CR

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR.JUSTICE ZIYAD RAHMAN A.A.

MONDAY, THE 2ND DAY OF AUGUST 2021 / 11TH SRAVANA, 1943

CRL.A NO. 1311 OF 2016

[AGAINST THE JUDGMENT IN SC No. 530/2015 OF ADDITIONAL DISTRICT & SESSIONS JUDGE (FOR THE TRIAL OF CASES RELATING TO ATROCITIES & SEXUAL VIOLENCE AGAINST WOMEN AND CHILDREN)]

APPELLANT/ACCUSED:

SANTHOSH
AGED 40 YEARS, S/O. DEVASYA, RESIDING AT VAZHAKKAYIL HOUSE, NELLARIKKUNNU BHAGAM, KAKKOOR KARA,THIRUMARADY VILLAGE, MUVATTUPUZHA TALUK,ERNAKULAM DISTRICT PINCODE 686 673

BY ADV.
PADMALAYAN.P.P.

RESPONDENT/S:

STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR HIGH COURT OF KERALA,ERNAKULAM, COCHIN 682 031

BY SMT.S.AMBIKADEVI, SPL.GOVT.PLEADER (FOR ATROCITIES AGAINST WOMEN AND CHILDREN AND WELFARE OF WOMEN AND CHILDREN)

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 14.07.2021, THE COURT ON 02.08.2021 DELIVERED THE FOLLOWING:

JUDGMENT

Ziyad Rahman A.A., J.

The documents before us unfold unfortunate instances of repeated sexual assault of various degrees, on a minor girl by a neighbour, who is married with children. Along with it, comes the unpardonable lethargy of the prosecuting agency, in collecting and producing materials to prove the age of the unfortunate victim, a basic requirement for establishing the offences under the Protection of Children from Sexual Offences Act, 2012 (POCSO) and also various provisions of Indian Penal Code. There also emerges a question of law of crucial importance, on the definition of "Rape" as contained under Section 375 IPC, in the light of Criminal Law Amendment Act, 2013 (Act, 13 of 2013) i.e, whether, the term "Rape" as contained in the amended section 375 takes in, sexual assaults beyond penile penetration into vagina, urethra, anus and mouth; the known orifices in the human body to which such penetration is imaginably possible. To be precise, we are called upon to decide the question whether, the penetration to "any part of the body of such woman" as mentioned in section 375(c) of the Indian Penal Code, brings within its ambit a penile sexual act committed between the thighs held together; which do not qualify to be called an orifice. Does the extended definition intend to

cover any manipulation of the body of a woman in such a manner as to simulate an effect, providing sexual gratification, akin to penile penetration; is the question we pose ourselves.

2. At first let us examine the factual matrix of the case, which are as follows; The appellant before us, is the accused in S.C. No. 530/2015 on the file of the Additional Session Judge (For the trial of cases relating to atrocities and sexual offences against women and children,) Ernakulam, wherein cognizance was taken for the offences punishable under sections 3(c) r/w 5(m), S.6,S.9(l) (m) r/w S.10, S.11(i) & (iii) r/12 of POCSO Act and under S.354,354A(1)(i) &(iii),377,375(c) r/w S.376(2) (i) of IPC. After trial, he was found guilty for the offences under S11(i) r/w 12, 9(l) (m) r/w. 10, S. 3(c) r/w 5 (m) and S.6 of the POCSO Act, S. 375(c) r/w Sections 376(2) (i), 377, 354, 354A(1)(i) of IPC and was sentenced to undergo imprisonment for various terms including life imprisonment for life, which shall mean imprisonment for the remainder of his natural life, and fine.

3. The entire episode commenced from a medical camp conducted in Thirumarady Government School, on 14.01.2015 where the victim voluntarily appeared along with her mother for addressing her constant complaint of stomach pain. During the course of examination, the victim revealed certain incidents of sexual assault

committed on her, by her neighbour, the accused herein, particularly the one committed six months prior to the said date. The doctor, who was examined as PW2, informed the mother of the victim (PW3) immediately, and instructed her to make a complaint before the police. Presumably, PW3 having serious concerns about the consequences of the revelation upon the reputation of the family and the social stigma on the child, failed to make a complaint immediately. Later when inquiries started coming in from Child Line authorities, she submitted a complaint and accordingly Koothattukulam Police registered Crime 176 of 2015 after recording the FIS of the victim (PW1), on 10.03.2015.

4. After completing the investigation, charge sheet was filed by the police, cognizance of which was taken by the Special Court, and the accused stood trial. The prosecution examined PWs 1 to 11, marked Exts P1 to P11 and identified MO's 1 to 4. After completion of the prosecution evidence, the incriminating evidence were put to the accused by the Special Court, under section 313 of Cr.P.C, during the course of which the accused denied all of them, except the statement of the prosecutrix regarding her age (11 years). No defense evidence was adduced. After evaluation of the entire materials, the Special Court found the appellant/accused guilty of the offences as mentioned above and was sentenced.

5. Heard Sri P.P.Padmalayan, learned counsel for the appellant/ accused and Smt.S.Ambikadevi, learned Special Government Pleader [Atrocities against Women and Children]. The learned counsel for the appellant/accused contends that, the prosecution miserably failed in establishing the offences alleged. The prosecution has not produced any documents showing the age of the victim and no attempt was made to bring in any details as to her age, through the prosecution witnesses. The offences under the POCSO Act and also under section 376 (2) (i) IPC are not attracted. As per the prosecution case, the sexual act alleged against the accused is that of inserting the penis of the accused between the thighs of the victim; which would not amount to a rape as defined under section 375(c). There are several inconsistencies/ discrepancies spoken of by the victim, in Ext P1 First Information Statement, Ext P2 statement under section 164 Cr.P.C and her deposition as PW1. There is no corroborative material available, and it is not at all safe to base a conviction solely on the evidence of PW1, as done by the Sessions Court. There is delay of more than six months in reporting the incident and even though the parents of the victim were informed on 14.01.2015, the complaint was made by PW1 and PW3 only on 9.03.2015 and the FIR was registered only on 10.03.2015. The victim was never subjected to examination in a medical camp on

14.01.2015, and it was only a concocted story of the prosecution to justify the delay.

6. Per contra, the Special Government Pleader stoutly opposes the submissions of the learned counsel for the appellant. She contends that, the evidence of PW1 is reliable and trustworthy. Inconsistencies pointed out by the accused are not at all material, as the reading of her evidence clearly provides adequate materials for arriving at the conclusion of guilt of the accused. Position of law that, it is not necessary to look for any corroboration, when the evidence of prosecutrix is consistent, credible and otherwise dependable, is well settled. She points out that, there cannot be any dispute with regard to the age of the victim, as she clearly stated her age to be 11 years in her deposition and the accused himself admitted that in the statement under section 313 Cr.P.C. With regard to the question of penetration and the ingredients of offence under section 375(c), she contends that, as per the amended provision vide Criminal Law Amendment Act, 2013 (Act 13 of 2013), offence of rape is not confined to a sexual intercourse; (normally understood as penile penetration of the vagina). According to her even the penetration into the urethra, anus or any other parts of the woman's body would attract the said provision. She further points out that, the sexual act of placing the penis in between the thighs that are held together, would make out a case for section

377 of IPC as well, since it is against the order of nature. In support of her contentions, she relies on a judgment of this court in **State of Kerala Vs Kundumkara Govindan and another(1969 Crl LJ 818)**.

7. The first information statement is Ext P1 in which, the victim stated as follows; She was a sixth standard student of Thirumaradi Government School and the accused was her neigbour. She used to call him Santhosh uncle (Santhosh Maman) and he used to come to her house frequently when she was alone. Even while she was studying in the 5th standard, he used to exhibit obscene scenes of naked people on his mobile phone and also on the TV at his residence. While so, during holidays after Onam exams, when she and her three year old brother were alone in their house, the accused came to her house, gave a toy JCB to her brother and asked him to go and play with the toy at the residence of the accused. Thereafter he took her to the bed room of her grand mother and showed her obscene pictures in his mobile phone and told her that, by doing things as shown therein, they could get pleasure. He took out his penis (the thing for urination, as per her version) and attempted to put it inside the mouth of the victim, which she resisted. Then he lifted her skirt and inserted his hand inside her under garment. She was later made to stand while he inserted his hand into her T shirt (baniyan) and pressed on her chest. Thereafter he placed his penis in between the thighs of the victim and pushed up and

down. After some time, she could see a milk like liquid flowing through her thighs, which was wiped away by her as instructed by the uncle (maman). She was told that, if she reveals this incident to any one, police would catch her and himself. She did not reveal the incident to any one due to this threat. She further stated that on several occasions thereafter, the accused used to come to her house when she was alone and make her hold his penis. Later when a medical camp was conducted in the school, she was subjected to medical examination, as she was suffering from stomach ache. In response to the queries made by the Doctor, she revealed the above incident. The complaint was accordingly made by her along with her mother and sister on 9.03.2015. It is mentioned that the first incident, mentioned above, occurred six months prior to the complaint.

8. The statement of the victim was recorded under section 164 of Cr.P.C also, which is marked as Ext P2. In the said statement, she revealed multiple instances of sexual assaults such as, making her to hold the genitals of the appellant till he ejaculated, showing obscene pictures, attempt to put his penis into the mouth of the victim, the incident of sexual acts between her thighs followed by ejaculation (with a slightly different narrative) etc. She also narrated an incident that occurred on a day when she went to draw water from the public tap, where the accused was having a bath. He asked her to place the tooth

brush on her private parts. He claimed to her that once he lay naked with her mother, which she knew to be a lie intended to persuade her to allow him to lie with her. There were some deviations in certain aspects from Ext P1 statement and she had spoken of more instances of sexual assault than mentioned in Ext P1. The said statement contains a clearer description of the sexual assaults with varying intensity on multiple occasions.

9. When she was examined as PW1, she reiterated the incident of sexual assault of the accused by inserting his penis in between her thighs and having ejaculation. The learned counsel relies on certain inconsistencies in Exts. P1,P2 and the deposition to substantiate his contention that the evidence of PW1 is not reliable. It is true that there are some minor discrepancies as pointed out by the learned counsel. As per Ext P1, on the day when the accused committed the sexual act on her thighs, her brother was also there in her house and the accused committed the said acts, in her grand mothers room, after sending her brother to the house of accused to play with a toy JCB, which he had given to the child. As per Ext P2, she stated that on the day when she was sexually abused by the accused after sending her brother away, he caused her to hold his penis and when she cried, he left the place. This was repeated on a day, when there was nobody in her house, except the grand mother, who was busy in the kitchen. It is further stated by

her that she was subjected to sexual assault between her thighs, on the very next day and there was no body in her house. She had also mentioned about an incident of making her hold his genitals, on a day when he was called to the house to rectify the cable TV connection. In both Ext P1 and P2, she stated that, she was subjected to penetrative sexual assaults on several occasions. But while examined as PW1, she stated about only one incident of penetrative sexual assault, though there were several incidents where she was forced to hold his penis and cause ejaculation. She also stated about various incidents of touching her private parts and chest. The learned counsel also points out that the number of incidents of assault varies from statement to statement.

10. When we evaluate the evidence of PW1 and the inconsistencies pointed out by the learned counsel for the appellant, we cannot ignore the fact that in every single instance, in the FIS, S.164 statement and before Court, she described the sexual abuse of that one occasion of showing obscene pictures and then molestation by touching on her private parts and eventually ejaculating between her thighs, vividly. It is true that, there are certain inconsistencies and variations as mentioned above, but that by itself cannot be a reason to discard the evidence in its entirety. It is a well settled position of law that, in such circumstances, the attempt of the court should be to separate the grains of truth as discernible from the entire evidence. In this case, in

all the statements she clearly mentioned about that one incident of sexual abuse by inserting his penis between her thighs and having ejaculation. Several incidents of making her to hold his penis are also mentioned.

11. The deviations are only in respect of the irrelevant particulars of the incidents such as, the persons who were present in the house at the relevant time, number of occasions of assaults etc. However, overall reading of the evidence reveals that, sexual assaults of varying degrees were committed on her by the appellant on several occasions. The evidence reveals that she was a student of 6th standard at the relevant time and we cannot assume that, she would be able to narrate the specific details of repeated acts merely from her imagination. Moreover, the language and expressions used by her for describing the sexual acts and the sexual organs, clearly convey her unfamiliarity with the sexual acts. We cannot expect that an ordinary school going girl from a village area would have such capacity to imagine stories of that nature for falsely implicating the appellant. It would not have been possible for her to narrate incidents of this nature with such clarity, unless she was subjected to such acts. A closer scrutiny of her evidence would reveal that her narratives provide adequate indication with sufficient clarity of what she was forced to undergo at the hands of the appellant. The discrepancies highlighted by

the learned counsel for the appellant can only be treated as minor in nature and the reading of the evidence as a whole reveals graphic description of her sufferings on various occasions.

12. Now we come to the argument of no corroboration being available. What was spoken of by PW1 are incidents which cannot have any ocular evidence. We cannot forget that, sexual offences are usually committed in utmost secrecy and when nobody is available, as in this case. As for scientific evidence what is available in this case are, Ext P10 medical examination of the victim proved by PW10 doctor and Ext P11 certificate of potency issued by PW11. The medical evidence by Ext. P11 only establishes that the accused is capable of performing the alleged acts. It is not inculpating but if it were in the negative there definitely would have been an element of exculpation. It has to be noted that the incidents of sexual assault were committed about eight months prior to the date of registration of crime and it was not possible to get any scientific evidence. The medical examination of the victim also could not have provided any evidence, as the specific case of the prosecution is commission of sexual assaults with the penis placed between the thighs to simulate a coitus and not penetration into any of the natural orifices of the victim. Legal position regarding the conviction on sole testimony of prosecutrix even without any corroboration is now well settled through a large number of decisions. In **Vijay @ Chinee V**

State of Madhya Pradesh (2010 (8) SCC 191), the Honourable Supreme Court, after referring to **State of Maharashtra v. Chandraprakash Kewalchand Jain (AIR 1990 SC 658), State of U.P. v. Pappu @Yunus and Another (AIR 2005 SC 1248), State of Punjab v. Gurmit Singh and Others (AIR 1996 SC 1393), State of Orissa v. Thakara Besra and Another (AIR 2002 SC 1963), State of Himachal Pradesh v. Raghubir Singh (1993 (2) SCC 622) etc,** held that, the statement of the prosecutrix, if found to be worthy of credence and is reliable, it requires no corroboration. The court can convict the accused on the sole testimony of the prosecutrix.

13. In **State of Orissa v. Thakara Besra and Another, AIR 2002 SC 1963,** it was held that rape is not mere a physical assault, rather it often distracts the whole personality of the victim. The rapist degrades the very soul of the helpless female and, therefore, the testimony of the prosecutrix must be appreciated in the background of the entire case and in such cases, non - examination even of other witnesses may not be a serious infirmity, particularly where the witnesses had not seen the commission of the offence.

14. In **State of Himachal Pradesh v. Raghubir Singh, 1993 (2) SCC 622**, the Honourable Supreme Court held that there is no legal compulsion to look for any other evidence to corroborate the evidence of the prosecutrix before recording an order of conviction.

Evidence has to be weighed and not counted. Conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate against her veracity.

15. At this juncture it is relevant to note that, the learned counsel for appellant tried to set up a case that, PW1 was tutored and was acting in tune with the instructions of her mother. Learned counsel brings our attention to the suggestion made to PW3 mother, during cross examination that, she and the appellant were having an illicit relationship and when the appellant refused to take PW3 along with him, she got enraged and the present complaint was submitted by her due to that enmity. However, apart from a mere suggestion, there are no materials to arrive at any such conclusion.

16. When considering the evidence of PW1 in the light of the principles laid down by the Honourable Supreme Court, we cannot find any infirmity therein. The deposition of the prosecutrix inspires confidence, and the discrepancies/inconsistencies pointed out by the appellant, are not of any significance and do not affect the credibility of PW1. The FIR as has been held by the Hon'ble Suprme Court is not an encyclopaedia of events (***Superintendent of Police, CBI v. Tapan Kr.Singh [(2003) 6 SCC 175]).*** In the present case the prosecutrix even at that first instance (FIS) spoke of the accused having for a long

time showed her obscene video footage in his mobile and the one incident where he made her stand up and obtained sexual gratification by placing his penis between her thighs, vividly as also made an allegation that there were a number of instances when the accused came to her house, when nobody was around and made her catch hold of his genitals. She deposed in tune with the FIS in chief examination and withstood the cross examination . There was no single contradiction marked nor were the omissions very material.

17. Another contention put forward by the learned counsel is regarding the delay in disclosure of the alleged acts and delay in registering the FIR. He points out that, according to the prosecution, the sexual assaults came to light during the medical camp conducted in the school of the victim on 14.01.2015 and it was reported that the incident took place six months prior to the said date. There is no proof offered of the medical camp and the FIS of PW3 was submitted only on 9.03.2015 and the FIR was registered on 10.03.2015. PW1 in Ext P1 FIS itself had stated that, she did not reveal the incident, as she was told by the appellant, that she and the uncle (appellant), would be caught by the police, in case she discloses the incident to anyone. The learned counsel points out an inconsistency from the said statement as against what is seen from Ext P2, recorded under Section 164 and also in her deposition wherein the threat was stated to be of arrest of

herself and her family members by the police. We do not think that this is a material discrepancy, as at any rate it reveals a threat from the part of the appellant, which prevented her from disclosing the incident until she voluntarily did so to PW2 doctor, who examined her in the medical camp.

18. According to the appellant there was no medical camp conducted on 14.01.2015, which is a cooked up story at the instance of the prosecution with an intention to explain the delay in launching the complaint. The contention is based on the fact that the prosecution has not produced any documents to prove the conduct of such a medical camp on that day. We have examined this aspect. We notice that, six witnesses i.e PW1 victim, PW2 Doctor who examined the victim in the medical camp, PW3 mother, PW4 nursing staff, PW5 Headmistress of the School and PW6 class teacher of the victim, have clearly spoken of the medical camp and also about the examination of the victim. PWs 2,4,5 and 6 have clearly stated that no records of participants of the said camp were maintained by them. We have no reason to disbelieve these official witnesses, particularly as we are unable to foresee any specific interest on their part in seeing the appellant punished. In such circumstances, we are not inclined to accept the contention of the learned counsel and there is required no further proof of the medical camp on 14.01.2015. The delay in disclosure is only natural since the

victim deposed that she was threatened with police action, if disclosure is made of the sexual assaults to her parents. We perfectly understand the effect of a threat so leveled especially to a school going girl who was sexually abused against her wishes. The abhorrent act would definitely have left a scar in the mind of the victim and it is not easy of disclosure; the ramifications of which probably eluded her. We find justification for the delay, as it is understandable of a school going girl who was disturbed with what she was subjected to, but also frightened by the threats levelled.

19. Regarding the further delay in submitting the complaint, it is to be noted that, as per PW3, mother, even though she was directed by PW2 to inform the police, she had not done it immediately, as she wanted to discuss it with her husband. She further stated that, thereafter when she asked her daughter as to what transpired between herself and the appellant, PW1 revealed the sexual atrocities. Even thereafter, the complaint was submitted (apparently before Child Line authorities) on 9.03.2015, when she was contacted by the said authorities. In our view the delay of about two months after 14.01.2015 cannot be treated as very relevant to suspect the veracity of the version of PW1. The mental state of the mother of the victim and her family, of being saddled with the disrepute of a rape and its consequences cannot be wished away. On being faced with the

circumstance of a neighbour having sexually violated a school going child it is only natural for the family of the victim to go on denial mode and not report the same for reason of the consequent ill-repute to the family. The Doctor obviously reported the matter and the Child Line authorities pursued it upon which the victim's family had no option. We have seen the Doctor, PW2, deposing as to the victim having disclosed the fact of sexual abuse to her which was hardly two months before registering of the FIR. This corroborates the deposition of the prosecutrix and her mother and in the process belies the defence set up of the victim having spoken on the instigation of the mother. If it were so the victim’s family would have immediately registered the crime.

20. The learned counsel for the appellant, then contends that, the prosecution miserably failed in proving the age of the victim, which is the most important ingredient of the offences under POCSO Act and also under section 376(2) (i). In this regard, we painfully notice that, there is a callous lapse on the part of the prosecuting agency and the Court too failed to alertly intervene to cure such defect. The evidence of the prosecution does not reveal even a suggestion, leave alone any assertion, from the part of the prosecuting agency, indicating the age of the victim. The only mention of her age is where the Sessions Court questioned PW1 as part of verification of her capacity/competence to depose. It is true that, she has stated that she is aged 11 in the 'voir

dire'; an exercise undertaken by the Court to test the competence of the child witness to testify. The prosecution did not produce any certificate from her school. Even though her mother, the best suited person to speak on the date of birth was examined, the prosecution has not cared to elicit any statement from her regarding the victim's age. The Headmistress or the Class teacher also did not testify on the age nor was any extract of the admission register marked. The Learned Special Government Pleader defends the same, by pointing out the fact that the appellant in his statement under section 313 Cr.P.C, had admitted her age as 11 years. This admission, as noticed, was to a question that the girl was studying in the 6th standard and was 11 years of age; the age not spoken of in the deposition. We are of the view that, the case of the prosecution, particularly in those aspects which form the basic ingredient of any offence, cannot rest on the shoulders of the accused. It is a crucial fact to be established by the prosecution by adducing positive evidence. The statements made by the witness during '*voir dire*' is not substantive evidence and only assures the Court of the competence to testify and understand the proceedings and cannot have the character of an incriminating material brought out in the evidence led on trial. The court committed an error in putting the question under Section 313 as an incriminating material.

21. In such circumstances, we are of view that, lack of evidence as to the age of the victim is a serious lapse on the part of the prosecution and the same makes the charges under the provisions of POCSO Act, unsustainable. While arriving at this conclusion, we are conscious of the objectives and rigour of the provisions of the POCSO Act, and also the degree of proof envisaged therein. However, to attract the rigour of the said provisions, the prosecution has to make out a case establishing the basic ingredients for attracting the provisions thereof. The age is the most significant and basic element to attract the offences under that Act and unless it is established by adducing positive evidence, the rigour of the provisions in the POCSO Act cannot be pressed into service. In such circumstances, we can only express our pain and anguish on the apathetic attitude of the prosecuting agency, while arriving at the conclusion that the accused is not guilty of the charges under the provisions of POCSO Act, so also of the offence under section 376(2) (i) of the Indian Penal Code.

22. Next contention of the learned counsel for the appellant is that, even if it is concluded that the evidence of PW1 is believable, it only reveals sexual acts falling short of penetrative sexual assaults and does not constitute rape, as described under section 375 of IPC. He points out that, the sexual act of highest degree alleged against the appellant is that, he had inserted his penis between the thighs of the

victim and such an act would not attract the offence of rape as defined under section 375.

23. The examination of this question requires deeper scrutiny, for which analysis of legislative history of definition of "rape" as it now stands and the evolution thereof through judicial precedents and statutory amendments, are absolutely necessary. The definition of 'rape" had under gone a sea change as per amendment vide Criminal Law Amendment Act, 2013 (Act 13 of 2013). Section 375 of IPC as it stood prior to amendment vide Act 13 of 2013 reads as follows:

> *" 375. Rape.-- A man is said to commit 'rape' who, except in the case hereunder excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:*
> *First.-- Against her will.*
> *Secondly.-- Without her consent.*
> *Thirdly.-- With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.*
> *Fourthly.-- With her consent, when the man knows that he is not her husband,and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.*
> *Fifthly.-- With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.*
> *Sixthly.-- With or without her consent when she is under sixteen years of age.*

> *Explanation.-- Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.*
> *Exception.-- Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.'*

24. As per the above definition, in order to make out a case of rape, there must be "sexual intercourse" and read with the Explanation if penetration is achieved to any degree it would constitute "sexual intercourse". There are large number of decisions of the Honourable Supreme Court and of this court, wherein it was held that penetration of even slightest degree will be sufficient to attract the offence of rape. In **State of U.P. v. Babulnath, (1994 (6) SCC 29)** it was held by the Honourable Supreme Court as follows:

> *"Even partial or slightest penetration of the male organ within labia majora or the vulva or pudendum with or without any emission of semen or even an attempt at penetration into the private part of the victim would be enough for the purpose of S.375 and 376 of IPC."*

25. A learned Single Judge of this Court, in **Chenthamara Vs State of Kerala (2008 (4) KLT 290),** after referring to the anatomy of female genetalia in detail and with specific reference to large number of decisions of the Honourable Supreme Court on the point, observed as follows:

> *"As per the dictum laid down in the above decisions, therefore, the 'penile accessing' (which I have elaborated above) would be sufficient to constitute the 'penetration' in the sexual intercourse, which is necessary for the offence of 'rape', which occurs, even in the absence of actual entry of the male organ through vagina or*

> *rupture of hymen etc. Though the said conclusion is arrived at by the Supreme Court, not by explaining the meaning of the word 'penetration,' as I have done in this judgment still, I find that both conclusions tally. Thus, in my humble view, my conclusions on the relevant point, though not in the same words, are supported by the various decisions of the Supreme Court and this Court also."*

26. Thus it is evident that, even "penile accessing" was treated as sufficient to constitute an offence of rape. The above trend of judicial interpretations, which are very consistent, clearly indicate that the offence of "rape" was being subjected to a very wide interpretation, to include any form of penile-vaginal penetration and even an attempt thereof; long prior to the amendment in the year 2013.

27. Despite such wider interpretations and convictions based on the same, the offences of sexual assault were always on the rise, which resulted in requests and demands from various women organizations and the authorities constituted for the welfare of women, for amendment of the definition thereof, by making it more stringent and wider. On the basis of the recommendations of the Law Commission of India in its One Hundred Seventy Second report on 'Review of Rape Laws' as well as the recommendations of the National Commission for Women for providing stringent punishment for the offence of rape, a High Power Committee was constituted consisting of the representatives of the Ministry of Women and Child Development,

Ministry of Law and Justice, National Commission for Women, Law Commission of India and the Ministry of Home Affairs to examine the matter considering the suggestions of various quarters on the subject. The Committee submitted its report along with the draft Criminal Law (Amendment) Bill, 2011 and recommended to the Government for its enactment. On the basis of which, Criminal law Amendment Bill, 2012 was introduced before the Parliament on 4.12.2012. One of the objectives of the said Amendment Bill was to substitute sections 375, 376, 376A and 376B by replacing the existing sections 375, 376, 376A, 376B, 376C and 376D of the Indian Penal Code, and replacing the word 'rape' wherever it occurs by the words 'sexual assault', to make the offence of sexual assault gender neutral and also widening the scope of the offence of sexual assault. The amendment proposed in section 375 was as follows;

> *"375. A person is said to commit "sexual assault" if that person—*
> *(a) penetrates, for a sexual purpose, the vagina or anus or urethra or mouth of another person with—*
> *(i) any part of the body including the penis of such person; or*
> *(ii) any object manipulated by such person, except where such penetration is carried out for proper hygienic or medical purposes;*
> *(b) manipulates any part of the body of another person so as to cause penetration of the vagina or anus or urethra or mouth of such person by any part of the other person's body;*
> *(c) engages in "cunnilingus" or "fellatio", under the circumstances falling under any of the following six descriptions:—*
> *Firstly.—Against the other person's will.*

Secondly.— Without the other person's consent.

Thirdly.— With the other person's consent when such consent has been obtained by putting such other person or any person in whom such other person is interested, in fear of death or of hurt.

Fourthly.—When the person assaulted is a female, with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes to be lawfully married.

Fifthly.—With the consent of the other person when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by that person personally or through another of any stupefying or unwholesome substance, the other person is unable to understand the nature and consequences of that action to which such other person gives consent.

Sixthly.—With or without the other person's consent, when such other person is under eighteen years of age. Explanation I.— Penetration to any extent is "penetration" for the purposes of this section.

Explanation II.—For the purposes of this section, "vagina" shall also include labia majora."

28. While the legislative process of the Bill was in progress, on 16.12.2012, the incident of "Delhi Rape Case" also known as 'Nirbahya Case" occurred in New Delhi, wherein the victim was brutally raped and inflicted with serious injuries in a moving bus. Even though the Government provided the best possible treatment to her, initially at New Delhi and later at Singapore, unfortunately she succumbed to the injuries. The brutality and inhumane nature of the assaults resulted in huge uproar throughout the nation and call for stringent law for punishment of rape, further strengthened. Accordingly, Government set

up a committee for review of the laws including the Criminal Law Amendment Bill, 2012, under the Chairmanship of Justice J.S Verma and Justice Leila Seth, as well as Sri Gopal Subramaniam, a Senior Counsel, as members thereof. The said committee after scrutiny of laws prevailing in various countries across the Globe and taking into consideration suggestions/recommendations received from NGOs, woman's organizations, statutory and non-statutory bodies , general public etc, submitted their report on 23.01.2013. Paras 67 and 68 of the said report reads as follows:

> *"67. We are of the considered opinion that in the Indian context it is important to keep a separate offence of "rape". This is a widely understood term which also expresses society's strong moral condemnation. In the current context, there is a risk that a move to a generic crime of "sexual assault" might signal a dilution of the political and social commitment to respecting, protecting and promoting woman's right to integrity, agency and autonomy. However, there should also be a criminal prohibition of other, non-penetrative forms of sexual assault, which currently is not found in the IPC, aside from the inappropriate references to "outraging the modesty" of women in Sections 354 and 509. We recommended the enactment of Section 354 in another form while we have recommended the repeal of Section 509.*
>
> *68. We have kept in mind that the offence of rape be retained but redefined to include all forms of nonconsensual penetration of a sexual nature. Penetration should itself be widely defined as in the South African legislation to go beyond the vagina, mouth or anus."*

29. On the basis of such recommendation, the Committee submitted proposal for amending section 375 in the following manner:

"375. A man is said to commit rape if he—

(a) penetrates the vagina or anus or urethra of a person with—

(i) any part of his body including his penis or,

(ii) any object manipulated by him, except where such penetration is carried out for proper hygienic or medical purposes; or,

(b) manipulates any part of the body of a person so as to cause penetration of the vagina or anus or urethra of another person; or,

(c) engages in "cunnilingus" or "fellatio", under the circumstances falling under any of the following six descriptions:—

Firstly, against the person's will; or,

Secondly, without the person's consent; or,

Thirdly, with the person's consent, where such consent has been obtained by putting the person, or any other person in whom the person is interested, in fear of death or of hurt; or,

Fourthly, with the person's consent, when the man induces the person to consent to the relevant act by

impersonating another man to whom the victim would have otherwise knowingly consented to; or,

Fifthly, with the person's consent, when at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by the man personally or through another of any stupefying or unwholesome substance, the person is unable to understand the nature and consequences of the action to which he/she gives consent; or,

Sixthly, when the person is unable to communicate consent either express or impliedly.

Explanation I.— For the purposes of this section, "penetration" means penetration of the vagina, anus or urethra to any extent.

Explanation II.—For the purposes of this section, "vagina" shall also include labia majora.

Explanation III: Consent will not be presumed in the event of an existing marital relationship between the complainant and the accused.

Explanation IV.— Consent means an unequivocal voluntary agreement when the person by words,
gestures or any form of non-verbal communication, communicates willingness to participate in the specific act:
Provided that, a person who does not offer actual physical resistance to the act of penetration is not by reason only of that fact, to be regarded as consenting to the sexual activity."

30. In the meanwhile, on 1.03.2013, the Parliamentary Standing Committee on Home Affairs examined the Criminal Law (Amendment) Bill, 2012 and tabled its Report in Parliament. Keeping in view the recommendations of the Parliamentary Standing Committee on Home Affairs, the recommendations of Justice Verma Committee and the views and comments received from various quarters including woman groups, the Government have drafted the Criminal Law (Amendment) Bill, 2013. One of the key objectives of Criminal Law Amendment Bill , 2013, as stated in its Statement of Objects and Reasons, reads as follows;

"*(c) widen the definition of rape; broaden the ambit of aggravated rape; and enhance the punishment thereof."*

31. Section 375 of IPC, which is relevant for this case, was amended as per Criminal Law Amendment Act, 2013, which reads as follows:

"375. Rape.- A man is said to commit "rape" if he-
(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:-

First.- Against her will.

Secondly.- Without her consent.

Thirdly.- With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.- With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.- With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.- With or without her consent, when she is under eighteen years of age.

Seventhly.- When she is unable to communicate consent.

Explanation 1.- For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2.- Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.- A medical procedure or intervention shall not constitute rape.

Exception 2.- Sexual intercourse or sexual acts by a man with his own wife,the wife not being under fifteen years of age, is not rape."

32. From the discussion above, the evolution of definition of section 375, onto the stage applicable in this case (prior to amendment in 2018) can be clearly understood. At every stage of its evolution, i.e through judicial interpretations, recommendations for amendments and from the amendments actually brought into the statute etc, emphasis was on the wider amplitude contemplated for the definition to the maximum extent possible, so as to include all forms of penetrative sexual assaults in the definition of rape; even those not contemplated ordinarily. One of the crucial aspects to be noticed in section 375 as it stood prior to the amendment in 2013, is that, it provided for *"sexual intercourse"* and *"penetration"* (of any degree). In **Sakhshi vs Union of India (2004(5) SCC 518**, the Honourable Supreme Court, adopted the dictionary meaning of the word " *sexual intercourse"* as *"hetrosexual intercourse involving penetration of the vagina by the penis".* So, penile-vaginal interaction was one of the necessary ingredients for constituting the offence of rape, prior to the amendment. As noticed above, even at that time, judicial

interpretations sounded different notes and often adopted very wide interpretation as to the degree of penetration and even slightest penetration was treated as sufficient to attract the offence of rape. In the amendment proposed in Criminal Law Amendment Bill, 2012, the expression "rape" itself was proposed to be substituted with the expression 'sexual assault', to make the offence of sexual assault gender neutral and also for widening the scope of the offence of sexual assault. One of the objects of the said proposal was that the term "sexual intercourse", which confined it to penile-vaginal intercourse, was to be done away with. However, in the report of Justice J.S Verma Committee, the proposal was to widen the scope of definition of "rape" by retaining the said expression in the statute, instead of substituting it with ` "sexual assault". The proposal in Justice J.S Verma Committee report included penetration to other orifices but such penetration was confined to orifices such as vagina, urethra and anus. In the said report section 375(b) proposed was ; "*manipulates any part of the body of a person so as to cause penetration of the vagina or anus or urethra of another person".* In all the above stages the suggestions were made for amendments to widen the scope of definition of offence of rape, though it fell short of including any orifices other than vagina, urethra and anus. Later, presumably by taking into account, the suggestions from other sources, the legislature has further widened the said

provision, by including the penetration to any part of the body of woman. As the provision stands at present in 375(c) what constitutes rape reads as: *(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or <u>any part of body of such woman or makes her to do so with him or any other person; or"</u>. I*t includes penetration to other parts of the body of woman and it is not confined to vagina, urethra and anus. In the amended provisions, the legislative intention is very evident, and it is also a marked deviation from what is proposed in Justice Verma Committee report, wherein the penetration was confined to vagina, urethra and anus alone. When the amended definition of section 375 is examined in the light of the gradual evolution of definition of rape and the expansion thereof, in our view, the expression "*cause penetration into the vagina, urethra, anus or <u>any part of body of such woman</u>"* as used therein, requires wider interpretation so as to include any orifices naturally present or any part of the body manipulated to simulate a penetration and have the effect/sensation of an orifice. It is crucial to note that the said provision starts with the words "*manipulates any part of the body of a woman so as to cause penetration"* The dictionary meaning of "manipulate: includes *"control or influence cleverly or unscrupulously."*. The word penetration means : *"a movement into or through something or some one"* The word, 'penetrate', as per 'The

Concise Oxford Dictionary', means *'the act or process of making way into or through something'; 'to enter or pass through or force a way into or through'.* When the above provision is read with the said definitions in common parlance, we have no doubt in our mind that, when the body of the victim is manipulated to hold the legs together for the purpose of simulating a sensation akin to penetration of an orifice; the offence of rape is attracted. When penetration is thus made in between the thighs so held together, it would certainly amount to "rape" as defined under Section 375. In short, considering the intention of the legislature as revealed from the above proposals, followed by the enactment of Criminal Law Amendment Act, 2013 and gradual evolution of the concept of the offence of "rape" from time to time, the irresistible conclusion is that, the definition of rape as contained in section 375 would take in, all forms of penetrative sexual assault onto vagina, urethra, anus or any other parts of the body so manipulated to get the feeling or sensation of an orifice. The word manipulation by itself includes an artificial creation. The effect of manipulating the thighs to be held tightly together is to cause penetration of the crevice, when the muscles engulf the object which penetrates to create or simulate the same effect as in a normal penile-vaginal intercourse.

33. We are of the view that such an interpretation is in tune with the intention of the legislature which rose to the need of the hour; the society having been confronted with increasing number of such incidents of sexual assault on a routine basis. The time has come for more stringent provisions with increasing instances of acts of such depravity both as a measure of prevention and retribution. In the report of Justice J.S Verma Committee, they have extracted a response of a victim of rape which reads as follows:

> *"Rape is horrible. But it is not horrible for all the reasons that have been drilled into the heads of Indian women. It is horrible because you are violated, you are scared, someone else takes control of your body and hurts you in the most intimate way. It is not horrible because you lose your 'virtue'. It is not horrible because your father and your brother are dishonoured. I reject the notion that my virtue is located in my vagina, just as I reject the notion that men's brains are in their genitals. If we take honour out of the equation, rape will still be horrible, but it will be a personal, and not a societal horror. We will be able to give women who have been assaulted what they truly need: not a load of rubbish about how they should feel guilty or ashamed, but empathy for going through a terrible trauma."*

34. When coming back to the facts of the case, it is established from the evidence of PW1 that, the appellant had committed the offence of rape as he had penetrative sexual act between the thighs of the victim held together; an act of manipulation of the body of the victim to obtain sexual gratification, which culminated in ejaculation. However as we have already held that, the prosecution failed to provide

any evidence to prove the age of the victim, the offences under the provisions of the POCSO Act and also under section 376(2)(i) of the Indian Penal Code are not attracted. However the sexual acts committed by the appellant is sufficient to attract the offence of section 375(c) read with section 376 (1) of IPC.

35. Regarding the offence under section 377, contention of the learned Special Government Pleader, is by relying upon the judgment of this court in **1969 Crl LJ 818 , State of Kerala vs Kudumkara Govindan and another**. The said decision was rendered in respect of commission of a sexual act of very same nature and it was held that sexual act committed between the thighs would attract the offence under section 377 as it is against the order of nature. We extract hereunder paras 19 and 20:

> *19. The word 'intercourse' means' sexual connection' (Concise Oxford Dictionary). In Khanu v. Emperor AIR 1925 Sind 286 the meaning of the word 'intercourse' has been considered:*
>
> *Intercourse may be defined as mutual frequent action by members of independent organization.*
>
> *Then commercial intercourse, social intercourse, etc. have been considered; and then appears:*
>
> *By a metaphor the word intercourse, like the word commerce, is applied to the relations of the sexes. Here also there is the temporary visitation of one organism by a member of the other organization, for certain clearly defined and limited objects. The primary object of the visiting organization is to obtain euphoria by means of a detent of the nerves consequent on the sexual crisis. But there is no intercourse unless the*

> *visiting member is enveloped at least partially by the visited organism, for intercourse connotes reciprocity.*
> *Therefore, to decide whether there is intercourse or not. What is to be considered is whether the visiting organ is enveloped at least partially by the visited organism. In intercourse between the thighs, the visiting male organ is enveloped at least partially by the organism visited, the thighs: the thighs are kept together and tight.*
> *20. Then about penetration. The word 'penetrate' means in the concise Oxford Dictionary 'find access into or through, pass through.' When the male organ is inserted between the thighs kept together and tight, is there no penetration? The word 'insert' means place, fit, thrust.' Therefore, if the male organ is 'inserted' or 'thrust' between the thighs, there is 'penetration' to constitute unnatural offence.*

The above extract perfectly is in consonance to our interpretation of a penetrative intercourse which earlier fell under Section 377 and now has been culled out from there and placed under Section 376 by virtue of the expanded definition of rape under section 375. We have already found that, section 375 as amended by Act 13 of 2013, widened the definition of "rape' by expanding its ambit beyond the penile penetrative assault into vagina. One of the consequences of such amendment is that, several penetrative sexual assaults, which would otherwise be triable under section 377, now come within the operative field of section 375. However, section 377 would still be attracted in cases of penetrative sexual assaults against the order of nature, which are not falling under section 375. Section 377 of IPC would still be a

relevant provision with wide interpretation, as sexual acts can be unnatural or against the order of nature in many ways, sometimes even beyond the imagination of normal persons. In this case, as we have found that, the acts committed by the appellant/accused come within section 375, we are of the view that, section 377 would not be attracted and accordingly we set aside the conviction of the appellant under section 377 of IPC. Another finding of the Sessions Court, is regarding offences under Sections 354 and 354A(1)(i). The prosecution case in this regard is that, he had touched her private parts and the chest of PW1 on several occasions, with sexual intend. While discussing the evidence, we have already dealt with those incidents in detail, as spoken by the victim and we have already held that, her evidence is trustworthy and to be accepted even in the absence of any corroboration. In view of the above, the Sessions Court rightly held the appellant guilty of the offences under Sections 354 and 354A (1)(i) and it is only to be confirmed.

36. In the above circumstances, the appeal is partly allowed by holding the appellant/accused not guilty under Sections 11(i) r/w S.12, 9(l)(m) r/w 10, S. 3(c) r/w 5(m) and S.6 of Protection of Children from Sexual Offences Act, 2012. He is also found not guilty under Section 376(2)(i) and Section 377 of IPC. He is found guilty of offences under Section 376(1) read with Sections 375(c), 354 and 354A(1) (i) of IPC.

As he is found guilty of offence under section 376(1) read with Section 375(c) instead of Sections 376(2) (i) and 377 by the Sessions Court, the sentence of life imprisonment with the meaning of imprisonment of remainder of natural life, is modified as life imprisonment. The sentences passed by the Sessions Court under Sections 354 and 354A(1)(i) are hereby confirmed. The sentences shall be undergone concurrently.

The Registry is directed to forward this judgment to the judicial officer who pronounced the judgment impugned in this appeal.

Sd/-

K.VINOD CHANDRAN
JUDGE

Sd/-

ZIYAD RAHMAN A.A.
JUDGE

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