IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR TUESDAY, THE

04TH DAY OF AUGUST 2020 / 13TH SRAVANA, 1942

CRL.A.No.419 OF 2019

AGAINST THE JUDGMENT IN SC 179/2016 DATED 21-12-2018 OF FIRST ADDITIONAL SESSIONS COURT, KOLLAM

CRIME NO.1370/2015 OF Pallithottam Police Station, Kollam

APPELLANT/ACCUSED:

DAVID,
AGED 47 YEARS, S/O. RATHINAM,
MUSLIM COLONY-28, JONAKAPURAM, VALIYAKADA
CHERRI, KOLLAM WEST VILLAGE.

BY ADVS.
SRI.S.RAJEEV
SRI.K.K.DHEERENDRAKRISHNAN
SRI.V.VINAY
SRI.D.FEROZE
SRI.K.ANAND (A-1921)

RESPONDENT/STATE:

STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM 682 031.
(CRIME NO. 1370/15 OF PALLITHOTTAM POLICE STATION, KOLLAM DISTRICT.)

R1 BY SMT.AMBIKA DEVI S, SPL.GP
SRI. B.JAYASURYA PP

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 23-072020, THE COURT ON 04-08-2020 DELIVERED THE FOLLOWING:

P.B.SURESH KUMAR, J.

Criminal Appeal No.419 of 2019

Dated this the 4th day of August, 2020.

J U D G M E N T

The sole accused in S.C.No.179 of 2016 on the files of the First Additional Sessions Court, Kollam is the appellant in the appeal. He challenges in this appeal, his conviction and sentence in the said case.

2. The accusation in the case is that on 12.9.2015, at about 1 a.m., the accused has committed penetrative sexual assault on the victim girl aged eight years, at her residence, by inserting his penis into her mouth, and thereby committed the offences punishable under Section 5(n) read with Section 6, and Section 7 read with Section 8 of the Protection of Children from Sexual Offences Act, 2012 (the POCSO Act). The accused is the uncle of the father of the victim girl.

3. On the accused pleading not guilty of the charges

levelled against him, the prosecution examined 14 witness on its side as PW1 to PW14 and proved through them 12 documents as Exts.P1 to P12. Among the witnesses examined, PW1 is the mother of the victim girl, PW2 is the victim girl herself, PW4 is a neighbour of the accused and PW8 is the Headmistress of the school where the victim girl was pursuing her studies at the time of the alleged occurrence. PW10 is the Police official who recorded the statement of the victim girl.

PW11 is the doctor who examined the victim girl on 15.9.2015. PW13 is the Police official who registered the first information report in the case and PW14 is the investigating officer in the case. Among the documents, Ext.P1 is the first information statement. Ext.P5 is a letter addressed by PW8 to the investigating officer and Ext.P8 is the first information report in the case.

4. On an appraisal of the materials on record, the court below found that the accused is guilty of the offences alleged against him and accordingly, convicted and sentenced him to undergo rigorous imprisonment for ten years and to pay a fine of Rs.50,000/- and in default of payment of fine, to undergo simple imprisonment for three months, for the offence punishable under Section 5(n) read with Section 6 of the POCSO Act. No separate sentence was awarded for the offence punishable under Section 7 read

with Section 8 of the POCSO Act. As noted, the accused is aggrieved by his conviction and

sentence.

5. Heard the learned counsel for the appellant as also the learned Public Prosecutor.

6. The learned counsel for the appellant submitted, at the outset, that the case being one arising under the POCSO

Act, it was obligatory for the prosecution to prove that the victim girl is a child, and the said fact has not been proved by the prosecution. It was pointed out by the learned counsel that what was produced by the prosecution to prove the age of the victim girl is Ext.P5 letter addressed by the Headmistress of the school, where the victim girl was pursuing her studies, to the investigating officer in the case informing him the age of the victim girl. According to the learned counsel, the said document is hit by Section 162 of the Code of Criminal Procedure (the Code). The learned counsel for the appellant has placed reliance on the decision of the Apex Court in **Kali Ram v. State of H.P.**, 1973 KHC 634 as also the decision of this Court in **Rajeevan and Others v. Superintendent of Police, Cochin and another**, 2011(1) KHC 738, following the decision of the Apex Court in **Kali Ram,** in support of the said proposition. It was argued by the

learned counsel that the accused is entitled to be acquitted solely on that ground. The learned counsel for the appellant has also pointed out that as regards the core aspect of the crime, viz, the sexual assault, there is only the evidence of the victim girl. If the said evidence

is viewed in the light of the various other circumstances

brought out in evidence, it could be seen that it is not reliable and credible enough to rest the conviction of the accused solely based on the same. The learned counsel has elaborated the said submission pointing out that though the alleged

occurrence took place on 12.9.2015, the crime was registered only after three days, viz, on 15.9.2015 and there is no

satisfactory explanation for the delay. It was also pointed out

by the learned counsel, placing reliance on the evidence tendered by PW4, a neighbour of the accused that during the relevant period, as the house of the accused was being

reconstructed, the accused was residing with him and that the case set out by the prosecution that the accused and his family were residing with the family of the victim girl cannot, therefore, be believed. It was argued by the learned counsel that although the said witness was hostile to the prosecution, the

evidence tendered by PW4 in this regard has not been discredited by the prosecution in any manner. It was further pointed out by the learned counsel, placing reliance on the evidence tendered by PW10, the Police official, who has recorded the statement of the victim girl, that the specific case of the prosecution is that the victim girl, on the relevant day, was sleeping with her elder sibling and it was while so, that the

accused has committed the sexual assault on her, whereas, PW10 has admitted in cross examination that the victim girl has told her that on the relevant day, she was sleeping with her father. According to the learned counsel, the said evidence of PW10 would also throw suspicion as to the genuineness of the prosecution case. It was further pointed out by the learned counsel that in a case of this nature, the elder sibling of the victim girl, with whom she was allegedly sleeping on the

relevant day, as also her father who was very much available in the house on that day should have been examined by the prosecution. It was pointed out by the learned counsel that among them, the prosecution has not even cited the elder

sibling of the victim girl as a witness in the case. Likewise, it

was argued by the learned counsel that going by the

prosecution case, the wife of the accused was also available at the house on the relevant day and even she was not examined in the case in fairness by the prosecution. It was further pointed out by the learned counsel that it has come out that the statement of the victim girl was recorded in the case under Section 164 of the Code and the same was also not placed before the court by the prosecution. According to the learned counsel, withholding of the said previous statement of the

victim girl, that too, one recorded by a Magistrate, also throws a serious suspicion as to the genuineness of the case set out by the prosecution. It was also argued by the learned counsel that in so far as harsh punishments are provided for the various offences under the POCSO Act, it is obligatory for the

prosecution to let in the best evidence to prove the accusation in the case and in so far as the best evidence has not been let in by the prosecution in the case, the court below was not

justified in convicting the accused.

7. Per contra, the learned Public Prosecutor submitted that the various circumstances pointed out by the learned counsel for the accused to show that the evidence

tendered by the victim girl is not reliable, are not sufficient to ignore the evidence tendered by the victim girl in a case of this nature, which is not only natural, but also consistent with the other evidence let in by the prosecution in the case. It was also

argued by the learned Public Prosecutor that there was no challenge raised to the evidence tendered by PW8 as regards the age of the victim girl and as such, the contention of the accused that the prosecution has not established the age of the victim girl is only to be rejected. The learned Public Prosecutor has also submitted, placing reliance on Section 29 of the POCSO Act, that in so far as the prosecution has adduced evidence to prove the foundational facts to be established by them in a case of this nature, it has to be presumed that the accused is guilty of the offences alleged against him and it is for the accused to show that he is not guilty. It was argued by the learned Public Prosecutor that the accused has not adduced any evidence in the matter to show that he is not guilty, and that the impugned judgment, in the circumstances, is only to be affirmed.

8. In reply to the submission made by the learnedPublic Prosecutor on the strength of Section 29 of the POCSO Act, the learned

counsel for the appellant submitted that Section 29 of the POCSO Act would apply only when the foundational facts are proved by the prosecution beyond doubt, and in so far as the prosecution has not proved in the case one of the foundational facts, viz, the age of the victim girl, Section 29 has no application.

9. Having heard the learned counsel for the parties on either side, it is seen that the point arising for consideration is as to whether the prosecution has established the guilt of the accused under Section 5(n) read with Section 6 of the POCSO Act.

10. In so far as the learned counsel for the parties have addressed arguments as regards the applicability of Section 29 of the POCSO Act, it is necessary to consider the scope of Section 29, before I deal with the arguments on the factual aspects of the case.

11. Section 29 of the POCSO Act reads thus:

> "Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved."

Since the provision aforesaid, going by the literal meaning of the words used therein, appears to be constitutionally suspect and against the presumption of innocence available to the accused in a criminal case which is recognized as a human right, it needs to be interpreted and understood in a manner which does not offend any of the constitutional and other

established rights of the accused.

12. Before proceeding to interpret the provision, I must state that presumption of innocence cannot be equated *per se* with the constitutional right to life and liberty

adumbrated in Article 21 of the Constitution of India. It, having regard to the extent thereof, would not mitigate against any statutory provision [See **Noor Aga v. State of Punjab**, (2008) 16 SCC 417].

13. As evident from the provision itself, the same is intended to apply only to cases where a person is prosecuted for committing or abetting or attempting to commit any of the offences mentioned therein. Unlike the expression 'when a person is accused of having committed the offence' contained in Section 24 of the Prevention of Money Laundering Act, 2002, as it stood prior to its 2012 amendment, dealing with the burden of proof of a few facts, the expression used in Section 29 of the POCSO Act being 'where a person

is prosecuted', the word 'prosecuted' therein would show that the provision therein would apply only to the proceedings before a criminal court for determining the 'guilt' or 'innocence' of the person charged with an offence under the POCSO Act, after the cognizance of

the same is taken by the court [See **General Officer Commanding v. CBI & Anr,** (2012) 6 SCC 228 and **Superintendent and Remembrancer of Legal Affairs, W.B. v. Mahendra Singh**, 1979 Criminal Law Journal 545]. In other words, the question whether there exists sufficient ground for proceeding with the case is to be determined by the Special

Court for the purpose of taking cognizance of the offence under Section 33 of the POCSO Act, independent of the presumption

under Section 29 of the POCSO Act.

14. In the light of the provision contained in Section33(9) of the POCSO Act, there is no scope for any doubt that a person accused of an offence punishable under the POCSO Act is to be tried by the Special Court as if it were a Court of Session and as far as may be, in accordance with the procedure prescribed in the Code for trial before a Court of session. Under the Code, the stage after cognizance is the stage of framing of charge. Section 226 of the Code requires the Public Prosecutor to open up the case by describing the charge brought against the accused and stating by what evidence he proposes to prove

the guilt of the accused. Sections 227 and 228 of the Code provide that if, upon consideration of the record of the case and

the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and if on such consideration and hearing, the Judge is of the opinion that there is ground for presuming that the accused has committed the offence, he shall frame charge against the accused. As evident from the aforesaid provisions itself, the opinion that there is ground for presuming that the accused has committed the offence is formed from the evidence which the prosecution proposes to rely on to prove the guilt of the accused. In so far as the provisions contained in Sections 226, 227 and 228 of the Code apply for trial of the cases under the POCSO Act, there cannot be any doubt that it is obligatory for the prosecution to make available before the court the evidence sufficient for proceeding against the accused and Section 29 of the POCSO Act does not absolve the prosecution from the said obligation and if evidence sufficient for proceeding against the accused are not made available, the accused is entitled to be discharged.

15. Section 231 of the Code provides that on the

date fixed for examination of witnesses and production of documents and other things, the Judge shall proceed to take all

such evidence as may be produced in support of the

prosecution. Section 232 of the Code provides that if, after taking evidence for the prosecution, examining the accused and hearing the prosecution and the defence on the point, the Judge considers that there is no evidence that the accused committed the offence, the Judge shall record an order of acquittal. It is trite that at the stage of Section 232, what the Judge has to look into and consider is whether there is legal evidence adduced on behalf of the prosecution connecting the accused with the commission of the crime and not its quality and quantity. He is not to consider at this stage the sufficiency, reliability or trustworthiness of that evidence. In other words, what the Judge has to see at that stage is whether there is any evidence on record which, if true, would establish the guilt of the accused and not whether that evidence is satisfactory, trustworthy or reliable. It is only after the accused is called upon to enter on

his defence under Section 233 of the Code and after the

evidence, if any, adduced on behalf of the accused and hearing the counsel appearing for both sides, the Judge would decide whether the evidence adduced on behalf of the prosecution is reliable and trustworthy [See **State of**

Kerala v. Mundan, 1981 Criminal Law Journal 1795]. In so far as the provisions contained in sections 231 and 232 of the Code apply for trial of the cases under the POCSO Act, there cannot be any doubt that it is obligatory for the prosecution to produce evidence to prove the essential and foundational facts constituting the offence and Section 29 of the POCSO Act does not absolve the prosecution from the said obligation also and if the prosecution

does not produce the evidence to prove the essential and foundational facts constituting the offence, namely, the facts which constitute the offence and which connect the accused with the commission of the offence, the accused is entitled to

be acquitted under Section 232 of the Code.

16. The expression 'burden of proof' is understood distinctly as 'legal burden' and 'evidential burden'. 'Legal burden', in the context of a criminal trial is the burden of establishing the bundle of facts constituting the guilt of the accused and 'evidential burden' in that context is the burden of proving the existence or non existence of one or more fact/facts in issue. To be precise, in a criminal trial, the 'legal burden', namely the burden of proving everything essential to establish the charge against the accused lies upon the prosecution, and that burden never shifts, and notwithstanding the same, the

'evidential burden' namely the burden of proving one or more fact/facts in issue may be laid by law upon the accused [See **State of Maharashtra v. Wasudeo Ramchandra Kaidalwar**, (1981) 3 SCC 199]. This occurs in cases where the Legislative bodies find that doing so is necessary, appropriate, reasonable and proportional vis-a-vis the threat posed to the society by the exceptionally serious crimes. In **Noor Aga,** the Apex Court has held that merely for the reason that the statute provides for reverse burden, it cannot be said that the statute is unconstitutional .

17. Presumptions operate in a trial to shift the 'evidential burden' unto the party against whom it operates, and as noted, it does not shift the 'legal burden', but only assists a party in discharging its 'legal burden' [See **LIC of India v. Anuradha**, (2004) 10 SCC 131]. A presumption is not in itself evidence, but only makes a prima facie case for the party in whose favour it exists. It indicates the person on whom evidential burden lies. When presumption is conclusive, it obviates the production of any other evidence to dislodge the conclusion to be drawn on proof of certain facts and when it is rebuttable, it enables the party on whom lies the duty of going

forward with evidence on the fact presumed to adduce evidence to show that the fact is not as presumed [See **M/s. Sodhi Transport Co. and another, etc.** v. **State of U.P. and another etc.**, AIR 1986 SC 1099].

18. Like similar statutory provisions dealing with presumptions, Section 29 of the POCSO Act is also only a rule shifting the evidential burden in a prosecution. Generally, in a criminal trial, the Prosecution would fail even if the accused does not adduce any evidence, or if the evidence adduced by the prosecution do not prove beyond reasonable doubt the guilt of the accused. But, in a trial under the POCSO Act, Section 29 operates at the stage after the stage under Section 232 of the Code. In other words, in a given case, if the prosecution adduces evidence to prove the essential and foundational facts constituting the offence, notwithstanding its reliability and trustworthiness, it will be presumed that the accused has committed or abetted or attempted to commit the offence

alleged against him, unless the contrary is proved by him, for at this stage, onus to disprove the fact of commission of the

offence shifts on to the accused.

19. In this context, it is relevant to mention that in the case of discretionary presumptions, the presumption, if drawn can be rebutted by an explanation which "might

reasonably be true and which is consistent with the innocence"

of the accused. However, in the case of a mandatory

presumption like one under Section 29 of the POCSO Act, 'the evidential burden resting on the accused would not be as light as it is in the case of discretionary presumptions and the same

cannot be held to be discharged merely by offering a

reasonable and probable explanation. The words 'unless the contrary is proved' which occur in the provision make it clear that the presumption has to be rebutted by disproving the facts for the proof of which evidence was let in by the prosecution

[See **Dhanvantrai Balwantrai Desai** v. **State of Maharashtra**, AIR 1964 SC 575].

20. The next question is as to the standard of proof of innocence that is expected from the accused to satisfy the requirement 'unless the contrary is proved'. It has been consistently held by the Apex Court that the standard of proof of innocence in cases of this nature is only "preponderance of probabilities" and not "beyond reasonable doubt", unless the statute specifically provides for a different standard. The aforesaid position

has been reiterated by the Apex Court in **V.D. Jhingan** v. **State of U.P.**, AIR 1966 SC 1762, in the

context of interpreting the expression "unless the contrary is proved" under Section 4(1) of the Prevention of the Corruption Act, 1947. The relevant passage from the judgment reads thus:

> "It is well-established that where the burden of an issue lies upon the accused, he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt. That is, of course, the test prescribed in deciding whether the prosecution has discharged its onus to prove the guilt of the accused; but the same test cannot be applied to an accused person who seeks to discharge the burden placed upon him under s. 4(1) of the Prevention of Corruption Act. It is sufficient if the accused person succeeds in proving a preponderance of probability in favour of his case. It is not necessary for the accused person to prove his case beyond a reasonable doubt or in default to incur a verdict of guilty. The onus of proof lying upon the accused person is to prove his case by a preponderance of probability. As soon as he succeeds in doing so, the burden is shifted to the prosecution which still has to discharge its original onus that never shifts i.e., that of establishing on the whole case the guilt of the accused beyond a reasonable doubt.
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> This principle is a fundamental part of the English Common Law and the same position prevails in the Criminal Law of India. That does not mean that if the statute places the burden of proof on an accused person, he is not required to establish his plea; but the degree and character of proof which the accused is expected to furnish in support of his plea, cannot be equated with the degree and character of proof expected from the prosecution which is required to prove its case."

The view aforesaid has been followed by the Apex Court in **Noor Aga** and in **P.N.Krishna Lal v. Government of Kerala**, 1995 Supp(2) SCC 187. In **Kali Ram** the Apex Court has

explained the standard of proof of innocence that is expected from the accused in cases of this nature, thus:

> ".....There are certain cases in which statutory presumptions arise regarding the guilt of the accused, but the burden even in those cases is upon the prosecution to prove the existence of facts which have to be present before the presumption can be drawn. Once those facts are shown by the prosecution to exist, the court can raise the statutory presumption and it would, in such an event, be for the accused to rebut the presumption. The onus even in such cases upon the accused is not as heavy as is normally upon the prosecution to prove the guilt of the accused. If some material is brought on the record consistent with the innocence of the accused which may reasonably be true, even though it is not positively proved to be true, the accused would be entitled to acquittal."

In the context of Section 29 of the POCSO Act itself, the Bombay High Court has held in **Sagar Dinanath Jadhav v. State of Maharashtra**, 2018 KHC 4701, that the accused has to rebut the presumption raised against him under the said provision only on the principle of preponderance of probability. In other words, it is clear that the standard of proof of innocence that is expected from the accused in a case under the POCSO Act is only on the touchstone of preponderance of probability. I take this view also for the reason that while

Section 30 of the POCSO Act clarifies that the culpable mental state on the part of the accused is to be proved by the accused beyond reasonable doubt and not merely on the principle of preponderance of probability, such a requirement is absent in Section 29 of the POCSO Act.

21. Coming to the manner in which the accused is required to rebut the presumption, I must notice at once that the Apex Court has clarified in **Trilok Chand Jain v. State of Delhi**, (1976)1 SCR 348, in the context of Section 4 of the Prevention of Corruption Act, 1947, that the quantum and the nature of proof required to displace this presumption may vary according to the circumstances of each case and that such proof may partake the shape of defence evidence led by the accused, or it may consist of circumstances appearing in the prosecution evidence itself, as a result of cross-examination or otherwise. The relevant portion of the judgment reads thus:

> "The quantum and the nature of proof required to displace this presumption may vary according to the circumstances of each case. Such proof may partake the shape of defence evidence led by the accused, or it may consist of circumstances appearing in the prosecution evidence itself, as a result of cross-examination or otherwise."

Similarly, it was also held by the Apex Court in the said case that if the case of the prosecution inherently militates against or is inconsistent with the fact presumed, the presumption will be rendered lifeless from its very inception, if

out of judicial courtesy, it cannot be rejected out of hand as still born. The relevant passage from the judgment in the said case reads thus:

> "Another aspect of the matter which has to be borne in mind is that the sole purpose of the presumption under s. 4(1) is to relieve the prosecution of the burden of proving a fact which is an essential ingredient of the offences under s. S (1) (2) of the Prevention of Corruption Act and s. 161, Penal Code. The presumption therefore can be used in furtherance of the prosecution case and not in derogation of it. If the story set up by the prosecution inherently militates against or is inconsistent with the fact presumed, the presumption will be rendered sterile from its very inception, if out of judicial courtesy it cannot be rejected out of hand as still born."

Thus, an accused in order to prove his case may or may not produce evidence and need only show on the totality of all the materials available on record that the fact presumed cannot be said to have been proved on the touchstone of preponderance of probability, for which, he may even rely on patent absurdities or inherent infirmities or improbabilities in the prosecution case leading to an irresistible inference of falsehood in the prosecution case.

22. To sum up, the presumption under Section 29

of the POCSO Act does not, in any way, affect the obligation of the prosecution to produce admissible evidence which, if accepted, would constitute the offence and when the prosecution produces admissible evidence to prove the foundational facts constituting the offence, the accused must, at the pain of losing, prove that he did not commit the offence on the principle of preponderance of probability. If he fails, the presumption applies and the evidential burden being undischarged, the prosecution will be considered to have discharged its legal burden and if he succeeds, the prosecution will be considered to have failed in discharging its legal burden in establishing the guilt of the accused. In other words, the essence of Section 29 of the POCSO Act is only that a higher degree of proof of facts constituting the guilt of the accused, as is usually insisted in criminal trials, is not insisted from the prosecution in a case arising under the POCSO Act. The Parliament has certainly the power to lay down a different standard of proof for certain offences or certain pattern of crimes subject to the establishment of some foundational facts and the same would not, therefore, affect any of the

constitutional and established rights of the accused in such cases [See **Harendra Sarkar v. State of Assam**, (2008) 9 SCC 204].

23. Having thus understood the scope of Section 29,I shall now proceed to consider the questions viz, whether the prosecution has adduced evidence to prove all the foundational facts to establish the guilt of the accused and if so, whether the accused has proved his innocence on the principle of preponderance of probability.

24. As regards the foundational facts, the case of the accused is only that the prosecution has not proved the age of the victim girl in order to show that she is a child in terms of the provisions of the POCSO Act. No doubt, the age of the victim girl is a foundational fact to be proved by the prosecution in a case arising under the POCSO Act. As pointed out by the learned counsel for the appellant, Ext.P5 is a letter addressed by the Headmistress of the school of the victim girl to the investigating officer in the case. It is, however, unnecessary to consider the question as to whether the said document is

admissible in evidence, as I find that the prosecution has let in other evidence to prove the age of the victim girl. As far as the age of the victim girl as also her date of birth are concerned, according to me, the most competent witness is her mother. As PW1, the mother of the victim girl has categorically deposed that the victim girl was born on 16.9.2006 and the said evidence has not been even challenged by the accused in cross examination. In the circumstances, I am inclined to hold that

the prosecution has adduced evidence to prove all the

foundational facts to establish the guilt of the accused.

25. The question remaining to be considered is as to whether the accused has proved his innocence on the

principle of preponderance of probability. In order to consider the said question, it is necessary to refer to the evidence let in by the prosecution in the case. PW1, the mother of the victim girl has deposed that she is a house maid; that her daughter was assaulted in the early hours of 12.9.2015 at their residence; that she was residing with her husband and two children including the victim girl; that the accused is the uncle of her husband; that they belong to the State of Tamil Nadu; that it was the accused who brought them down to Kerala; that they were residing in the house of the accused for some time; that later, they

shifted to a rented house; that while so, the accused and his family shifted their residence to the said rented house as they were reconstructing their house; that on the

relevant day, the victim girl was sleeping with her elder brother

in one room and she was sleeping with her husband in the adjacent room; that the accused and his wife were occupying another room; that the victim girl called her in the early hours of the day and told her that the accused lifted her dress, caressed her body, kissed on her cheeks and thereafter, inserted his penis into her mouth; that PW1 immediately informed the matter to her husband and created a scene; that the accused and his wife then came to them and the wife of the accused asked the victim girl as to whether she has dreamed, and that the victim girl then asserted that it was not a dream and that the accused has committed the acts earlier mentioned by her. In the first information statement, PW1 has stated that while going out for work on 14.9.2015, her husband warned the accused not to disturb his wife and children any more and then, the accused along with his wife and son assaulted her husband. In the cross examination of PW1, it was brought out by the accused that PW1 did not lodge any complaint regarding the said occurrence. Other than that, there was virtually no cross examination on any of the aspects of the evidence tendered by PW1. PW2, the

victim girl has deposed that on the relevant day, at about 1.15 a.m, while she was sleeping, the accused lifted her banyan and caressed her body and inserted his penis into her mouth; that the accused left the scene when she cried; that she immediately informed the matter to her mother and her mother, in turn, informed the matter to her father; that the accused and his wife then came to them and asked her whether she has dreamed and she has asserted that it was not a dream and it has actually happened. PW2 has also deposed that she was studying in 3rd standard at the relevant time. As in the case of PW1, there was virtually no cross examination of PW2 also, except the suggestion that there was no occurrence and

that PW2 was deposing as tutored by her parents.

26. True, PW4 has stated that the accused was residing with him on the relevant day. But, PW4 is a witness on whom the Public Prosecutor has put questions lawful in crossexamination with the permission of the court. Even otherwise, it is a trite that the credit of a witness cannot be impeached on the basis of a statement of another witness. Similarly, it is seen that PW10, the Police official who recorded the statement of the victim girl has stated in cross examination that "അച്ഛൻ

കറ ക ന ങറ ന ണ കട പ ഞത." It was placing reliance on the said statement that it was argued by the learned counsel for the accused that the evidence tendered by PW1 and PW2 that the victim girl had slept with her elder brother on the relevant

day cannot be believed. I do not find any merit in this contention as well. First of all, it cannot be inferred from the said statement that the victim girl had not slept with her elder brother on the relevant day. Further, had there been such a statement by PW10, if at all the accused wants to rely on the same for the purpose of contradicting the victim girl, the same should have been put to the victim girl in terms of the provisions contained in Section 145 of the Indian Evidence Act and the said course has not been resorted to by the accused.

27. As regards the contention raised by the learned counsel for the accused as to the delay in lodging the first information statement, it is necessary to refer to the statement made by PW1 in the first information statement, which reads thus :

"ബനവ യതറക ണ റവളയല ഞ ൽ ന ണക# വറ ന കരതയ ണ വവര ആകര ട പ യ തരനത. എന ൽ ഇനറല (14.9.15) ര ത 8.30 ണകയ ടക ഭർത വ വ കക0 ലകകപ ക റന രങയക2 ശ എറ4 ഭ ര5റയയ കറളയ ആര ശല5 റ8യരറതന പ ഞ. അതകകട ക;വഡ ഭ ര5യ കന ക എറ4 ഭർത വറന ക>ക? പദവക ലച. ഇനയ ക>ക? പദവക ലകകയ ക;വ; കറള ശല5 റ8യറ നമള ഭയ റക ണ ണ ഇക2 ശ കFഷനൽ വവര യചത "

The aforesaid statement, according to me, gives a satisfactory explanation for the delay. True, the father of the victim girl as also the brother of the victim girl could have been examined in the case by the prosecution. But, merely for the reason that they were not cited or examined, it cannot be said, on the facts of this case, that the evidence tendered by the victim girl and her mother cannot

be believed. Similarly, it is seen that though the statement of the victim girl recorded under Section 164 of the Code is part of the records, the same has not been proved in the case. According to me, the omission in proving the said previous statement cannot also be said to be fatal in a case of this nature, for the same could have been otherwise proved by the accused, if he chose to rely on the same to discredit the victim girl. To sum up, in the light of the overwhelming, convincing and weighty evidence adduced by PW1 and PW2, the materials brought out and relied on by the accused,

according to me, are not sufficient to establish the innocence of the accused on the touchstone of preponderance of probability. In other words, there is no infirmity in the decision of the court

below.

For the aforesaid reasons, I do not find any merit in the appeal and the same is, accordingly, dismissed.

Sd/-

P.B.SURESH KUMAR, JUDGE

tgs