



IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

MONDAY, THE 18TH DAY OF MAY 2026 / 28TH VAISAKHA, 1948

CRL.A NO. 246 OF 2016

CRIME NO.311/2005 OF KADINAMKULAM POLICE STATION, THIRUVANANTHAPURAM

AGAINST THE JUDGMENT OF CONVICTION AND SENTENCE DATED 16.02.2016 IN

S.C. NO.680 OF 2007 OF THE ADDITIONAL SESSIONS JUDGE-I,

THIRUVANANTHAPURAM [SPECIAL COURT FOR THE TRIAL OF OFFENCES AGAINST
CHILDREN]

APPELLANT/ACCUSED:

SURESH @ KADAKAM
AGED 34 YEARS, S/O.CRISTUDAS, ATHIRTHIYIL PURAYIDAM,
MARYANAD, PUTHUKURICHI DESOM, KADANIAMKULAM VILLAGE,
THIRUVANANTHAPURAM.

BY ADVS.
SRI.S.RAJEEV
SRI.K.K.DHEERENDRAKRISHNAN
SRI.V.VINAY

RESPONDENT/STATE/COMPLAINANT:

STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF
KERALA, ERNAKULAM-682031, (CRIME NO.311/2015 OF
KADINAMKULAM POLICE STATION, THIRUVANANTHAPURAM
DISTRICT).

BY ADV PUBLIC PROSECUTOR
SR PP RENJIT GEORGE

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 31.03.2026,
THE COURT ON 18.05.2026 DELIVERED THE FOLLOWING:

**“C.R”****JUDGMENT****Dated this the 18th day of May, 2026**

The sole accused in S.C. No.680/2007 on the files of the Special Court for the trial of offences against children (Additional Sessions Judge-I), Thiruvananthapuram, has filed this appeal, under Section 374 of the Code of Criminal Procedure [hereinafter referred as ‘Cr.P.C’ for short], challenging the conviction and sentence imposed by the Special Judge, against him as per the judgment dated 16.02.2016. The State of Kerala, represented by the Public Prosecutor is arrayed as the respondent herein.

2. Heard the learned counsel for the appellant and the learned Public Prosecutor, in detail. Perused the verdict under challenge and the records of the Special Court.

3. Parties in this appeal shall be referred as ‘accused’ and ‘prosecution’, hereafter.

4. The prosecution alleges commission of offence punishable under Section 376 of the Indian Penal Code [hereinafter referred as ‘IPC’ for short], by the accused. The



allegation of the prosecution is that, the accused committed rape against the minor victim aged 2 years, who is the daughter of PW2 on 09.10.2005.

5. After framing charge, the Special Court recorded evidence and completed trial. During trial, PWs 1 to 8 were examined, Exts.P1 to P12 and MOs 1 to 4 were marked on the side of the prosecution. DW1 was examined on the side of the defence.

6. On appreciation of evidence, the Special Court found that the accused was guilty for the offence punishable under Section 376(2)(f) of IPC. Accordingly, the accused was convicted for the said offence and sentenced as under:

“Resultantly the accused is convicted and sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.20,000/-(Rupees twenty thousand only) in default of which he shall undergo rigorous imprisonment for a period of one year more u/s.376(2)(f) of I.P.C.

The accused is granted right of set off as per section 428 of Cr.P.C from 13/10/2005 till 9/12/2005 from the substantive sentence of imprisonment imposed.

The entire fine amount if remitted or realised shall be given to the victim girl allowing her mother PW2 to realise the same for and on



behalf of her as compensation u/s.357(1)(b) of Cr.P.C.”

7. According to the learned counsel for the accused, the ingredients to constitute the offence punishable under Section 376 of IPC not established by the prosecution, in a case where the victim, who admittedly aged two years, failed to be examined by the prosecution. It is pointed out that, the evidence of PW2, the mother of the victim and PW3, one Stella, who is the friend of PW2, at the courtyard of her house the alleged occurrence took place, were relied upon by the Special Court to prove the prosecution case. According to the learned counsel for the accused, the above evidence would not by itself is sufficient to find the commission of the offence punishable under Section 376(2) (f) of IPC by the accused. It is also pointed out that, even though the evidence of the doctor is suggestive of the fact that contusion was present around vaginal orifice of the victim, the same by itself would not show that there was penetration of penis into the vagina of the victim by the accused, to complete the offence under Section 375 of IPC, where it is reported by the doctor that hymen of the victim



was intact. Accordingly, the learned counsel for the accused pressed for interference in the impugned verdict.

8. It is zealously argued by the learned counsel for the accused that, before amendment of Section 375 of IPC with effect from 03.02.2013, the legal position as to the requirements to prove an offence under Section 376 of IPC is well settled. The learned counsel for the accused has placed the decision of the Apex Court reported in **[(2004) 5 Supreme Court Cases 518 : 2004 Supreme Court Cases (Cri) 1645 : 2004 SCC OnLine SC 116] Sakshi v. Union of India and Others**, wherein the Apex Court held in paragraph No.20 as under:

"20. Sections 354, 375 and 377 IPC have come up for consideration before the superior courts of the country on innumerable occasions in a period of almost one-and-a-half century. Only sexual intercourse, namely, heterosexual intercourse involving penetration of the vagina by the penis coupled with the explanation that penetration is sufficient to constitute sexual intercourse necessary for the offence of rape has been held to come within the purview of Section 375 IPC. The wide definition which the petitioner wants to be given to "rape" as defined in Section 375 IPC so that the same may become an offence punishable under Section 376



IPC has neither been considered nor accepted by any court in India so far. Prosecution of an accused for an offence under Section 376 IPC on a radically enlarged meaning of Section 375 IPC as suggested by the petitioner may violate the guarantee enshrined in Article 20(1) of the Constitution which says that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence."

9. He has placed another decision of the Apex Court reported in **[MANU/MP/1606/2012] Nanhelal v. State of Madhya Pradesh** with reference to paragraph Nos.12, 16 and 17 to contend that, mere presence of aberration on the vagina of the victim by itself would not constitute an offence under Section 376 of IPC, without signs of complete penetration.

10. It is pointed out by the learned counsel for the accused that, in the instant case, either the offence under Section 376 of IPC or under Section 511 read with 376 of IPC would not attract and according to him, penetration is *sine qua non* for an offence of rape and in order to



constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little. In the decision of the Apex Court reported in **[2004 KHC 959 : 2004 (4) SCC 379 : AIR 2004 SC 1497] Aman Kumar and Another v. State of Haryana**, the Apex Court considered the essentials to apply Section 511 read with 376 of IPC and held in paragraph Nos.8 to 14 as under:

“8. The plea relating to applicability of S.376 read with S.511, IPC needs careful consideration. In every crime, there is first, intention to commit, secondly preparation to commit it, thirdly, attempt to commit it. If the third stage, that is, attempt is successful, then the crime is complete. If the attempt fails the crime is not complete, but law punishes the person attempting the act. S.511 is a general provision dealing with attempts to commit offences not made punishable by other specific sections. It makes punishable all attempts to commit offences punishable with imprisonment and not only those punishable with death. An attempt is made punishable, because every attempt, although it falls short of success, must create alarm, which by itself is an injury, and the moral guilt of the offender is the



same as if he had succeeded. Moral guilt must be united to injury in order to justify punishment. As the injury is not as great as if the act had been committed, only half the punishment is awarded.

9. A culprit first intends to commit the offence, then makes preparation for committing it and thereafter attempts to commit the offence. If the attempt succeeds, he has committed the offence; if it fails due to reasons beyond his control, he is said to have attempted to commit the offence. Attempt to commit an offence can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence. The word 'attempt' is not itself defined, and must, therefore, be taken in its ordinary meaning. This is exactly what the provisions of S.511 require. An attempt to commit a crime is to be distinguished from an intention to commit it, and from preparation made for its commission. Mere intention to commit an offence, not followed by any act, cannot constitute an offence. The will is not be taken for the deed unless there be some external act which shows that progress has been made in the direction of it, or towards maturing and effecting it. Intention is the direction of conduct towards the object chosen upon considering the motives which



suggest the choice. Preparation consists in devising or arranging the means or measures necessary for the commission of the offence. It differs widely from attempt which is the direct movement towards the commission after preparations are made. Preparation to commit an offence is punishable only when the preparation is to commit offences under S.122 (waging war against the Government of India) and S.399 (preparation to commit dacoity). The dividing line between a mere preparation and an attempt is sometimes thin and has to be decided on the facts of each case. There is a greater degree of determination in attempt as compared with preparation.

10. An attempt to commit an offence is an act, or a series of acts, which leads inevitably to the commission of the offence, unless something, which the doer of the act neither foresaw nor intended, happens to prevent this. An attempt may be described to be an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime. In other words, an attempt consists in it the intent to commit a crime, falling short of, its actual commission. It may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted. The illustrations given in S.511 clearly show the legislative intention to



make a difference between the cases of a mere preparation and an attempt.

11. In order to find an accused guilty of an attempt with intent to commit a rape, Court has to be satisfied that the accused, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part. Indecent assaults are often magnified into attempts at rape. In order to come to a conclusion that the conduct of the accused was indicative of a determination to gratify his passion at all events, and in spite of all resistance, materials must exist. Surrounding circumstances many times throw beacon light on that aspect.

12. Though the prosecutrix's version in Court was of rape, when it is compared with the one given during investigation, certain irreconcilable discrepancies are noticed. The evidence regarding actual commission of rape is at variance from what was recorded by police during evidence. The evidence of PW-11, the father who according to prosecution made departure from what he allegedly stated during investigation is to the effect that his wife PW-9 told her that the prosecutrix was teased by the accused persons. Merely because he was termed as a hostile witness his entire evidence does not get effected. Significantly, the evidence of prosecutrix and the doctor does not specifically refer to penetration which



is sine qua non for the offence of rape.

13. There is no material to show that the accused were determined to have sexual intercourse in all events. In the aforesaid background, the offence cannot be said to be an attempt to commit rape to attract culpability under S.376/511 IPC. But the case is certainly one of indecent assault upon a woman. Essential ingredients of the offence punishable under S.354 IPC are that the person assaulted must be a woman, and the accused must have used criminal force on her intending thereby to outrage her modesty. What constitutes an outrage to female modesty is nowhere defined. The essence of a woman's modesty is her sex. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive. Modesty in this Section is an attribute associated with female human beings as a class. It is a virtue which attaches to a female owing to her sex. The act of pulling a woman, removing her dress coupled with a request for sexual intercourse, is such as would be an outrage to the modesty of a woman, and knowledge, that modesty is likely to be outraged, is sufficient to constitute the offence without any deliberate intention having such outrage alone for its object. As indicated above, the word 'modesty' is not defined in IPC. The Shorter Oxford Dictionary (Third Edn.) defines the word 'modesty' in relation to woman as follows:



"Decorous in manner and conduct; not forward or lewd; Shame-fast: Scrupulously chaste."

14. Modesty can be described as the quality of being modest; and in relation to woman, "womanly propriety of behaviour; scrupulous chastity of thought, speech and conduct." It is the reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions. As observed by Justice Patterson in Rex v. James Llyod (1876) 7 C&P 817. In order to find the accused guilty of an assault with intent to commit a rape, court must be satisfied that the accused, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person but that he intended to do so at all events, and notwithstanding any resistance on her part. The point of distinction between an offence of attempt to commit rape and to commit indecent assault is that there should be some action on the part of the accused which would show that he was just going to have sexual connection with her."

11. The learned counsel for the accused also cited decision of the Apex Court reported in **[2025 KHC OnLine 6717 : 2025 KHC 6717 : 2025 KLT OnLine 2760] Neelam Kumari v. State of Himachal Pradesh**, wherein the Apex Court discussed the impact of non-examination of material witness and how far the same is fatal to the



prosecution and held in paragraph No.13 as under:

*“13. It is to be noted that during examination of the appellant under S.313 of the Code of Criminal Procedure, 1973 (For short, the CrPC), she had negated the extra-judicial confessions and in the said statement, she had provided an alternative explanation. She stated that when she found her child unresponsive in the morning, she started crying. On hearing her cries, two women came and made enquiries. One of the women, namely Sita Devi, who was allegedly a non interested witness to the extra judicial confession, was never examined by the prosecution. While the prosecution is not required to examine every possible witness, it must ensure that those witnesses essential to substantiate the truth are produced before the Court. Failure to do so without adequate explanation, may cast doubt on the prosecution's case as held by this Court in the case of **Gaurav Maini v. The State of Haryana**, (2024 INSC 488) that non examination of a relevant witness at the trial persuades the Court to draw an adverse inference against the prosecution.”*

12. The learned counsel for the accused also placed decision of the Apex Court reported in **[(2006) 13 Supreme Court Cases 516 : 2006 SCC OnLine SC 1273] Gagan Kanojia and Another v. State of Punjab**,



wherein in paragraph Nos.16 to 18 the Apex Court discussed the impact of Sections 6 and 8 of the Evidence Act and held as under:

"16. PW 5, Pooja, is a tutor. She merely stated that she had gone to the residence of other student, Sarita, having been informed that Abhishek and Heena did not return to their house. Sarita told her that Heena had called some person wearing helmet, white shirt, black pants, as "Chacha" and then Abhishek and Heena sat on the scooter.

17. Sarita having not been examined, we do not intend to place any reliance on her statement. We also do not accept the contention of Mr D.P. Singh that her statement is admissible under Section 8 of the Evidence Act. Section 8, inter alia, speaks about the conduct of an accused. The statements made by Sarita before Pooja vis-à-vis the conduct of the victims did not form part of the same transaction. Unless any fact or statement forms part of the same transaction, it will not be admissible in evidence. Sarita had not identified the accused. Sarita had not been examined and, therefore, the hearsay evidence of Pooja could not have been relied upon being based upon the purported statement of Sarita. As regards conduct of the victims vis-à-vis the person about whom she was informed and whose identity was not known, cannot be said to be admissible in terms of Section 8 of the Evidence Act.



18. The learned trial Judge relied upon Section 6 of the Evidence Act which, in our opinion, has no application.”

13. Repelling the contentions raised by the learned counsel for the accused, the learned Public Prosecutor would submit that, since the minor could not be examined because of her tender age, the prosecution successfully proved the offence punishable under Section 376 of IPC through the evidence of PW2 and PW3, supported by the evidence of PW6. It is pointed out further that, even otherwise, Section 511 read with 376 of IPC is made out in the facts of the present case. Therefore, the accused could not wriggle out from the penal consequences either under Section 376 of IPC or under Section 511 read with 376 of IPC.

14. The learned Public Prosecutor has placed decision of the Apex Court reported in **[(1997) 7 Supreme Court Cases 677] Madan Lal v. State of Jammu and Kashmir**, wherein the prosecution case was that the accused gripped his penis and then rubbed qua the uterus of the prosecutrix and the finding could be gathered from the evidence was that the accused had rubbed his penis



with the vagina of the prosecutrix and tried to penetrate, but could not succeed in penetrating and ultimately got himself discharged and the hot semen fell on the thighs of the prosecutrix. In the said case, the Apex Court held that the prosecutrix evidence clearly established the fact that the accused spread the blanket on the floor and forcibly laid her on the blanket and thereupon the accused forcibly opened the cord of the salwar of the prosecutrix and kept it apart and then forcibly rode upon her and on that point of time caught hold of her head with one hand and closed her mouth with the other and had kept his penis qua her uterus and was doing something and then the accused was trying to penetrate his penis but it did not penetrate and had gripped his penis with his hand and was rubbing it against her uterus which he was doing by jumping.

15. In the said case, the Apex Court found the above overt acts would establish not a mere assault under Section 354 of IPC, but an attempt to commit rape punishable under Section 511 read with 376 of IPC. In the said decision, the Apex Court held further that, the statement of



the mother of the prosecutrix to the effect that the prosecutrix narrated the entire episode immediately when she arrived at home can also be held to be corroborative piece of evidence, which was excluded by the Sessions Judge erroneously.

16. The learned Public Prosecutor placed another decision of the Apex Court reported in **[(2022) 12 Supreme Court Cases 442 : 2021 SCC OnLine SC 965] State of Madhya Pradesh v. Mahendra alias Golu**, wherein the Apex Court discussed distinction between preparation and attempt to commit an offence of rape in paragraph Nos. 13 and 14 and relying on the decision of the Apex Court in **Aman Kumar's** case (supra), it was held that, *penetration is the sine qua non for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little.* Therein also the Apex Court referred **Madan Lal's** case (supra).

17. The learned Public Prosecutor also placed



another decision of the Apex Court reported in **[(2004) 3 Supreme Court Cases 602 : 2004 Supreme Court Cases (Cri) 840 : 2004 SCC OnLine SC 299] Koppula Venkat Rao v. State of A.P.**, wherein the Apex Court held that, *ejaculation without penetration would constitute an attempt to commit rape and not actual rape*, in a case where the accused mounted on top of the victim, but before actual intercourse there was ejaculation. In the instant case, reading the evidence available as that of PWs 2 and 3, who did not witness the occurrence, it is pointed out by the learned Public Prosecutor that, their evidence would satisfy the requirements of the principle of *res gestae*. Accordingly, the learned Public Prosecutor submitted that the verdict impugned does not require any interference.

18. In order to rebut the contention raised by the learned Public Prosecutor regarding the principle of *res gestae*, the learned counsel for the accused has placed decision of the Apex Court reported in **[(2016) 16 Supreme Court Cases 701 : (2017) 4 Supreme Court**



Cases (Cri) 524 : 2016 SCC OnLine SC 983] Dhal Singh Dewangan v. State of Chhattisgarh, wherein in paragraph No.26, the Apex Court discussed the principles regarding circumstantial evidence and also the principle of *res gestae*. Paragraph Nos.22, 24, 25 and 26 are extracted hereunder:

"22. In Gentela Vijayavardhan Rao v. State of A.P., a bus was set on fire which resulted in the death of 23 passengers. The statements of two seriously injured fellow passengers were recorded by the Magistrate as it was thought that they might succumb to their injuries, in which event their statements could be pressed into service under Section 32 of the Evidence Act. Fortunately, they survived. But while answering the question whether those statements could now be relied upon under Section 6, this Court found that there was appreciable interval between the criminal act and the recording of their statements by the Magistrate and as such the statements could not be relied upon with the aid of Section 6. It was observed: (SCC pp. 246-47, paras 15-16)

*"15. The principle of law embodied in Section 6 of the Evidence Act is usually known as the rule of *res gestae* recognised in English law. The essence of the doctrine is that a fact which, though not in issue, is so connected with the fact in issue "as to form part of*



the same transaction" becomes relevant by itself. This rule is, roughly speaking, an exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement or fact admissible under Section 6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. But it is necessary that such fact or statement must be a part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or at least immediately thereafter. But if there was an interval, however slight it may be, which was sufficient enough for fabrication then the statement is not part of res gestae. In R. v. Lillyman a statement made by a raped woman after the ravishment was held to be not part of the res gestae on account of some interval of time lapsing between the act of rape and the making of the statement. Privy Council while considering the extent up to which this rule of res gestae can be allowed as an exemption to the inhibition against hearsay evidence, has observed in Teper v. R. thus: (Teper case, All ER p. 447 G-H)

'The rule that in a criminal trial hearsay evidence is admissible if it forms part of the res gestae is based on the propositions that the human utterance is both a fact and a means of communication and that human action may be so interwoven with words that the significance of the



action cannot be understood without the correlative words and the dissociation of the words from the action would impede the discovery of the truth. It is essential that the words sought to be proved by hearsay should be, if not absolutely contemporaneous with the action or event, at least so clearly associated with it that they are part of the thing being done, and so an item or part of the real evidence and not merely a reported statement.'

The correct legal position stated above needs no further elucidation.

16. Here, there was some appreciable interval between the acts of incendiarism indulged in by the miscreants and the Judicial Magistrate recording statements of the victims. That interval, therefore, blocks the statements from acquiring legitimacy under Section 6 of the Evidence Act. The High Court was, therefore, in error in treating Exts. P-71 and P-75 as forming part of res gestae evidence."

xxx xxx xxx

24. The general rule of evidence is that hearsay evidence is not admissible. However, Section 6 of the Evidence Act embodies a principle, usually known as the rule of res gestae in English law, as an exception to hearsay rule. The rationale behind this section is the spontaneity and immediacy of the statement in question which rules out any time for concoction. For a statement to be admissible under Section 6, it must be contemporaneous with the acts which constitute



the offence or at least immediately thereafter. The key expressions in the section are "... so connected ... as to form part of the same transaction". The statements must be almost contemporaneous as ruled in Krishan Kumar Malik and there must be no interval between the criminal act and the recording or making of the statement in question as found in Gentela Vijayavardhan Rao case. In the latter case, it was accepted that the words sought to be proved by hearsay, if not absolutely contemporary with the action or event, at least should be so clearly associated with it that they are part of such action or event. This requirement is apparent from the first illustration below Section 6 which states "whatever was said or done.... at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact".

25. Considered in the aforesaid perspective, we do not find the statements attributed to PW 6 Kejabai by PWs 3 and 5 to be satisfying the essential requirements. The house of the appellant, according to the record, was at a distance of 100 yards from Gandhi Chowk, where these witnesses are stated to have found PW 6 Kejabai crying aloud. Both in terms of distance and time, the elements of spontaneity and continuity were lost. PW 6 Kejabai has disowned and denied having made such disclosure. But even assuming that she did make such disclosure, the spontaneity and continuity was lost and the



statements cannot be said to have been made so shortly after the incident as to form part of the transaction. In the circumstances, we reject the evidence sought to be placed in that behalf through PWs 3 and 5. Even if we were to accept the version of PWs 1 and 2, the same would also suffer on this count and will have to be rejected.

26. We are therefore left with certain pieces of circumstantial evidence and have to see if those circumstances bring home the case of the prosecution. The principles how the circumstances be considered and weighed are well settled and summed up in Sharad Birdhichand Sarda v. State of Maharashtra as under: (SCC p. 185, paras 153-54)

"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra where the observations were made: (SCC p. 807, para 19) '19.... Certainly, it is a primary



principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between "may be" and "must be" is long and divides vague conjectures from sure conclusions.'

(emphasis in original)

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.'

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

19. In view of the rival submissions, the points arise for consideration are:

1. Whether the Special Court is justified in finding that the accused committed the offence under Section 376(2)(f) of IPC?



2. Whether the verdict of the Special Court would require interference?

3. Order to be passed?

20. Point No.1:- In this case, the evidence of PW3 is relevant. According to PW3, she was familiar with Mary Reeja, who was examined as PW2 (the mother of the victim) and the accused. She deposed that, PW2 is her friend. According to her, the occurrence was in between 01.00 p.m. to 02.00 p.m. on 09.10.2005, when she along with PW2 went for washing clothes, the victim aged two years and her daughter were playing at the courtyard of her house. Later, when she returned, she found that the minor victim was sitting on the lap of the accused and when she asked the minor about her sister, she stated that she went for purchasing sweets. Further, the accused was found without wearing shirt and also that the undergarment of the victim found laying nearby the place the accused and the victim were sitting. When she found that the sitting of the victim on the lap of the accused was not fair but unpleasant, she had sent back the victim to her mother. Then, she divulged the occurrence to PW2. According to



her, the accused is a nearby resident of her and she identified him at the dock. During cross-examination of PW3, nothing asked to shake the evidence of PW3 as unbelievable as regards the occurrence spoken by her.

21. Coming to the evidence of PW2, who is the mother of the minor victim, she stated that the occurrence was on 09.10.2005. According to her, while she along with Stella (PW3) and other friends were engaged in washing clothes, at about 01.30 pm, at the courtyard of the house of PW3, her daughter along with the daughter of PW3 were engaged in paying. After sometime, PW3 went to her house at 01.45 pm and she sent back the minor victim and thereafter PW3 also reached her house and informed that the minor victim was found sitting on the lap of the accused and the victim was found not wearing her undergarment and when she found unfairness in the mode of sitting, she had sent back the victim. According to PW2, her daughter completed two years on 12.10.2005. She deposed further that, when she enquired about the occurrence to her daughter, she stated that, while she was at the house of



Stella aunty (PW3), the accused removed her knicker and pierced her. PW2 deposed further that, when Stella and her husband reached her house and asked about the occurrence, the victim reiterated the same. When the victim was examined, red stain on her body was found. She deposed that, since her husband was working abroad, she was perplexed and was in a dilemma. Later she obtained permission of her husband and lodged a complaint before the Police on 12.10.2005. Ext.P2 identified as the complaint so lodged. She also deposed about medical examination of her daughter by the doctor in the presence of WPC and she identified the dress worn by her daughter at the time of the occurrence. On reading the limited questions asked to her during her cross-examination, the version of PW2 regarding the occurrence, as spoken by the victim was not at all challenged.

22. It is in this context, the evidence of PW6, the doctor who examined the minor victim assumes significance. According to PW6, on 12.10.2005, while she was working as the Assistant Surgeon in Women and



Children Hospital, Thycaud, at about 01.20 p.m., she had examined minor victim aged two years. She also deposed the occurrence stated before her in similar terms as deposed by PW2 and PW3. According to her, as per Ext.P4 certificate, she could not find any external injuries over the face or other body parts of the victim. But, contusion was present around vaginal orifice, though the hymen was intact. She had taken vaginal smear and swab for chemical examination. According to her, the opinion based on the findings, 'may be as alleged'.

23. At this juncture, it is necessary to address the ingredients to attract the offence under Section 375 of IPC prior to amendment of Section 375 of IPC with effect from 03.02.2013 and the same reads as under:

"375. Rape. - A man is said to commit "rape" who, except in the case hereinafter 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. Before conclusion, it is necessary to look into the findings of the Special Judge in paragraph No.26 of the verdict impugned. The same is as under:

"26. The medical evidence brought out on record by the prosecution very precisely proved that the genitalia of the child is accessed by an



*extraneous object. The prosecution raised an indictment u/s 376 of IPC against the accused. The question whether actual entry of the male sexual organ through vagina of the victim is essential to constitute rape u/s 375 of Indian Penal Code and in the absence of penile-vaginal entry will the offence of rape be made out u/s.375 of IPC is well discussed and settled by the Hon'ble High Court of Kerala in **Chenthamara v. State of Kerala (2008 (4) KHC 313)**. After elaborate discussion, there it is held with reference to a plethora of rulings of the Hon'ble Apex Court that "needless to say, there is no passage or canal in vulva/pudendum, labia majora etc., like that of vagina and hence, during penetration into these areas, there will not be passing of penis through these portions, as in the case of vagina. In such cases of 'penetration', there can only be act of male organ finding access into / towards vagina, without there being an actual entry of male sexual organ through vagina and in such process, the male organ may get in touch with the external portions of the female genital organ like labia majora, etc. According to me, it is such process of 'penile accessing', which the Hon'ble Supreme Court and this Court described as, 'penetration into labia majora, pudendum, vulva' etc., in the decisions cited above. This is the type of 'penetration' which is referred to in the Explanation*



to section 375 IPC.”

25. Insofar as the ingredients to accept a part of evidence as *res gestea*, as pointed out by both sides, the law is well settled. In order to apply rule of *res gestea* as an exception to the general rule of hearsay evidence, which is inadmissible, making certain statement or fact admissible under Section 6 of the Evidence Act to be on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. It is necessary that such fact or statement must be a part of the same transaction i.e. such statements constitute the offence or atleast immediately thereafter. But, if there is an interval however slight it might be, it is sufficient for fabrication when a statement would not form part of *res gestea*.

26. In ***Dhal Singh Dewangan***'s case (supra), the Apex Court referred ***R. v. Lillyman [(1896) 2 QB 167 : (1895-99) All Rep 586 (CCR)]***, wherein it was held that, *a statement made by a raped woman after the ravishment was held to be not part of the res gestea on account of*



some interval of time lapsing between the act of rape and the making of the statement.

27. In the instant case, even though it is argued by the learned counsel for the accused relying on the decision of the Apex Court in **Neelam Kumari's** case (supra) that non examination of relevant witness would be fatal to the prosecution, in the instant case, non-examination of the victim, who even not completed two years of age as on the date of occurrence, could not be held as non-examination of a material witness. Here, the available evidence would suggest the fact that when PW2 and PW3 were engaged in washing cloths at about 01.30 p.m. on 09.10.2005, the daughter of PW3 and the victim were engaged in playing at the courtyard of the house of PW3. After sometime, when PW3 went to her house at about 01.45 p.m., she found that the minor victim was sitting on the lap of the accused and the victim was seen not wearing her undergarment and when she found unfairness in the mode of sitting, she sent back the victim to her mother. Admittedly, the victim completed two years only on 12.10.2005 i.e. after the



occurrence. According to PW2, when she enquired about the occurrence to the victim as informed by PW3, the victim stated that the accused removed her knicker and pierced her. The version of PW3 is that she found the undergarment of the victim lying beneath the place where the victim and accused were sitting. This aspect was spoken by PW2 and PW3 without any ambiguity. PW6, the doctor who examined the victim, categorically given evidence regarding examination of minor victim and issuance of Ext.P4 certificate. According to her, contusion was present around vaginal orifice of the victim, though the hymen was intact. When reading the evidence of PW2 and PW3, supported by the presence of contusion on the vaginal orifice of the victim, it could be seen that there was an attempt on the part of the accused to commit rape on the minor victim. But, there is no convincing evidence to show penetration to complete the offence of rape as on the date of occurrence, which is prior to amendment of Section 375 of IPC with effect from 03.02.2013. When a person is attempting to do an act with intention to do so and he would do some overt



acts and when he could not complete the offence by doing the remaining overt act or acts, the law would punish such person for commission of offence of attempting to commit the said offence for which the punishment is half of the punishment provided for such offence. Even though from the evidence discussed, the learned Special Judge found commission of offence punishable under Section 376 of IPC by the accused, the evidence available would not suggest necessary ingredients to constitute an offence under Section 375 of IPC punishable under Section 376 of IPC prior to amendment of Section 375 of IPC with effect from 03.02.2013. But the ingredients to prove an attempt to commit the offence of rape have been established by the prosecution based on the evidence discussed herein above.

28. In view of the matter, the conviction imposed by the learned Special Judge finding that the accused committed offence punishable under Section 376 of IPC required to be interfered, holding that the offence committed by the accused is one punishable under Section 511 read with 376 of IPC.



29. Point Nos.2 and 3:- In the result, this appeal stands allowed in part. The conviction and sentence imposed by the Special Court against the accused for the offence punishable under Section 376 of IPC are set aside and the accused is convicted for the offence punishable under Section 511 read with 376 of the IPC. Accordingly, the accused is sentenced for the offence punishable under Section 511 read with 376 of the IPC as under:

i. The accused is sentenced to undergo rigorous imprisonment for a period of five years and to pay a fine of Rs.50,000/- and in default to undergo rigorous imprisonment for six months, for the offence under Section 511 read with 376 of IPC.

ii. The fine amount if paid or realized, Rs.30,000/- (Rupees Thirty Thousand only) shall be released to the victim, as compensation and the remaining amount shall go to the State Exchequer.

iii. The period of detention undergone by the accused in this case will be set off against the substantive sentence of imprisonment.

30. The order suspending sentence and granting bail to the accused stands vacated, with direction to the accused



to appear before the Special Court, forthwith, to undergo the modified sentence, failing which, the Special Court is directed to execute the sentence, without fail.

Registry is directed to forward a copy of this judgment to the Special Court, forthwith, for information and further steps.

**Sd/-
A. BADHARUDEEN
JUDGE**

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