natural and consistent with the case of the prosecution *qua* the accused and such witnesses shall, under no circumstances, give room for any doubt as to the factum of the occurrence and the evidence shall have co-relation with each and every one of other supporting material, including expert opinions. It was also held in the said case that such evidence should also satisfy the test applied in cases involving circumstantial evidence, viz, there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence. To put it differently, the version of such witnesses on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary, and material objects should match the said version in material particulars. Keeping in mind the principles aforesaid, let us now consider the evidence tendered by PW1, the victim.

13. PW1 has deposed unambiguously in her evidence that right from her childhood, at least once in a week, the accused used to make her lie down on a mat and insert his genital organ into her vagina and move the same upwards and downwards until a white coloured substance came out of his genital organ. She has also stated that the accused repeated the same at about 9 p.m. on 30.08.2013 also. She has also stated in her deposition that her brother would not be available in the house during the day hours and that the accused used to commit the said act in the north-western room of their house. She has also stated that her mother died on 09.10.2012 while she was studying for Plus Two course and that she has not gone to the school thereafter. She has also stated in her deposition that she disclosed the sexual assaults committed by the accused on her to PW2, the Anganwadi teacher. This is in essence, the evidence of PW1. One of the questions put to PW1 in cross-examination by the learned counsel for the accused was as to why she did not disclose the sexual assaults committed by the accused to her mother and the answer to the

said question was that the accused had told her that she will be killed, if she discloses the same to her mother, owing to which she did not disclose the occurrences to her mother in fear of her father. PW1 had also denied in cross-examination the suggestion made by the learned counsel for the accused that she was reluctant to go to school, by stating categorically that she was never reluctant to pursue her studies. The defence of the accused in cross-examination was that the accused used to scold her for showing reluctance to go to school and it is on account of the said reason that she is deposing against him.

14. Let us now examine the remaining evidence in the case. As noted, PW2 is an Anganwadi teacher. PW2 is a person who had previous acquaintance with the victim as she used to teach her. PW2 has stated in her evidence that she was in charge of the second ward of the Panchayat, within the limits of which the house of the victim is situated. She has stated that she used to visit all houses in the said ward as part of her work to ascertain whether there exists instances of child abuse, sexual abuse, domestic violence etc. She has stated that when she went to the house of the victim once, she found the victim

in a deplorable health condition, not even capable of speaking to anyone. It was stated by her that since the accused was present in the house, she could not communicate much with the victim then. It was also stated by her that later on 31.08.2013 when she went to house of the victim, she could talk to her and she had disclosed then that the accused used to sexually assault her continuously and that he did so on 30.08.2013 also. It was stated by her that immediately thereafter, she passed on this information to the ICDS office, and based on the instruction given from the ICDS office, the matter was informed to PW4, the District Programme Manager of Kudumbasree. It was stated by her that as instructed by PW4, she lodged Ext.P2 complaint to the District Mission Co-ordinator. It was deposed by her that thereupon, she came back to the Anganwadi and met the victim again on 01.09.2013 along with PW4 and PW3 Doctor, in the pretext of treating the victim and on perusal of the medical records available with the victim, it was found that she is suffering from AIDS. It was also deposed by PW2 that the matter was immediately informed to the police. It is seen that the aforesaid evidence given by PW2

has not been discredited in the cross-examination in any manner whatsoever.

15. PW3, the Doctor attached to the Medical College deposed that on 01.09.2013, she visited the house of the victim along with PW2 and PW4 and the victim had complained to her that the accused had raped her on several occasions including on 30.08.2013. Though it was suggested to PW3 that she did not visit the house of the victim, she also emphatically denied the same. PW4 has also deposed that she went to the house of the victim along with PW2 and PW3 on 31.08.2013 based on the information given to her by PW2 and that the victim had complained to her about the sexual assaults by the accused and it was accordingly, that the matter was informed to the police. As in the case of PW3, the suggestion put to PW4 was also that she did not visit the house of the victim as deposed by her and she emphatically denied the suggestion.

16. As noted, PW6 is the Doctor who conducted medical examination of the victim. She deposed that she was informed by the victim girl that she was subjected to sexual

assault by her father right from her childhood and the last occurrence was on 30.08.2013. The medical examination was on 01.09.2013. It was deposed by PW6 that on examination of the victim girl, it was found that her hymen was completely torn. PW6 has stated that she issued Ext.P4 certificate of examination certifying that she found evidence of past vaginal penetration. The only question put to PW6 during cross-examination was whether there would be presence of semen in the vagina under normal circumstances upto 48 hours and the answer of PW6 to the said question was that there would be presence of semen in the vagina, if the same is not washed out after the intercourse. PW9 is the doctor who conducted potency test on the accused and issued Ext.P7 certificate that there is nothing to suggest that the said person is incapable of performing sexual act.

17. The evidence tendered by PW1 appeared to us to be natural and consistent with the case of the prosecution. The core spectrum of the crime remained intact throughout the cross-examination. PW1 has not given room for any doubt as to the material particulars deposed by her especially in relation to

the sexual assaults committed on her by the accused. The evidence tendered by her has co-relation with each and every other supporting evidence, including the expert opinion given by the doctor who examined her. We have, therefore, no doubt in our minds that PW1 can certainly be regarded as a sterling witness and the trial court was justified in holding that the accused is guilty of the offences punishable under Sections 376(2)(f) and 376(2)(n) of IPC and Section 23 of the Juvenile Justice (Care and Protection of Children) Act, 2000.

18. Let us now consider the various arguments raised by the learned counsel for the accused. As noted, the first and foremost argument advanced by the learned counsel for the accused is that the victim was a matured woman aged 25 years at the time when she gave evidence and as she had not complained about the alleged sexual assaults till she attained the age of 19 years, her evidence needs to be scrutinized with caution. True, the specific case of the prosecution is that the accused has committed sexual assaults on the victim right from her childhood and that she has not disclosed this fact to anyone until almost three years prior to

the last occurrence. As noted, on a question put to the victim during her cross-examination, she has deposed categorically that she has not disclosed the sexual assaults committed by the accused to anyone, as she was threatened by the accused that she will be done away with if she discloses the same and that it was fearing the accused that she did not disclose the occurrences to anyone. A child who was subjected to sexual assault by her father, not disclosing the same to anyone during her childhood, is no reason to think that what is spoken to by her at a matured age is false. The question whether the evidence tendered by such a person is reliable, is to be decided having regard to the facts and circumstances of each case. In the case on hand, as we have already found that the evidence tendered by the victim was very much natural and there was no room at all for any doubt as to its genuineness, we do not find any merit in this argument. We have come to the said conclusion also for the reason that the only suggestion put to the victim by the counsel for the accused was that she deposed against the accused for having scolded her for showing reluctance to go to school. According to us, no daughter would

depose against her own father in a manner in which the victim in the case on hand has deposed, for such a flimsy reason.

19. There is also no merit in the argument advanced by the learned counsel for the accused that there is delay in lodging the First Information Report and that the said delay is fatal to the case of the prosecution. As it is well settled, the delay in lodging the First Information Report will not be fatal, if the same is satisfactorily explained. Going by the materials on record as narrated in the preceding paragraphs, we are of the view that the delay in lodging the First Information Report in the case on hand, has been satisfactorily explained by the prosecution.

20. True, the prosecution could have certainly examined Molly, the relative of the victim to reinforce its case. But, merely for the reason that the said witness was not examined by the prosecution, it cannot be inferred that the case spoken to by the victim is false, when we are satisfied that the case spoken to by the victim is reliable and one to be acted upon. We take this view also for the reason that the accused did not bring on record any material indicating that there was

no impediment at all for the prosecution to examine Molly. There is, therefore, no merit in the argument raised by the accused in this regard also.

21. Another argument raised by the learned counsel for the accused based on Ext.P3 mahazar and Ext.P5 scene plan is that the case of the prosecution that sexual assaults have been committed by the accused on the victim in a door-less room cannot be believed, especially when there were admittedly two other inhabitants also in the house, the mother as also the brother of the victim. The victim has categorically stated in her evidence that her brother would not be there at all in the house during the day hours. As regards her mother, the evidence tendered by the victim is that she died almost a year before the last occurrence. Having regard to the social background of the parties, we do not think that the fact that the room in which sexual assaults have been committed on the victim by the accused being a door-less one, is a ground to disbelieve the testimony of the victim.

22. Yet another argument advanced by the learned counsel for the accused is that Ext.C1 FSL Report does not

show any seminal plasma or stains even under ultra violet examination on MO2 mat on which the accused had allegedly raped the victim and therefore, the accusation is false. The argument is flimsy as it proceeds on the premise that seminal plasma and stains are bound to appear in a case of this nature on the MO2 mat. Another argument raised is that although it was shown by the prosecution that MO1 churidar top of the victim contains semen and human spermatozoa, there is nothing to show that the same is that of the accused. True, the prosecution could have attempted a DNA examination of the semen and human spermatozoa found in MO1 cloth, but, merely for the reason that the same was not done, the court cannot reject the prosecution case, especially when there is overwhelming evidence to hold that the accused is guilty of the offences alleged.

23. Another argument seriously pressed into service by the learned counsel for the accused is that although PW1 was medically examined by PW6 on 01.09.2013, a day after the alleged last occurrence, PW6 did not find any evidence of recent sexual act on her and it was with a view to

ascertain whether there is any evidence of recent sexual act, the vaginal swab and smear were collected and sent for chemical analysis. The argument is that the conduct of the prosecution in not bringing on record the report of the chemical analyst on the vaginal swab and smear creates a serious doubt as to the genuineness of the case of the prosecution that the victim was subjected to recent sexual assaults. As indicated above, the evidence tendered by the victim coupled with the evidence tendered by PW6, the doctor who conducted the medical examination, establishes beyond reasonable doubt the case of the prosecution, and merely on account of the fact that the vaginal swab and smear were taken for chemical analysis and its report had not been brought on record, the prosecution case cannot be rejected. There is also no merit, in the peculiar facts of this case, in the argument advanced by the learned counsel for the accused that non-examination of the brother of the victim was fatal to the prosecution case.

24. We have perused meticulously the various decisions cited by the learned counsel for the accused and we find that those are all decisions rendered purely on the facts of

those cases having regard to the general principles highlighted therein and the said decisions may not have any application on the facts of the present case.

25. Let us now deal with the question whether the sentence imposed on the accused is proportionate to the gravity of the guilt established. As noted, the accused was sentenced to undergo imprisonment for the remainder of his natural life for the offence punishable under Section 376(2)(f) of IPC although he was sentenced to undergo only a rigorous imprisonment for ten years for the offence punishable under Section 376(2)(n) of IPC. True, Sections 376(2)(f) and 376(2)(n) of IPC provide for a sentence of imprisonment for life which shall mean imprisonment for the remainder of the natural life of the accused. But it is now settled that the constitutional courts are empowered to modify the punishment within the punishment provided for in the IPC for specified offences.

26. Having regard to the social background of the parties and having regard to the fact that there would be more heinous crimes than the one involved in this case, we deem it appropriate to modify the sentence imposed on the accused for

the offence punishable under Section 376(2)(f) of the IPC to rigorous imprisonment for a period of 20 years, instead of imprisonment for the remainder of his natural life.

In the result, the appeal is allowed in part, affirming the conviction of the accused and modifying the sentence for the offence punishable under Section 376(2)(f) of the IPC to rigorous imprisonment for a period of 20 years, instead of imprisonment for the remainder of his natural life.

Sd/-

**P.B.SURESH KUMAR, JUDGE.**

Sd/-

**C.S.SUDHA, JUDGE.**

YKB