IN THE HIGH COURT OF KERALA AT ERNAKULAM

CRL A No. 590 of 2000(B)

1. JOSEPH @ BABY
... Petitioner

Vs

1. S.I. OF POLICE
... Respondent

For Petitioner :SRI.T.G.RAJENDRAN

^ For Respondent :PUBLIC PROSECUTOR

Coram

The Hon'ble MR. Justice K.A.ABDUL GAFOOR
The Hon'ble MR. Justice R.BASANT

Dated : 20/01/2005

: O R D E R

K.A. ABDUL GAFOOR &
R. BASANT, JJ.

- -

Crl.A.Nos. 590, 591, 599, 600, 602, 603, 604
605, 606 to 619, 627, 632, 633, 633 and 637 of 2000
877 of 2002, Crl.M.C. Nos.7136 of 2001,
3862 of 2002 & 4141 of 2003

- -

Dated this the 20th day of January, 2005

JUDGMENT

Abdul Gafoor, J.

Thirty five accused persons were convicted in S.C.No.187 of 1999. They have filed the above appeals except Crl.A.No.877 of 2002. Crl.A.No.877 of 2002 is by the sole convicted accused in S.C.No.241 of 2001. At the outset we may mention that the facts relating to both the cases emanate out of the same occurrence of alleged kidnapping, wrongful confining, procuration of a minor girl and rape and gang rape of the victim, PW3, in this case.

PW3 was reported missing from 16.1.1996. Initially the case was registered under the caption `man missing' based on information furnished by PW1, the father of the victim on 16.1.96 itself. For about 40 days, in spite of the investigation conducted by PW82, the local Asst. Sub Inspector, the whereabouts of the girl could not be found out. The girl later appeared in the office of her father PW1 on 26.2.1996. Next day she gave a statement to PW82 revealing information about the commission of cognizable offences including kidnapping, wrongful confinement, procuration of minor girl, rape and gang rape on her. Investigation thereafter proceeded in that line and the investigators came to the conclusion that altogether 45 persons were involved. Two of them could not be traced out. Out of the remaining 43 persons, one was deleted from the array of accused. Two were absconding. Charges were laid against the remaining 40 persons and the case against them was taken on file by the Sessions Court, Kottayam as S.C.No.187 of 1999. During the trial, the 40th accused died. Accused Nos. 23, 26, 32 and 36 were acquitted. The remaining 35 accused, convicted on different counts of offences have filed the appeals as mentioned, except Crl.A.No.877 of 2002. During the pendency of these appeals Accused No.4, the appellant in Crl.A.No.607 of 2000, committed suicide.

2. After the trial of S.C.No.187 of 1999 was terminated, one among the absconding accused, viz., Dharmarajan, surrendered. Thereafter his case was also committed. It was tried as S.C.No.241 of 2001 on the same set of charges. He was also convicted. Crl.A.No.877 of 2002 is at his instance.

3. In the first case the convicted accused were found guilty of all or any one or more of the offences punishable under Sections 120-B, 363, 365, 366A, 368, 376(1) and 376(2)(g) I.P.C. They have been sentenced to undergo rigorous imprisonment for terms ranging from 4 years to 13 years depending on the offences found proved against them. Sentence of fine and consequent default sentences have also been imposed. Fine, if realised, was directed to be paid to the victim. The appellant in Crl.A.877 of 2002 was found guilty of the offences punishable under Sections 120-B, 365, 363, 366A, 368, 376(2)(g), 372 and 392 I.P.C. He was sentenced to undergo life imprisonment for the offence punishable under Section 376(2)(g) alone. So, no separate sentence was imposed on any other count.

4. The accused will be described as arrayed in S.C.No.187 of 1999 and the sole accused in S.C.No.877 of 2002 will be mentioned by his name Dharmarajan hereafter in this judgment for the sake of convenience. The exhibits, witnesses and MOs, unless otherwise specified, are referred to as in S.C.No.187 of 1999.

5. The prosecution case is that PW3, as a result of a conspiracy hatched by accused Nos. 1, 2 and Dharmarajan, was persuaded, induced and kidnapped by accused No.1 from the lawful guardianship of her parents to go away from the school hostel in Munnar to join him at Adimali and thereafter to go along with him to Kothamangalam at about 4.30 P.M.. on 16.1.1996. Before reaching there, he disappeared. In such perplexed situation, late in the evening at about 7.30 P.M. PW3 decided to go from Kothamangalam to her mother's sister's house at Kottayam. She boarded a private bus to Muvattupuzha. She noticed accused No.2, Usha, in that bus. Thereafter she alighted at Muvattupuzha and went in an autorickshaw to K.S.R.T.C. bus station there, to catch a bus to Kottayam. She boarded a Trivandrum Fast Passenger bus wherein also she noticed the presence of accused No.2. She got down at Kottayam bus stand. She was frightened to go through the bylanes to reach her aunt there. Therefore she decided to catch a bus to Mundakkayam so as to go to her uncle's house. But there was no bus to Mundakkayam during that night. It was at that time, accused No.2 approached her calling her name. Later she introduced PW3 to one person by name Sreekumar, whom she later realised as Dharmarajan. He promised to take her to Mundakayam. Thereafter Dharmarajan took her to Metro lodge near the bus stand where, he told her, his mother was staying. With the hope that she would be taken to her uncle's house at Mundakayam, she followed Dharmarajan. But Dharmarajan raped her during that night in the lodge room. On the next day morning she was taken to Ernakulam in a transport bus and thereafter to different places like Kumali, Kambam, Palakkad and Vanimel at Kozhikode, again to Kumali, Muvattupuzha, Aluva, Theni, Kanyakumari, Trivandrum, Kuravilangad, Kottayam, again to Kumali, Muvattupuzha and again to Kottayam, still again to Theni, Kumali, Kambam, again to Kumali, Kottayam and to Muvattupuzha and finally enfreed her on the morning of 26.2.1996. In the meantime she was presented to several persons including the appellants/convicted accused, except accused Nos. 2, 17, 38 and 39, who committed rape or gang rape on her. The

said four persons, according to the prosecution, aided others to commit the said offences. They also wrongfully confined her. PW3 had, as admitted by both sides, crossed the age of 16, but had not attained 18 years, at the relevant time.

6. The evidence in the first case consists of the oral testimony of PWs.1 to 97 and Exts.P1 to P182 and MOs.1 to 21 on the side of the prosecution. The defence evidence consists of the oral evidence of DWs 1 to 10 and Exts.D1 to D30. PWs 1 to 57 were examined and Exts.P1 to 102 were marked on the side of the prosecution in the latter case. MOs 1 to 21 were also identified. The defence evidence in that case consists of the oral testimony of DWs 1 to 6 and Exts.D1 to D43, apart from the witnesses' exhibits 1 to 40 and court exhibit C1. The court below considered the evidence on record and convicted the accused as mentioned above.

7. When we scanned through the evidence we could understand that several new materials could be brought out by the accused to strengthen their defence, in the second case. On going through the said evidence we are also convinced that few of such pieces of evidence could be used by the accused in the first case as well, for the purpose of their effective defence. Accordingly, as these cases arise out of the same occurrence, we are of the view that the evidence in both the cases can be considered together for the purpose of finding the truth in this case. Whatever available in these cases in favour of the accused shall be made use of in their favour, irrespective of where it was let in, but not vice versa.

8. It is contended by the appellants that they have been falsely implicated in the case due to political enmity. Few of them are political workers or interested in politics. There are others also who are not involved in politics. Sufficient materials have not been placed by the accused to show that they have been thus falsely implicated with political motive. There is nothing to show that any of the accused was holding any such position of eminence politically or to justify an inference that they were implicated falsely on political considerations.

9. It is submitted by the appellants that no conspiracy is proved in this case. There is no cogent evidence in that regard. On the other hand the letter said to be written by PW3 to DW3 in the second case which has been suppressed by the prosecution will cut at the root of the allegation of conspiracy, it is contended.

10. The other contention raised is that there is no reliable evidence in this case to act upon and enter conviction for serious offences as mentioned above. The only material and vital evidence available is that of PW3, who cannot be reckoned as a trustworthy witness. Her evidence deserves careful scrutiny, because of her past conduct of squandering the amount given by her parents for remitting hostel fees and even daring, admittedly, to pledge her ornaments on 1.1.1996. Certain other aspects were also brought to our notice to elucidate this contention.

11. It is further contended that even if PW3 is found to be believable otherwise, a conjoint reading of her evidence in toto will show that she was not an unwilling partner for intercourse. So far as the accused are concerned, there was no resistance from her part, so that those who approached her could discern that she was not willing for intercourse or there was absence of consent from the part of PW3. Absence of consent on the part of PW3 has not been satisfactorily proved in this case to bring home the guilt of the accused under Section 376(1) or 376(2)(g). It is further contended that the unwillingness now spoken to by PW3 before the court below is really an excuse found out by her to save her face in the family and among the relatives for her long absence of 40 days from her house. It is further submitted that the normal approach adopted for appreciating the evidence of a rape victim cannot be applied in this case, taking into account the incidents occurred in those 40 days. Therefore, the court should always seek corroboration for the evidence of PW3 before finding the accused guilty of the offences under Sections 376(1) or 376(2)(g). In this regard the counsel for the appellants have relied on the decisions reported in Kali Ram v. State of Himachal Pradesh (1973 SCC (Cri.) 1048), Deelip Singh @ Dilip Kumar v. State of Bihar (JT 2004 (9) SC 469), State of Maharashtra v. Chandraprakash Kewalchand Jain (AIR 1990 SC 658), Sudhansu Sekhar Sahoo v. State of Orissa (2003 Crl.LJ 4920), Gopi Shanker and ors. v. State of Rajasthan (AIR 1967 Rajasthan 159), Kuldeep K. Mahato v. State of Bihar (1998) 6 SCC 420), Jagannivasan v. State of Kerala (1995 Supp (3) SCC 204), Jinish Lal Sah v. State of Bihar (2003) 1 SCC 605), Vimal Suresh Kamble v. Chaluverapinake Apal S.P. & anr. (2003) 3 SCC 175) and S.A. Nanjundeswara v. M.S.Varlak Agrotech Pvt. Ltd. (AIR 2002 SC 477). The consent is thus discernible from the conduct of PW3; submit the appellants' counsel. No

rape punishable under Section 376(1) is proved.

12. It is contended that even going by the evidence of PW3, the offence punishable under Section 376(2)(g) has not been made out. No jointness in action by several persons alleged to have raped her on any single occasion had been spoken to by her. In this regard the decisions reported in Ashok Kumar v. State of Haryana (AIR 2003 SC 777), Devendra Das and ors. v. The State of Bihar (1999 Crl.LJ 4805), Jai Bhagwan & ors. v. State of Haryana (1999) 3 SCC 102), State of Orissa v. Arjun Das Agrawal & anr. (1999) 8 SCC 154) and Ashok Kumar v. State of Haryana (2003) 2 SCC 143) are relied on. It is further contended that apart from the evidence of PW3 the only other evidence introduced by the prosecution to substantiate the offence under Section 376(2)(g) is that coming from the mouth of PW8. She was really accused No.42 in the first case and was arrested and remanded. She was later transformed as a prosecution witness, in reward of her giving evidence against the accused. Such a witness cannot be treated as trustworthy, the appellants submit, relying on the decision reported in Vemireddy Satyanarayan Reddy & ors. v. State of Hyderabad (A.I.R.1956 SC 379). Thus there is no evidence to fasten guilt under Section 376(2)(g), they submit.

13. It is further contended that the entire investigation in this case was totally unfair, suppressing material particulars gathered in the investigation. Certain material witnesses cited by the prosecution had also been withheld and withdrawn without examining them. Even one among the investigating officers had not been examined in the second case. He had to be cited as a defence witness. PW3 did allegedly have some connection with the accused in a case relating to the death of a nun in a convent and she had been questioned in that regard. The amount given by her father for remitting the hostel fee was allegedly made use of to pay to an accused in that case. This ought to have been spoken to by DW6, who was questioned by police. But she was given up by the prosecution. It is also submitted based on the evidence of DW3, Kochumon, in the second case who spoke about a letter written by PW3 on the day when she disappeared, that the entire case of conspiracy projected by the prosecution falls down. Suppression of those relevant materials speaks a lot about the unfairness shown by the investigating agency and such unfairness has resulted in prejudice so far as the accused are concerned. The decisions reported in

Rampal Pithwa Rahidass & ors. v. State of Maharashtra (1994 Crl.LJ 2320) and Vemireddey Satyanarayan Reddy & ors. v. State of Hyderabad (AIR 1956 SC 379) are relied on in this regard.

14. It is further contended that apart from the unfairness shown in the investigation and the consequent unfairness in the trial, the prosecution also had suppressed the relevant materials which the accused are entitled in terms of the Code, thereby disabling them to mould their defence properly from the initial stage of the trial. It is submitted and is borne out from the evidence that at least 10 statements, including one disputed by the prosecution, had been obtained from PW3 by various investigating officers in this case. According to PW82, who started the investigation in the case when Ext.P1 F.I. statement was furnished and Ext.P1(a) F.I.R. was registered, PW3 on her reappearance had given a statement to him on 27.2.1996, which he had written down in his own hand. At the same time, it is submitted relying on the evidence of DW10 that there was yet another statement taken from PW3 on the same date by PW82 himself. This was not disclosed to the court. When PW95 had been in charge of the investigation he had also recorded another statement dt.28.2.1996 from PW3. Apart from these two statements, three statements had been recorded on 8.3.96, 10.3.96 and 15.3.96 by PW93, who conducted the investigation between 27.2.96 and 8.3.96. Two statements were thereafter recorded by PW91, who continued the investigation and two more statements were recorded by PW97, who finally investigated the case. It is submitted that the statement of PW3 initially recorded by PW82, that recorded by PW95 on 28.2.96 and the three statements recorded by PW93, Circle Inspector, Devicolam, were not produced before court in time or furnished to the accused, as enjoined under Section 173(5) and 207(iii) Cr.P.C. respectively. Thus, suppression of details spoken to by the victim in this case really prejudiced the accused in shaping their defence. Those statements stated to be recorded by PW93 on 8.3.96, 10.3.96 and 15.3.96 and the statements stated to be recorded by PW95 on 28.2.1996 were produced at a later stage in the first case. That was far later than PW3 had spoken to about the incident and been cross examined. Though the prosecution offered PW3 again to be cross examined on the basis of the materials so belatedly produced, it was not a real and effective opportunity to defend the allegations, as PW3 had made up her mind when

she had been already cross examined extensively. It was too late for the accused to mould or remould their defence. Such belated production of documents in court and offering PW3 for further examination are not sufficient to render any real opportunity to the accused to mould their defence at the initial stage. It is further submitted that the mere production of these documents is not sufficient to satisfy the requirement of Section 207(iii) Cr.P.C. The accused have to be furnished with the copies thereof. It has not been done. They could not and did not, therefore avail of the opportunity to cross examine PW3 further. So suppression of these materials indicates absence of fair trial, which prejudiced the accused from moulding their defence at the initial stage. Such prejudice percolated throughout the trial. Thus the accused had been denied a fair opportunity to defend themselves, it is submitted.

15. It is their further case that no first information report as could be called so in law under Section 154 Cr.P.C. is available in this case. Ext.P1 F.I. statement did not reveal commission of any cognizable offence. A reading of Ext.P1 will disclose that even the complaint of PW1, the father of the victim, was that she had gone away from the hostel. `I do not know why my daughter had run away' is the specific averment in Ext.P1. He had no case that she had been kidnapped by any one or that he had suspected so. Exts.P1 and P1(a) cannot satisfy the requirements of an F.I. statement in terms of Section 154 Cr.P.C., for commencement of investigation in a case relating to cognizable offence. Cognizable offence, if at all, was revealed for the first time when PW3 had been questioned by PW82, the Assistant S.I. of Munnar police station on 27.2.1996. Her statement ought to have been registered as F.I.R. In the absence of that, the investigation conducted cannot be said to be fair investigation in this case. Absence of an F.I.R., which can be legally acted upon, vitiates the trial in this case. In that regard the decisions in The State of Assam v. Upendra Nath Rajkhowa (1975 Crl.LJ 354), Aru Kumar Banerjee & anr. v. The State (AIR 1962 Calcutta 504) and Mani Mohan Ghose v. Emperor (AIR 1931 Calcutta 745) are relied on.

16. It is also submitted that had the police followed the right, fair, proper and legal method mentioned in Section 154 Cr.P.C., the controversy as to which of the two statements dt. 27.2.1996 had been really recorded would not have arisen at all. The statement so recorded

revealing commission of cognizable offences ought to have been, in law, forwarded to the concerned Magistrate forthwith and there would not have been any dispute on that.

17. It is submitted by the learned Special Public Prosecutor in answer to the above contentions of the appellants that the conspiracy had been proved in this case by the evidence of PW3, PW66, MO1, PW59, though hostile, PW60 and Exts.P115 trip sheet of the buses in which the victim girl travelled from Munnar to Adimali and from Adimali to Kothamangalam produced by PW78 R.T.O. PW3 moved from the school campus to Adimali and thereafter to Kothamangalam only at the persuasion of accused No.1. Intimacy with him was revealed by the handing over of MO1 photo album. That the first accused had a conversation with the second accused with respect to the arrival of a girl was categorically spoken to by PW60, an autorickshaw driver. In such circumstances the conspiracy in this case stands proved. The first accused induced PW3 to come out of the school campus and kidnapped her, so that she could be placed, through accused No.2, in the hands of Dharmarajan, who was waiting, as is revealed by Ext.P57, in Metro Lodge right from 2.1.1996.

18. The Special Public Prosecutor also draws our attention to the version spoken to by PW3 regarding the attempt to mortgage her ornaments and spending of the amount given by her parents to remit the hostel fees. According to him, PW3 wanted to raise money only to pay the first accused to avoid him. MO1 album was taken by accused No.1 from PW66 to give it to PW3. This reveals his intimacy with PW3. Thus involvement of the first accused and his intimacy with PW3, to kidnap her are manifest from this evidence. Non-examination of Kochumon, DW3, in the second case, by the prosecution will not be fatal to prove the conspiracy. It is also submitted that even though the police did not find out the letter said to be written by PW3 as spoken to by DW3, it will not affect the prosecution case. Therefore the conspiracy hatched by accused Nos. 1, 2 and Dharmarajan stands proved. The further acts of the remaining accused were in continuation of this conspiracy. So they have also continued the conspiracy to commit the offences alleged. Thus there was real conspiracy in this case to commit various offences charged against the accused.

19. It is further contended by the Special Public Prosecutor that there is no reason to disbelieve PW3 at

all. PW3 is the victim of a sex offence. Appreciation of evidence in rape cases shall be different from the appreciation of evidence of the victim in any other case. In this regard he has relied on the decisions reported in State of Maharashtra v. Chandraprakash Kewalchand Jain (1990 SCC (Cri) 210), State of Maharashtra v. Kalu Sivram Jagtap & ors. (1980 SCC (Cri) 946) and State of Punjab v. Ramdev Singh (AIR 2004 SC 1290). It is further submitted that when the evidence of PW3 is viewed in that angle, it can be seen that she can be believed. It is evident that there was total absence of consent and PW3 was not willing for intercourse with any of the accused in this case. Absence of consent was, therefore, successfully proved by the prosecution.

20. It is further contended that consent is to be proved by the accused. In this respect the decision in State of Himachal Pradesh v. Shree Kant Shekari (AIR 2004 SC 4404) is relied on. Even if there was consent, it shall be further proved that the consent so expressed by the victim is one made voluntarily and consciously and based on reasons after understanding the good and evil of the act to be done by the person who so consents. Reliance is placed on the decision reported in Rao Harnarain Singh Sheoji Singh & ors. v. The state (AIR 1958 Punjab 123) and Uday v. State of Karnataka (AIR 2003 SC 1639).

21. It is further contended that any absence of sign of resistance by the victim shall not be a reason for presuming consent. This contention is urged placing reliance on the decision in State of Himachal Pradesh v. Mange Ram (2000 Crl.LJ 4027). It is further submitted by the learned Public Prosecutor placing reliance on the decision in State of Maharashtra v. Prakash & anr. (1992 Crl.LJ 1924) that even in the case of prostitutes consent is an essential requirement. Otherwise, it will amount to rape. There is no reason to disbelieve PW3, when she submits that the accused had intercourse with her without her consent, he contends. He therefore submits that the fact of rape by several accused as alleged in this case has been proved by the evidence of PW3 who speaks about her express unwillingness and absence of consent.

22. It is contended that the theory of consent by such a young girl aged less than 17 years is inherently improbable. Whey should she consent? A girl could have consented to sexual relationship only out of love, lust or lure for money. PW3 had none of these. Her detractors even admittedly had no love for her. There is nothing to

show that she was prompted by any such uncontrollable lust to agree to such intercourses. Her parents were both employed. She had no reason to crave for money. In these circumstances she could not have consented for any of the three possible reasons. Her statement that she did not consent must, in these circumstances, be accepted, contends the learned Special Public Prosecutor.

23. It is his further contention that there is evidence from PW3 revealing the situations of rape by more than one person on a single day at a particular time and such persons had come together to approach PW3. Therefore gang rape punishable under Section 376(2)(g) is also proved in this case. There need not be completed acts of rape by each and every rapist involved in gang rape. Some involvement is sufficient. The Public Prosecutor relies on the decisions in Pramod Mahto & ors. v. State of Bihar (1990 SCC (Cri) 206), Justus v. State of Kerala (1987 (2) KLT 330), Moijullah alias Puttan v. State of Rajasthan (AIR 2004 SC 3186) and Bhupinder Sharma v. State of Himachal Pradesh (AIR 2003 SC 468). It is further contended that when PW3 deposed that more persons had raped her together, the provisions contained in Section 114 A of the Evidence Act comes to play and therefore absence of consent has to be presumed. Thus this is a case where gang rape is conclusively proved. The decision in Bodhisattwa Gautam v. Subhra Chakraborthy (Ms) (1996 SCC (Cri) 133) is also relied on. Presumption under Section 114A is hence available, it is contended.

24. Replying to the contentions urged by the appellants with regard to the unfair manner of trial/investigation resulting in prejudice, it is submitted by the Special Public Prosecutor that in the first case all the statements taken from PW3 by different investigating officers, except the one disputed by the prosecution, were produced though later. The initial prejudice, if any, caused is thus wiped off and the accused had sufficient opportunity to cross examine PW3 with reference to those statements. So there was no prejudice in the first case. In the second case also the entire statements, except the disputed one, said to be recorded on 27.2.1996, have been supplied to the accused. So in that case also there was no prejudice. Every accused had opportunity for his full say when copies were so produced.

25. It is further contended that the disputed statement said to be written by DW10 in the first case is one manipulated to screen off several accused with the

involvement of his superior officer, PW95. So the admitted statement of PW3 recorded by PW82 now forming part of the C.D. records is the real and true statement. Non-production or non-furnishing of the disputed statement dt. 27.2.96 allegedly recorded from PW3 is not one of relevance as the said statement is not recorded in terms of Section 161 and is not liable to be produced in court in terms of Section 173(5) or to be furnished to the accused under Section 207(iii) Cr.P.C. So there was no occasion for any prejudice in this case.

26. It is submitted by the Public Prosecutor that PW82 had, when PW1, father of the girl furnished the information regarding the missing of his daughter, registered an F.I.R. Ext.P1(a) and forwarded it promptly to the Magistrate court concerned. That was necessary in the light of the instructions contained in the Police Manual. That is the long established practice adopted by the police whenever a man missing case is reported. Depending upon the facts revealed in the investigation, the case will be moulded based on the very same F.I.R. Appropriate further reports will be filed before Court by the Investigators. No fresh F.I.R. is filed. That is the practice followed. In this case, when PW3 reappeared after 40 days on 26.2.1996, her statement was recorded on the next day, which revealed commission of certain cognizable offences. It was recorded, in the light of the registration of Ext.P1(a) F.I.R. earlier on the basis of the information furnished by PW1, only as a statement under Section 161 Cr.P.C. That cannot in any way vitiate the investigation or the trial. No prejudice has resulted therefrom. The police was only following the practice hither to followed based on the Police Manual and the instructions contained therein.

27. In the light of these rival contentions by either party we have to examine the evidence in this case and the situations spoken to by PW3 revealing any offence.

28. As already mentioned above, the entire prosecution case is based on a conspiracy allegedly hatched by accused Nos. 1, 2 and Dharmarajan some time prior to 16.1.1996 to kidnap PW3, to move her from place to place, to confine her and to procure her for prostitution by others, to sell or buy her and to commit rape or gang rape on her. So the conspiracy is the beginning of the occurrence. Necessarily the conspiracy has to be examined first.

29. As already mentioned above, PW3 speaks about

the intimacy developed by her towards accused No.1, who was a Cleaner/Checker in a bus in which she used to travel while attending tuition classes. According to her, MO1 album which she had brought to show her friend, PW66 Fathima, came to be in the hands of accused No.1, when PW66 brought it back to return to PW3, who was not available in the bus on that day. The first accused took it from PW66 promising to hand it over to PW3 later. The photographs in MO1 were threatened to be made use of to blackmail PW3. She was threatened that unless she accompanied him, those photographs would be made use of to tarnish her as well as her parents. PW60, an autorickshaw driver available in Adimali bus stand, speaks about the conversation between accused Nos. 1 and 2 on 16.1.96, about the anticipated arrival of a girl. He had seen PW3 arriving, shortly thereafter, in the bus named "Anjali" at Adimali and accused No.1 accompanying PW3 to the bus stand and accused No.2 following them. So, the evidence of PW60 reveals the case of conspiracy. The timing of the bus in which PW3 travelled, had been spoken to by PW78 on the basis of Ext.P115 trip sheet produced by him. It is a supporting evidence on conspiracy to corroborate PW3. This is the prosecution case and evidence on conspiracy.

30. The main trump-card of the defence to torpedo this conspiracy is the evidence of DW3 and Ext.X13 letter dt. 14.3.1996 produced from the custody of a police officer upon summons from the court, in the second case. DW3 is one Kochumon. According to him, he was the driver of a bus plying between Alwaye Sooryanelli. On 16.1.96 while his bus was on its trip, another one coming from the opposite direction stopped as they were passing each other and the driver in the said bus one Joy handed over a letter to him. He put it in his pocket and later read it when his day's work was over at Sooryanelli. He could realise that it was a letter written by PW3 who had regularly travelled earlier in his bus. There was such a friendly relationship between PW3 and DW3, an employee in a bus. She felt it necessary to write such a letter to DW3. The contents of the letter are also almost spoken to by him in his evidence. The contents do not make reference to accused No.1, as can be ascertained from the evidence of DW3.

31. Ext.X13 is an official document written by the Dy.S.P., Munnar to S.P. of Idukki with regard to certain reports in Crime No.6 of 1996 giving rise to the present case. It reveals that the evidence given by DW3 regarding the letter written by PW3 is true.

32. When there is a letter contemporaneously written by PW3 on the day when she disappeared from the campus, it must in all probability reveal why she had so disappeared. It must also reveal whether there was involvement of any one including the first accused. It should show whether she was going with the first accused as induced by him or whether she had been leaving her parents of her own. It was the suggestion of the accused during cross examination that PW3, as of her own, had left her house, because of certain domestic reasons. There was subsisting quarrel between her parents. It is suggested that the home environment was unsatisfactory. Father was an alcoholic and mother was deviant, it was suggested.

33. In order to cross check the version of DW3, as he was seen to have been questioned by PW82 as revealed by Ext.X13, we chose to exercise our powers under Section 172(2) Cr.P.C. We perused the case diary from the hands of the Public Prosecutor as to whether the said Kochumon, DW3, had spoken to the police about the letter said to be written by PW3. It is also revealed from Ext.X13 that the police has questioned the driver Joy who handed over the letter to DW3, also. Ext.X13 also speaks about the contents of the letter. We are satisfied that existence of the letter written by PW3 was revealed by DW3 to the police.

34. When there is such a contemporaneous letter written by PW3, necessarily it will reveal the reason for her disappearance. Existence of that letter was known to the police as revealed by DW3 and Ext.X13. But none of the investigating officers has spoken about the existence of the letter or their effort or incapability to trace it out when they gave evidence in the court below. The public prosecutor was also cross examining DW3, as if there was no such letter. Thus the prosecution was really suppressing that letter, though known to them as revealed by DW3 and in Ext.X13. It has to be borne in mind that the investigating officers did not move their little finger to find out this letter and to ascertain the reason revealed therefrom for the disappearance of PW3. Or else they were withholding it from court and the accused. According to DW3 he entrusted the letter to the police. Necessarily the evidence of DW3, the contents of the letter spoken to by him and Ext.X13, which refers to that letter do create a doubt as to the reason for the disappearance of PW3. That PW3 had left the campus as of her own cannot be, therefore, ruled out. In such circumstances it cannot be said, conclusively, that

PW3 was kidnapped consequent to a conspiracy hatched by accused Nos. 1, 2 and Dharmarajan.

35. True, as contended by the Public Prosecutor, there is evidence of PWs.59 and 60. PW59 turned hostile completely and nothing beneficial to the prosecution has come out from him. PW60 is an autorickshaw driver who has spoken about the conversation between accused Nos. 1 and 2 about the arrival of PW3 on 16.1.1996, the date of commencement of the series of occurrences in this case. That witness was found out and questioned far belatedly on 23.7.1996 by PW97. By that time this case had become sensational. PW60 also did not volunteer to give information to the police promptly. He offers no cogent explanation for this. There had been five Investigating Officers earlier than PW97. None of them had any knowledge about the existence of such a witness and no one had reason to doubt so obviously because of their knowledge about the letter written by PW3, mentioned in Ext.X13. So the belated questioning of PW60 and bringing that evidence to support conspiracy do arouse suspicion and cannot be sufficient to fasten guilt for conspiracy. On the other hand, the evidence of DW3 in the second case speaks about the contents of the letter said to be written by PW3 that she had gone out of her house as of her own. In this context it will not be inapposite to note that the earliest versions indicate that PW3 was requested to "go for a trip" by her lover and not to elope and get married. PW1 or PW3 has not been asked anything about the said letter by the prosecution. That course of conduct must certainly cause suspicion. The clear indication is that the investigators were attempting to black out all indications about the said letter.

36. The evidence of a person over hearing a conversation is too weak an evidence to prove conspiracy as held by the Supreme Court in Darshan Singh & ors. v. State of Punjab (AIR 1983 SC 554). The Apex Court observed:

> "On the question of conspiracy, the prosecution led the usual kind of puerile evidence, as for example, of someone over-hearing something while on way to answering a call of nature. Here the strain was changed by alleging that Suran Singh (PW27) heard a most damaging conversation between the accused while he was negotiating the purchase of a tractor. Evidence was also produced to show that a wallet

was found at the scene of offence, containing a letter (Ext.P53) sent by one of the accused to another of them, discussing the threads of conspiracy."

It is not safe to rely on PW60, as the alleged conspirators would not have spoken about their plan so loudly in a busy bus stand, so that it could be heard by others, so clearly as spoken to by PW60. So the alleged conversation between accused Nos. 1 and 2 as perceived by PW60, and kept it to himself till PW97 came into the picture belatedly could not be relied on to prove conspiracy. That evidence revolts against commonsense and prudence.

37. More over, PW60 is a witness found out by PW97, far belatedly. On that reason also no reliance can be safely placed on him. The Apex Court in Vijayabhai Bhanabhai Patel v. Navnitbhai Nathubhai Patel & ors. (2004) SCC (Cri) 2032) observed as follows:

"The delay in questioning these witnesses by the investigation officer is a serious mistake on the part of the prosecution. We do not think that the High Court erred in disbelieving these witnesses."

38. It has come out in the second case that as PW59, who was also introduced to prove conspiracy, turned hostile to the prosecution, he had to face harassment from police and had to move a police protection writ petition before this court. (See Ext.D24 in the second case). These facts relating to the threat to PW59 from police as he did not support the prosecution case were not available in the first case when the court below considered the evidence on conspiracy. This fact cannot also be neglected.

39. Added to this is the alleged round about turn by PW60 discussed in para 25 of the impugned judgment in the first case. After PW60 had given evidence on conspiracy in the first case, he wrote a letter to the accused about the circumstances that led him to speak so in court. Later he himself filed a petition alleging that he was made to write such a letter. On the face of the new facts brought in as regards PW59 in the second case, this somersault by PW60 shakes the credence of his evidence; in the light of the decision in Darshan Singh referred supra. Thus his evidence on conspiracy is not believable.

40. There is a further fact that PW3, who had left the campus allegedly upon the persuasions from accused

No.1, had never enquired about him after she realised that accused No.1 had vanished before she reached Kothamangalam. This long silence of PW3 with respect to her alleged partner, accused No.1, is also relevant in this regard. The version of the victim, in both the cases reveals that she had never enquired about accused No.1 with any one, at all. This conduct of hers is inconsistent with her theory that she left the school campus out of love towards or under the threat of the first accused. The theory of simultaneous threat as also love both acting as reasons prompting PW3 to accompany the first accused is inherently uninspiring also.

41. Apart from these there is no connecting link proved between accused Nos.1 and 2 and Dharmarajan. The presence of accused No.2 in the bus does not in any way connect accused No.1 to the alleged conspiracy. The prosecution has no case of any previous acquaintance between accused No.2 and PW3. The evidence of PW66 does not speak about any conspiracy. She speaks about giving MO1 album to accused No.1 who undertook to give it to PW3. This will reveal only acquaintance among the said three who happened to see in the bus regularly and does not give any support to the theory of conspiracy.

42. The trip sheet of the buses, Ext.P115, produced by PW78, R.T.O. speaks about timing of the buses in which PW3 had travelled from Munnar to Kothamangalam on 16.1.96 and nothing else. In the absence of production of the letter written by PW3 as is discernible from the evidence of DW3 and Ext.X13 in the second case, this travel can be as of her own in the nature of the contents of the letter spoken to by DW3.

43. There is also no case for the prosecution that the alleged conspiracy among the three persons had been continued by Dharmarajan with other accused by presenting the girl for rape and gang rape to them and also in confining PW3 in the house of Accused No.38 and 39. We have gone through the evidence again and we could not find any allegation of meeting of mind of any of these persons except the alleged phone call made by Dharmarajan or by accused No.4 to Accused No.10. Nobody has spoken about the meeting of minds by these accused to have a further conspiracy regarding the commission of rape or gang rape. The second part of the conspiracy is alleged as the integral part of the initial conspiracy itself. The prosecution could not prove the initial conspiracy and thus any continuing conspiracy as well.

44. It has to be borne in mind that even going by the prosecution case accused No.1 did not have any role at all after 16.1.96. The prosecution has no evidence, theory or even semblance of a suggestion that the first accused had any role to play after 16.1.96 or had enjoyed any benefit from the alleged agreement to commit crimes. The allegations against the first accused are thus found to be inherently uninspiring. About the involvement of Dharmarajan in the conspiracy prior to his alleged meeting PW3 in the Bus stand at Kottayam, there is no evidence worth the name except his presence there on 16.1.96. The case of the prosecution that Dharmarajan was waiting at Metro lodge from 2.1.96 anticipating that the other conspirators would bring PW3 to Kottayam bus stand on some day thereafter is, to say the least, improbable and uninspiring. Thus these facts are sufficient to conclude that the prosecution has failed to prove the conspiracy, including its commencement from the alleged kidnapping of PW3. The prosecution has not thus succeeded in proving the case of conspiracy alleged against any of the accused beyond reasonable doubt. Thus the conviction under Section 120-B has to be reversed.

45. Next we will consider the case of kidnapping. It is the case of the prosecution that the first accused had kidnapped PW3 so that he could hand her over to Dharmarajan and other accused. While considering the conspiracy alleged by the prosecution we referred to a letter written by PW3 as spoken to by DW3 and as referred to in Ext.X13 in the second case. We have also come to the finding that that letter would reveal the reason for her disappearance. The contents is spoken to by DW3 that, she was going on her own from the family. Though the letter is known to the police, they did not reveal it. If it contained the version that she had gone on her own, allegation of kidnapping of PW3 from lawful custody of her parents cannot be sustained. The letter thus also takes us a long way to disprove the case of kidnapping. That letter cannot any more be disputed by the prosecution in the light of Ext.X13 in the second case. Non production of this letter, the existence and contents of which are proved by DW3 and Ext.X13, creates a doubt against the theory of kidnapping alleged by the prosecution. From S.Varadarajan v. State of Madras (AIR 1965 SC 942) it is clear that if a minor girl leaves her parents on her own, the persons who subsequently come across the minor cannot be held to be guilty of "taking or enticing" the minor out of the lawful

keeping of its guardian. Non production of the letter and suppression of the same must in these circumstances certainly entitle the accused to the benefit of doubt on this crucial aspect. So the conviction under Section 363 IPC shall also have to be reversed, giving the benefit of doubt to the accused.

46. We will now consider the other offences related to kidnapping viz., those punishable under Sections 365 and 368 I.P.C. No kidnapping is proved satisfactorily and beyond doubt as found above. So there arises no case of confining a kidnapped minor nor concealing such a person revealing offences punishable under Sections 365 and 368 I.P.C. Consequently the conviction under Section 365 and 368 shall also have to be vacated. Under Section 368, accused No.38 and 39 alone had been convicted and their conviction is on those counts alone.

47. Next we will have to deal with the alleged rape. The evidence regarding rape is spoken to by PW3. A reading of the evidence of PW3 will categorically reveal that there had been several occasions of sexual intercourses with her by several of the accused during the 40 days period from 16.1.1996 to 25.2.1996, except by accused Nos. 1, 2, 17, 38 and 39. The Public Prosecutor is justified in submitting that appreciation of evidence of a victim in a rape case shall be on a different footing from the evidence of any other injured witness in other criminal cases. The evidence of the rape victim shall have to be given due weight as held by the Supreme Court in the decision in State of Maharashtra v. Chandraprakash Kewalchand Jain (1990 SCC (Cri) 210) and Rafiq v. State of U.P (1980 SCC (Cri) 947). In the former it was held that:

> "The prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is

dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence. We have, therefore, no doubt in our minds that ordinarily the evidence of a prosecutrix who does not lack understanding must be accepted. The degree of proof required must not be higher than is expected of an injured witness. For the above reasons we think that exception has rightly been taken to the approach of the High Court as is reflected in the following passage:

"It is only in the rarest of rare cases if the court finds that the testimony of the prosecutrix is so trustworthy, truthful and reliable that other corroboration may not be necessary.

With respect, the law is not correctly stated. If we may say so, it is just the reverse. Ordinarily the evidence of a prosecutrix must carry the same weight as is attached to an injured person who is a victim of violence, unless there are special circumstances which call for greater caution, in which case it would be safe to act on her testimony

if there is independent evidence lending assurance to her accusation."

In the latter one, it was observed by the Apex Court that:

"Hardly a sensitized judge who sees the conspectus of circumstances in its totality and rejects the testimony of a rape victim unless there are very strong circumstances militating against its veracity."

48. The Public Prosecutor has also relied on the recent decision of the Supreme Court reported in State of Himachal Pradesh v. Shree Kant Shekari (AIR 2004 SC 4404), wherein it was held that:

"It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. She stands at a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is physical as well as psychological and emotional.

But even in that decision, the Apex Court has made it explicitly clear that:

However, if the Court on facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice would suffice."

49. In State of Maharashtra v. Chandrapakash Kewalchand Jain (AIR 1990 SC 658) also the Apex Court ruled in the same lines that:

"We think it proper, having regard to the increase in the number of sex-violation cases in the recent past, particularly cases of molestation

and rape in custody, to remove the notion, if it persists, that the testimony of a woman who is a victim of sexual violence must ordinarily be corroborated in material particulars except in the `rarest of rare cases'. To insist on corroboration except in the rarest of rare cases is to equate a woman who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood"

indicating that, there can be rarest of rare cases where corroboration shall be insisted. We do agree - not corroboration, not even assurance, but certainly satisfaction of the judicial conscience must be insisted.

50. Reversing conviction by Sessions Court and its confirmation in appeal by the High Court, the Apex Court in Surjan & anr. v. State of M.P. (AIR 2002 SC 476) held that:

"In a case where six indicated persons should be visited with a minimum sentence of 10 years' RI, the Court cannot afford to act on the uncorroborated testimony of the prosecutrix unless the said evidence is wholly reliable. When looked at the testimony of PW1 from all the different angles highlighted above, we are unable to hold that her testimony is wholly reliable. In such a situation, materials for corroborating the testimony of PW1 could not be obviated. But unfortunately there is none."

Therefore the legal position is as held in Vimal Suresh Kamble v. Chaluverapinakeapal S.P. & anr. {(2003) 3 SCC 175} that:

"It is no doubt true that in law the conviction of an accused on the basis of the testimony of the prosecutrix alone is permissible, but that is in a case where the evidence of the prosecutrix inspires confidence and appears to be natural and truthful.

Because as held by the Apex Court in Sudhansu Sekhar Sahoo v. State of Orissa (2003 Crl.LJ 4920),

"It is also reasonable to assume that no woman would falsely implicate a person in sexual offence

as the honour and prestige of that woman also would be at stake. However, the evidence of the prosecution shall be cogent and convincing and if there is any supporting material likely to be available, then the rule of prudence requires that evidence of the victim may be supported by such corroborative material."

51. In yet another recent decision reported in State of Punjab v. Ramdev Singh (AIR 2004 SC 1290), the Supreme Court again reiterated that:

"It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. She stands at a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the Court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice would do."

52. At the same time the defence has a contention that appreciation of evidence of PW3 in this case, who is said to have withstood the alleged atrocities committed on her for a long period of 40 days shall have to be viewed in a different angle rather than in an ordinary rape case or a rape for one or two days. As held in Rafiq's case cited supra:

" We do not agree. For one thing, Pratap Misra case laid down no inflexible axiom of law on either point. The facts and circumstances often vary from case to case, the crime situation and the myriad psychic factors, social conditions and people's life-style may fluctuate, and so, rules of prudence relevant in one fact-situation may be inept in another. We cannot accept the argument that regardless of the specific circumstances of a

crime and criminal milieu, some strands of probative reasoning which appealed to a Bench in one reported decision must mechanically be extended to other cases. Corroboration as a condition for judicial reliance on the testimony of a prosecutrix is not a matter of law, but a guidance of prudence under given circumstances. Indeed, from place to place, from age to age, from varying life-style and behavioural complexes, inferences from a given set of facts, oral and circumstantial, may have to be drawn not with dead uniformity but realistic diversity lest rigidity in the shape of rule of law in this area be introduced through a new type of precedential tyranny. The same observation holds good regarding the presence or absence of injuries on the person of the aggressor or the agressed."

53. Even in C.K.Jain (supra) it was pointed out that:

"We think it proper, having regard to the increase in the number of sex violation cases in the recent past, particularly cases of molestation and rape in custody, to remove the notion, if it persists, that the testimony of a woman who is a victim of sexual violence must ordinarily be corroborated in material particulars except in the rarest of rare material particulars except in the rarest of rare cases."

Thus there can always be rarest of rare cases where corroboration is required. Based on the facts in this case, is it one of that sort? If the answer is in the affirmative, the evidence of the victim in this case shall be viewed in the same angle as an injured witness who is always interested in the outcome of the case. In such circumstances the court shall always have to seek materials to offer satisfaction to the judicial conscience, if not corroboration or even assurance. The materials must be such as to induce satisfaction in the judicial mind. Or else the evidence should have been one which shall inspire implicit confidence in the mind of the court. In other words, as held in Vimal Suresh Kamble's case (supra) if,

"The evidence of the prosecutrix in this case is not of such quality, and there is no other evidence

on record which may even lend some assurance, short of corroboration that she is making a truthful statement",

it is of no use to fasten conviction.

54. We are unable to persuade ourselves to accept the argument that in all cases the rigid rule of acceptance of the evidence of prosecution is to apply. Precedents can only guide and assist the courts in the matter of appreciation of evidence - whether of a rape victim or other victims or witnesses. It is the prudence and sound judgment of the court, its assessment of circumstances, its knowledge of men and matters, its assessment of probabilities, its knowledge of the common course of events and behaviour and conduct of individuals and its trained intuitions which should help it to resolve subtle questions of appreciation of evidence. An emotional approach or insistence that the evidence of all rape victims have to be accepted is not warranted or permitted by law and would result in negation of justice.

55. The Investigating Officers have attempted to secure evidence to corroborate the evidence of PW3 about her movements and residence at various places between 16.1.96 and 26.2.96. Evidence of PW3 on those aspects have been substantially corroborated. But the million dollar question in this case is not whether PW3 had stayed at these places and whether the indictees had intercourse with her. The question is whether such intercourses were without her consent to be called rapes. It is on that subtle, finer and sublime aspect that the evidence deserves to be scrutinised with care. Is PW3 after returning to the fold of her parents on 26.2.96 attempting to wish away all consensual sexual intercourses between 16.1.96 and 26.2.96 by calling them rapes without her consent? Is she trying to paint herself white and attempting to place the blame for her unfortunate predicament on the shoulders of all with whom she had sexual intercourse by making convenient omnibus assertions that they were all rapes? We cannot assume that the consent is no consent because PW3 was a young girl who had just crossed 16 years. Under law she had reached that age of consent. Why did she consent and was it prudent on her part to consent are not certainly the questions before Court. Did she consent - whether for the proper reasons or the improper ones? Is such consent vitiated on any grounds recognised by law? These are the questions to be considered. Her young age by itself cannot be legally accepted as a sufficient reason to vitiate

consent, because she was admittedly above the age of 16 years at the relevant time. These questions have to be considered cognisant of the law relating to burden of proof and benefit of doubt wherever applicable. The yardstick of the ordinarily prudent person in the polity has to be adopted by the court.

56. When we read the evidence of PW3, we have to be cognisant of her psyche - her mental make up. Her past conduct and behaviour have to be borne in mind. She was only a student of 9th standard. She had squandered Rs.450/- entrusted to her by her father for remitting hostel fees, whether it was given to Arun as stated by the appellants or to the first accused as stated by the Prosecutor. That piece of conduct is admitted by her. Though there is no such statement earlier in the C.D. she now explains it away saying that she had paid the amount to the first accused. A school girl will always be obliged to account when hostel fee is not remitted. She must have known that she will have to account. Her conduct showed that she was still unmindful of it. She was prepared to take that risk. Added to this is, as suggested by the counsel for the appellants, that she was even courageous enough to approach a jeweller for pledging an ornament of hers which her parents had given her to wear, meaning thereby that she had that much capability or courage of even withstanding a question by her parents as to the loss of such ornament. She admitted during evidence that she had done so. So this gives indications about the conduct and mental make up of PW3. She is shown to be one who was prepared to take such risks. She was mentally ready to take that risk for raising money. She needed money. She was prepared to raise it. She had needs which her parents did not know. She was prepared mentally to advance a different false version to justify herself. The jeweller was a kind soul. He became suspicious. She gave a false identity to him. He verified her books. He realised her ploy. He informed PW1. She is thus shown to be a girl of deviant character. She was not a normal innocent girl of that age. She was a different person. The peculiarity in her personality must realistically be borne in mind. The evidence of a person of her age with such a conduct certainly has to be viewed seriously and with caution. A court cannot meekly swallow her version. It requires serious critical assessment.

57. It is also brought to our notice that a question was asked during cross examination as to whether

she was interrogated by the Investigating Officer in "Abhaya case". Abhaya case is a notorious one known to every one in Kerala. Her answer was that she did not remember whether she was questioned in that case. This is an evading answer. No one could have forgotten that if she were really questioned in such a case. This shows her attitude. Her capability not to reveal to others what she does not feel inclined to. The aspect by itself is irrelevant. But the attitude is certainly relevant while appreciating the evidence.

58. Referring to her evidence in court, the non-identification of accused No.23, a Professor, by her is also highlighted by the appellants. Even according to her, accused No.8 and 23 raped her while in Samudra Hotel in Kanyakumari on 2.2.1996. Next day she was taken to Thiruvananthapuram in a car. This Professor, accused No.23, was also in the car while on the journey from Kanyakumari to Thiruvananthapuram. Thus he was with her on 2.2.96 and 3.2.96 for quite a long time. In spite of that she did not identify him in court, though she says that she had noticed him, specifically, as a man aged 50 to 55 years, among the persons who came to her while in Kanyakumari. PW97, the final Investigating Officer has admitted that, accused No.23 was the Professor while he studied in College. It is thus suggested that she is prepared to implicate any one or avoid another, even at the instance of the of the Investigating Officer. Though this contention as such has no bearing on this case, her inability to identify the professor who was with her for two days including in a journey and whom she had noticed as the aged among the lot, is something to be kept in mind, while appreciating her evidence. We repeat careful and cautious assessment, not naive acceptance is the imperative necessity.

59. It was suggested by the defence inviting our attention to the evidence of PW3 that she was speaking untrue version about her leaving Mount Carmel School, Kottayam while in standard VIII to join the Little Flower Girls High School at Nallathanni. According to the appellants it was because of her expulsion from the former school due to bad conduct that she could not carry on her studies for an year there. That was why she had gone for tuition under PW55. But her version is that she had been in the habit of bed wetting and therefore had to discontinue the studies in the Mount Carmel School as she lost the help of her elder sister, who left the school on

completion of her study, for cleaning the urine soaked bed linen. But her evidence further shows that she attained puberty at the age of 10 1/2 years, obviously while studying in 5th or 6th standard. It is pointed out that it is too unbelievable that such a girl studying in Standard 8 then could not clean by herself, her urine soaked bed wetted night linen. That means she is always seeking for some or other excuse for her acts, one way or other. Even though we do not attribute any importance by itself to the change of school, the attitude of PW3 is revealed by this also.

60. It is also revealed from the evidence of PW1, the father of PW3, that even though PW3 was in a hostel managed by nuns, he was keeping an unusually vigilant eye on her. There is evidence in this case that the nuns had contacted him over phone as to whether PW3 should be granted permission to go out of the hostel on 16.1.96 itself in order to give her clothes to the launderer. This is so unusual and it speaks about the deep apprehension of her father about her conduct and movements. Such telephone calls from the hostel became necessary only as insisted by him, as he was suspicious and unsure of his daughter. PW1 apprehended that she may run away, it is compellingly indicated. Even when she was found missing his first statement in Ext.P1 is that he did not know why "she had run away" (..... .....). It is also discernible from the evidence of DW3 and from Ext.X13 and the letter spoken to by DW3 in the second case, that she had written a letter to DW3, Kochumon, the driver of a bus. Kochumon had also deposed that PW3 had a conduct of easily getting acquaintance with all. Her inclination to have such friendly relationship with a stranger like Kochumon must also be taken note of while appreciating her evidence.

61. When such a girl had gone out of the custody of her parents for about 40 days and had been with several other persons, it cannot be said that her evidence regarding her unwillingness for sexual intercourse should be believed as such without insisting on satisfactory materials for assurance, as in the case of a rape victim of a solitary instance or being ravished by one or a group of persons for one or two days.

62. Added to these is the fact that during the long period of 40 days she had been taken from place to place in public conveyances and she had been kept in lodges where others had also sought accommodation. She was also taken to hospitals twice, as admitted by her during this

period. But there was no attempt on her part to escape from the clutches of any of the accused, including Dharmarajan. While appreciating the evidence on this aspect one cannot lose sight of the state of mind of her detractors - the indictees. If they had even a suspicion that she was unwilling, would they have even from the very next day i.e. 17.1.96 withstood the risk of taking her along public roads to public places in public conveyances and through places which she was familiar with? While appreciating her evidence about her consent or otherwise such conduct of her detractors, which is inconsistent with the assertion of absence of consent by PW3 cannot be ignored or lightly wished away.

63. After she had allegedly realised on the night of 16.1.1996, on the first day, in the Metro lodge at Kottayam that the mission of Dharmarajan was not to save her or to entrust her to her uncle at Mundakayam, but to ruin her, when she was taken on the morning of 17.1.96 from the lodge and reached Kottayam bus stand; there should normally have been an attempt for escape. There was none else at that time. According to her even on the previous night, she came to Kottayam bus stand, on her own decision to go to her aunt residing in Kottayam. So she could have easily attempted to escape as it was a place of acquaintance for her. She knows the house of her aunt. She had been studying, admittedly, in Kottayam earlier. Instead, she was, in a public conveyance, as admitted in her evidence, accompanying Dharmarajan to Ernakulam. Was that transportation, through territory not alien to her, of a captive minor who could at any moment have foiled the designs of the only detractor at that time by reacting against him or was it a willing journey of a misguided girl above 16? The question requires and demands closer and anxious search The response has to be rational and not emotional.

64. Ext.P57(a) register discloses that room taken by Dharmarajan in Metro lodge, Kottayam was vacated in the morning of 17.1.96 itself and he took a room in Anand lodge at Ernakulam only at 6.45 P.M. on 17.1.96 as is revealed by Ext.P58 and 58(a). She was thus for long hours in day light in the open space in Ernakulam, a busy city. Necessarily there were occasions for her to escape from Dharmarajan who had, according to her, really spoiled her on the previous night, at least by attracting the attention of the public. As admitted by PW3, there was none other than him at that time with her. At least Dharmarajan must

have been wary of that possibility. An assessment on probabilities has to take into account all the realities of the situation - including the apprehension which must have worked in the mind of Dharmarajan, the alleged tormentor, who took the risk of taking PW3 the alleged captive minor in that manner.

65. She also did not attempt to escape when she had been kept in a room at Hotel Geeth in Trivandrum while on their way from Kanyakumari to Kuravilangad, by the 4th accused. Even going by the evidence of PW3, after an over night stay in Hotel Geeth, in the next morning, accused No.4 had left the room keeping her alone in the room and locking it from outside. He came late in the evening. Necessarily a person who was not consenting to the allegedly atrocious acts of the 4th accused or any one else, could not have remained alone there without thinking of the option to escape after two or three hours or even half a day, if she had been suffering atrocities from the accused persons as deposed by her. These human possibilities and probabilities cannot be ignored.

66. It is also revealed that PW12 Jacob Sait had approached her in Hotel Geeth. But as admitted by PW3 he did not commit any mischief on her. He was sympathetic towards her. She was alone in the room at that time, and on allegedly seeing her plight, PW12 withdrew from the room. It was on 4.2.1996. According to her, she was suffering a lot for about three weeks by that time. Even to PW12, a person of such a nature found by her for the first time after 16.1.1996, she did not admittedly reveal her identity and alleged plight, which she had admittedly spoken to other rapists; so that she could manage to escape from the 4th or other accused.

67. It is also pointed out that from Kumali Dharmarajan had taken PW3 to Palghat and stayed in Hylex lodge at Palghat. After an overnight stay, they went over to Vanimmel in Kozhikode, where accused No.16 was residing. He was an employee in the Panchayat and a friend of Dharmarajan. Even going by the evidence of PW3, Dharmarajan had gone out leaving PW3 in the house and came back only on the next day. She had been alone there for a long time, when two teachers, who were the inmates of the house and the 16th accused had gone for their job. A close neighbour of the house of accused No.16 has been examined as DW5. He was also a witness to the scene mahazar prepared by the police after inspecting the house of 16th accused. He had deposed that he had seen PW3 in the

courtyard and veranda of the house and the owner of the house Nabeesa told him about the girl in the house of accused No.16. Thus in spite of the fact that she had an occasion to be alone in that house she did not make any attempt to escape. She had been in that house for three days from 22.1.96 to 25.1.96. If the version given by PW3 is correct, by that time, she had suffered almost every day from 16.1.96 onwards continuous rapes by Dharmarajan, Accused No.5, one Devassiachen, an absconding accused and Accused Nos.4, 7 and 16 at different places. Any one in such situation will think of an attempt to escape, if not an escapade.

68. It is also pointed out that she had been taken for journey for a long distance throughout the breadth and length of the State and even beyond the State, during these 40 days. She had travelled between Kanyakumari in the south and Vanimel in Calicut in the north, as spoken to by her. It is also stated that she had travelled in the breadth of the State right from Ernakulam to Kumali, a hill station, and even crossed the border to Kambam and Theni in Tamil Nadu. Mundakkayam and Kottayama, as admitted by PW3, are familiar places for her. In Kottayam she had studied for few years. More over, when she was placed in a helpless situation at Kothamangalam due to vanishing of the first accused on 16.1.1996, she had deliberately decided to go to Kottayam even during night to reach her aunt there. She had come to Kottayam on more than two occasions during these 40 days in public conveyance and even to bus stand. But she had not attempted to escape. It is also in evidence that she had passed through Mundakkayam. Mundakkayam is also a place where she decided to go on the night of 16.1.1996 to reach her uncle. She had been a commuter from Mundakkayam to Kottayam while studying in Kottayam, as spoken to by her in the court below. She had passed through Mundakkayam in a public conveyance during the said 40 days. In spite of that she had not tried to escape so that she can reach the house of her uncle, whom she had telephoned earlier.

69. As admitted by PW3, while in the custody of the accused, she had made a phone call to her uncle PW57. She alone knew that telephone number. That telephone call is of vital significance. Why did she make that call? Did she make it on her own? Certainly her detractors could not have asked her to make the call. That would not serve their purpose at all. She was, it is evident, free to make a telephone call to her relatives. If she were in

captivity her detractors would not have permitted her to make a call. What did she tell PW57 when she made the call? If she had told PW57 (or if the conversation conveyed to PW57) that she was in captivity the reactions of PW57 and PW1 (to whom PW57 admittedly conveyed information of that conversation) must have been different. In Ext.P1 the allegation of PW1 was that the girl had run away. If the evidence of PW3 and PW57 were true, here was information received by PW57 and PW1 that she was captive. The first response must have been to run to the police and inform them that the girl had not run away; but was taken captive detained illegally. What followed the telephonic conversation was not that. The marked portions of the C.D. statement of PW1 indicates that PW57 told PW1 that PW57 had asked PW3 "to return". Not only PW57 but his daughter in law had also spoken to her. Was PW3 calling PW57 on her own free will? Did PW57 then feel the need to advise her to return? Why did not PW57 or PW1 choose to inform the police after that call that it was not a case of the girl running away as perceived at the time of lodging Ext.P1, but one of kidnapping of PW3 by some miscreants? We must look for answers to these disturbing questions also.

70. It is also her version that she had been taken to two doctors. First in Periyar Hospital in Kumali on 21.2.96 and then in Anpu Hospital at Elappara on 25.2.96. By that time, she allegedly had pain in her private parts. On account of painful compelled intercourses, puss was allegedly coming from vagina and she was too weak, according to her. She had been taken by the 2nd and 17th accused to PW27, the doctor at Periyar hospital. Ext.P24 is the O.P. card in that hospital. The only ailment spoken to by her is sore throat, as seen from Ext.P24. Whatever that be, she had been in the safe hands of a doctor and in a secure place like a hospital. She had, according to her, as spoken to in court, very painful ailments at that time including in her Vagina. But according to PW27, the doctor, "she appeared normal in gait and appearances". She told him that she went for a visit in Thekkady, a place of tourist attraction and was going back to Ponkunnam. Ponkunnam is not her place, but the place of one of the accused. Even if it had been said so by any one else, nothing prevented her to disclose her plight to the doctor while in that hospital. This cannot be the words and attitude of a girl subjected to rape for several days together. She did not even disclose her true name to the Doctor. Ext.P24 O.P. card discloses a

different name. If she was in real difficult situation she could at least try at that moment to escape from the clutches of the accused and Dharmarajan and can safely reach her parents or her uncle. A person suffering the trauma described by her for a month will certainly try for that; because nobody can snatch her away from the hospital and from the hands of a doctor. Her conduct that she did not do so even in that situation certainly speaks volumes.

71. It is also in her evidence that the third accused Jamal took her to his relatives and kept her with his relatives for an over night stay on 25.2.96. During the night she developed stomach pain. She had not admittedly revealed her identity or plight to the inmates of that house, who were only ladies. They had taken her to Anpu hospital for treatment by PW28, the doctor there. She did not reveal her correct name to the doctor there also. In Ext.P25 prescription card her name is written as `Anjali'. According to her she had constipation and back pain. She was very weak. It is in evidence of PW.28, the doctor and PW29, the nurse there, that she had been administered enema. For this the nurse had to undress her. Necessarily if any discolouration or inflammation was there, it would have been noticed by the nurse. The doctor had deposed that she was not terrified. PWs.28 and 29 have deposed that after administration of enema, she became normal and was relieved of her debilities. She could at that time reveal her identity to PW28, the doctor or to PW29, the nurse. She did not do so. So unusual a conduct of a person, if she really did not like the company of the accused.

72. Visits to the doctors assume significance and relevance. Even for a comparatively minor ailment of sore throat for a day she was taken to a doctor. Does that indicate cruel conduct of the captors or sympathetic conduct of friendly individuals? If her version were true she was going on telling the persons brought by her captors for prostitution that she was unwilling. She fully knew that such persons would tell her detractors of her conduct. The evidence is that her detractors knew that she was telling so to such persons. She was allegedly taken to task for such behaviour. If she would tell so to such persons, knowing the risk involved, why did she not tell the independent doctors? If her detractors knew or had reason to think that she may divulge inconvenient details even to persons brought by them, would they have taken the risk of taking her to respectable doctors for such a minor

ailment like sore throat? It doesn't appear to be normal conduct of ordinary individuals to do so. These disturbing possibilities have also to be taken into account while considering the acceptability of the evidence of PW3.

73. It is also to be noted at this juncture that whenever a rapist came to her, she had revealed that she had heavy pain and she was cheated, she was the daughter of Munnar Postmaster and she had also revealed her correct name. It is unbelievable that such a person did not reveal her identity to PWs. 27, 28 and 29, in whose hands she was safe, She could have revealed her identity or at least her alleged ailments on those two occasions and attempted to escape from the jaws of the rapists.

74. These are sufficient indications in the conduct on the part of PW3 that her evidence as a rape victim cannot be treated as in the case of any other rape victim in the decided cases cited before us. As held in Rafiq (1980 SCC (Crl) 947) extracted supra, the facts and circumstances often vary from case to case, the crime situation and the myriad psychic factors and so on. So rules of prudence relevant in one fact situation may be inept in another. To quote the words of Justice Krishna Iyer once again,

> "We cannot accept the argument that regardless of the specific circumstances of a crime and criminal milieu, some standard of probative reasoning which appealed to a Bench in one reported decision must mechanically be extended to other cases."

75. So taking all the aforesaid circumstances together a person like PW3, who deposed that more than 30 persons were having intercourse with her at different places like Kumali, Theni, Kambam, Palaghat and Vanimmel, it cannot be believed from her evidence alone that she was not a consenting partner. As a guidance of prudence under the given circumstances, at least convincing assurance if not corroboration has to be searched for judicial reliance on the testimony of the prosecutrix in this case. In this case necessarily apart from assurance, corroboration may really be required before a conviction is entered into in respect of a serious offence under Section 376(1) or 376(2)(g) believing her testimony. The evidence of PW3 does not appear to be cogent and convincing to inspire confidence for the aforesaid reasons, because as held in

Vimal Suresh (2003 (3) SCC 175):

"the evidence of the prosecutrix in this case is not of such quality"

to be acted upon without corroboration or at least assurance that she is making a truthful statement.

76. Whether PW3 was a consenting/willing partner for the intercourse is the moot question. As already mentioned, this is not an occasion of a sudden and solitary instance of rape, nor a situation of a forcible abduction and consequent rape for a day or two. According to her she had been raped continuously for nearly 40 days except when she was on her menstrual periods once, by several at different places in the State and outside, in hotels and rest houses including in places of tourist attraction like Kanyakumari and Kumily. Absence of consent on all such occasions, in spite of several instances when she could have escaped as mentioned above, cannot be gathered only from her evidence or from what she says in court. Assurance/corroboration not ocular, but from circumstances and broad probabilities, must be searched for. It has to be examined in the light of the peculiar fact situation of this case.

77. As held in Rao Harnarain Singh v. State (AIR 1958 Punjab 123); relied on by the Special Public Prosecutor:

"A woman is said to consent, only when she freely agrees to submit herself, while in free and unconstrained possession of her physical and moral power to act in a manner she wanted. Consent implies the exercise of a free and untrammelled right to forbid or withhold what is being consented to; it always is a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former."

The decision in State of Maharashtra v. Prakash and anr. (1992 Crl.LJ 1924) relied on by the Public Prosecutor, has no relevance to the fact situation in this case. It was a case of rape by a police constable at whose instance the victim was called out from the house in the late hours at 2 a.m. It is in such peculiar fact frame that the Apex Court held that:

"To these poor rustic helpless villagers, the police constable represents absolute authority. They had no option but to submit to his will. In all the facts and circumstances of the case, therefore, we are of the opinion that the learned single Judge was in error in acquitting the accused. Accordingly, we set aside the judgment of the learned single Judge and restore that of the learned Sessions Judge."

The other decision relied on by the Public Prosecutor reported in State of Himachal Pradesh v. Mange Ram (2000 Crl.LJ 4027) is a case where:

According to the prosecutrix she resisted the accused by scratching him with nails",

and where

she also stated that the accused gagged her mouth when she attempted to cry aloud."

In the 590 pages long deposition in the first case and another 520 pages long deposition in the second case, PW3 has no case that she had made any resistance even on any of the occasions of alleged rapes. The alleged physical threat by the rapist was only once on the first occasion of rape. So the said decision also has no application to the facts situation here.

78. Even in Uday v. State of Karnataka (AIR 2003 SC 1639) relied on by the Public Prosecutor, the Supreme Court has made it clear that:

In the ultimate analysis, the test laid down by the Courts provide at best guidance to the judicial mind while considering a question of consent, but the Court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the

question whether the consent was voluntary or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.

79. In this background it is advantageous to refer to two decisions of the Apex Court. The first one is Jinish Lal Shah v. State of Bihar (2003 (1) SCC 605). The facts there are almost similar to the case on hand. In the case on hand in the light of the letter written by PW3 it cannot be ruled out that she had not left her parents on her own. She was away from her house from 16.1.96 to 25.2.1996. She went away with clothes and money. Keeping this in mind, the following dictum in Jinish Lal Sha (supra) can be read.

If we see the sequence of events starting from 30.4.1989 to 10.5.1989 it is clear that she has accompanied the appellant willingly.

xx xx xx

On the contrary, we notice she was with him from 30th April to 10th May, during which period she had travelled by train, tempo and stayed with the appellant without there being any evidence of her having protested or having made any effort to seek help from others or even trying to run away. Apart from that from the record, it is seen that PW6 in the FIR had stated that "I got information from my wife in the house that Geeta went away by taking clothes and a gold chain and she took Rs.500/- in cash in total amounting to Rs.8500/-" This evidence though subsequently resiled by PW6 indicates that PW1 had planned her departure from the house in advance and had willingly gone away with the appellant which also indicates that there was no threat or inducement either in regard to her leaving the house or in regard to accompanying the appellant. In such situation in the absence of any other material to show to the contrary, it will be difficult to accept the prosecution case that either there was a forcible marriage or rape as

contended by the prosecution to find the appellant guilty under Section 366 or 376 IPC. Since the courts below proceeded on the basis that PW1 was a girl below the age of 18 on the date when she left the house they have not properly appreciated the evidence in regard to her consent which is a mandatory requirement before finding a person guilty under Section 366 or 376 IPC.

The other decision is Kuldeep Mahato v. State of Bihar ((1998) 6 SCC 420). It was held:

"Then coming to the conviction of the appellant under Section 376 IPC, although both the courts below have held after accepting the evidence of the prosecutrix as being truthful that the appellant had forcibly committed the rape, we are of the opinion that the said finding is unsustainable. The prosecutrix had sufficient opportunity not only to run away from the house at Ramgarh but she could have also taken the help of the neighbours from the said village. The medical evidence of Dr.Maya Shankar Thakur, PW5 also indicates that there were no injuries on the person of the prosecutrix including her private parts. Her entire conduct clearly shows that she was a consenting party to the sexual intercourse and if this be so, the conviction of the appellant under Section 376 IPC cannot be sustained. There is one more additional factor which we must mention that it is not the case of the prosecutrix that she was put in physical restraint in the house at Ramgarh, with the result that her movements were restricted. This circumstance also goes to negative the case of forcible intercourse with the prosecutrix by the appellant."

In the light of the facts discussed above, these dicta as aforesaid can safely be applied to this case to come to the conclusion that there is no convincing evidence to show that she was not an unwilling partner for the sexual intercourse. The claim of the accused to at least the benefit of doubt has to be considered anxiously.

80. It cannot be contended any more, as the

learned Public Prosecutor did, that the absence of consent is a matter beyond the burden of proof by the prosecution. The definition of rape under Section 375 I.P.C. reveals that a person having intercourse with a woman against her will and without her consent is guilty of that offence. A man shall be said to commit rape if he had sexual intercourse with a woman against her will, without her consent or with the consent generated by putting her or any person in whom she is interested in fear of death or of hurt. Admittedly, according to the prosecution, PW3 had crossed the age of consent, viz.,. 16 years. So want of consent is an ingredient of the offence and that ingredient has to be proved by the prosecution by some reliable evidence. Then alone rebuttal by proving positive consent arises. The Supreme Court in Uday (AIR 2003 SC 1639) has made it explicit in unequivocal terms that court:

> "must also weigh the evidence keeping in view the fact that the burden is on the prosecutrix to prove each and every ingredient of the offence, absence of consent, being one of them".

This was again reiterated in Deelip Singh v. State of Bihar (JT 2004 (9) SC 469) that:

> "the burden is on the prosecutrix to prove that there was absence of consent."

81. Consent is certainly "an act of reason, accompanied with deliberation, the mind of weighing, as in a balance, the good and evil on each side". The Public Prosecutor is justified in contending so. Consent supposes three things - a physical power, a mental power and a free and serious use of them. These ensure only the avoidance of intimidation, force, undue influence etc. It does not mean that use of these factors shall result in an intelligent, wise and righteous decision. In other words, it should not be a mere act of helpless resignation, non resistance and passive giving in. Therefore as held in State of Himachal Pradesh v. Mango Ram (JT 2000 (9) SC 408):

"Whether there was consent or not is to be ascertained only on a careful study of all relevant circumstances."

82. Section 90 I.P.C. specifies what cannot be regarded as consent under the Code. Consent given under fear of injury and under misconception of fact is not consent at all. That is what is enjoined by the first part of Section 90. This is from the point of view of the victim. The second part of Section 90 envisages that the indictee must have knowledge or reason to believe that the consent was given by the victim in consequence of fear of injury or misconception of fact. Thus the second part lays emphasis on the knowledge or reasonable belief of the person who obtains the tainted consent. The requirements from the points of view of both the parties have to be cumulatively satisfied. It has been held in Deelip Singh (JT 2004 (9) SC 469) that:

"In other words, the court has to see whether the person giving the consent had given it under fear of injury or misconception of fact and the court should also be satisfied that the person doing the act i.e. the alleged offender, is conscious of the fact or should have reason to think that but for the fear or misconception, the consent would not have been given. This is the scheme of Section 90 which is couched in negative terminology."

Again as cautioned in that decision itself:

The decided cases on the issue reveal different approaches which may not necessarily be dichotomous. Of course the ultimate conclusion depends on the facts of each case."

83. We have pointed out earlier, several situations including in hospitals when the victim in this case had the sure chances for escaping from the accused who, according to her, put her in great trauma of sexual exploitation. Reversing the conviction under Section 376(1) as confirmed by a High Court, the Supreme Court held in Kuldeep K.Mahato v. State of Bihar (1998) 6 SCC 420)

that:

> "Then coming to the conviction of the appellant under Section 376 IPC, although both the courts below have held after accepting the evidence of the prosecutrix as being truthful that the appellant had forcibly committed the rape, we are of the opinion that the said finding is unsustainable. The prosecutrix had sufficient opportunity not only to run away from the house at Ramgarh but she could have also taken the help of the neighbours from the said village. The medical evidence of Dr. Maya Shankar Thakur, PW5 also indicates that there were no injuries on the person of the prosecutrix including her private parts. Her entire conduct clearly shows that she was a consenting party to the sexual intercourse and if this be so the conviction of the appellant under Section 376 IPC cannot be sustained."

84. More over, is it safe to sentence three dozens of persons solely on the uncorroborated testimony of PW3 which arouses in the mind of the court the dissatisfactions referred above? Even in a rape case involving half a dozen persons, that too in an alleged rape only on a day, the Supreme Court in Surjan & ors. v. State of M.P. (AIR 2002 SC 476) observed - we may quote on fear of repetition - as follows:

> "In a case where six indicted persons should be visited with a minimum sentence of 10 years' RI, the Court cannot afford to act on the uncorroborated testimony of the prosecutrix unless the said evidence is wholly reliable."

In the line of the reasoning adopted by the Supreme Court in Sudhansu Sekhar Sahoo v. State of Orissa (AIR 2003 SC 2136):

> "All these factors cast a serious doubt on the prosecution case. Though there is no apparent motive for Ms.X to falsely implicate the appellant, it may be that Ms.X must have changed her mind when she came to know that others must have come to know

of her conduct. So there are so many loose ends in the prosecution case. On a consideration of the broad probabilities of the case, we feel that various factors cast a serious doubt about the genuineness of the case of Ms. X that she had been forcibly ravished by the appellant. The appellant is certainly entitled to the benefit of doubt."

85. In the aforesaid circumstances, we have to seek corroboration or at least some assurance to the evidence of PW3 on the precise aspect of want of consent. It is not enough if there is evidence of presence and intercourse between PW3 and the indictees. Assurance and satisfaction is needed on the precise aspect of want of consent. Keeping in mind the aspects dealt with earlier, we are hesitant to place implicit and absolute reliance on the testimony of the prosecutrix alone on this vital aspect. The judicial conscience does not get the assurance which it is strenuously searching for on this vital aspect. The Supreme Court in Chandraprakash Kewalchand Jain's case (supra) observed that:

"If for some reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice."

We did not get any assurance on absence of consent. Necessarily it is to be held that the prosecution failed to prove that there was absence of consent in this case. Therefore, giving the benefit of doubt the conviction under Section 376(1) I.P.C. shall have to be reversed in this case.

86. It is also to be noted that during the sojourn of 40 days, there was no physical restraint of P.W.3. She had been allowed to travel freely. She does not have a case that she was confined in the house of Accused No.38. As spoken to by D.W.4, she was seen in the courtyard and verandah in the house of Accused No.16. She was alone in Hotel Geeth at Trivandrum in a room for a whole day. P.W.12 was compassionate towards her while in that hotel. No body else was there at that time. When there is no physical restraint, that will speak much about the consent for sexual intercourse. This is one more additional factor

to be considered as held in Kuldeep K. Mahato v. State of Bihar (1998 (6) SCC 420) as follows:

> "There is one more additional factor which we must mention that it is not the case of the prosecutrix that she was put in physical restraint in the house at Ramgarh, with the result that her movements were restricted. This circumstance also goes to negative the case of forcible intercourse with the prosecutrix by the appellant."

87. There were several occasions for P.W.3 to reveal her identity to the non-rapists with whom she had come across and sought help. That she did not do so is an indicative factor that she may not have been unhappy with those who had been keeping her. She did not raise any objection with the treatment that she was receiving from their hands. If she had any humiliating or unbearable treatment, she could have, while in bus or bus stand on several occasions or in hospitals on two occasions or with P.W.12 who showed mercy towards her or while in the house of A16, A38 or A39 or in the house of the relatives of accused No.3, escaped or at least attempted to escape from the clutches of the accused.

88. The medical opinion available in this case also is of no help to the prosecution to prove that there was intercourse using force. As admitted by the victim, P.W.3, on 21/2/1996, the accused Nos.2 and 17 took her to the Periyar Hospital at Kumily. P.W.27 is the Doctor there and Ext.P24 is the O.P. card. The ailment as disclosed by Ext.P24 was sore throat since a day and mild cough. Her real name was not disclosed there. According to her, she was taken by them to the Hospital from the rest house at Kumily. She was brought there on 15/2/96. At that time, she says in evidence that, there was puss in her vagina and that accused No.3 and Dharmarajan took several persons to her room. From 15/2/96 to 21/2/96 when she was taken to the hospital, according to her, inspite of puss coming from her vagina, accused Nos.12, 11, 15, 13, 20, 37, 24, 31, 26, 25, 19, 18, Dharmarajan and Devassiachan had raped her. Few of them had raped her even more than once. According to her, during those days her condition was precarious. She had acute pain on the back of her hip.

89. To rape a girl with such ailments, pain and infected vagina may be humanly impossible, as contended by the appellants, except with roaring cry of the victim. She

has no case that she cried aloud on any occasion. It is in this background, the ailment of sore throat complained of to P.W.27 Doctor on 21/2/96 has to be viewed. Even if as stated by P.W.3, the ailment has been told by any of the accused who accompanied her or even if any one had threatened her not to disclose her true name or cause of ailments, nothing prevented her to disclose her full details and predicament to P.W.27, a doctor while in his hospital. She was in the protection of a doctor in a safe place like hospital wherefrom no one could snatch her away. A person like P.W.3 with the ailments as spoken to by her during those days could not be believed to have not disclosed such ailments if there had been such ailments. P.W.27, the doctor also deposed that she was normal in gait and appearance and that P.W.3 told him, that she was on visit to Thekkady a hill resort and was on her return journey to Ponkunnam. Thus, she had told these details to the doctor. If somebody else told so, she could have revealed the truth to the doctor, while in that hospital. This is indicative of the fact that there was no forced intercourse by nearly 15 persons as mentioned above during that week. If she suffered any such pain or ailment as to make intercourse painful and hence impossible, it is unlikely that she would not have complained to the doctors.

90. Again, the relatives of Accused No.3 took her to Anbu Hospital, Elappara on 25/2/96. It is to be noted that from Periyar Hospital she was taken to Kambam where according to her two persons including accused No.35 raped her. Later she was taken to Kumily again. She was unable to walk, she says. She stayed with accused Nos.2 and 17 for two days. Later she was taken to the house of the relatives of accused No.3. It was from that house she was taken to Anbu Hospital.

91. P.W.28 is the Doctor in Anbu Hospital. P.W.29 is the nurse there. Ext.P25 is the treatment card. This discloses that her only complaint was constipation and back pain. There also she did not disclose her true name and identity. The doctor prescribed enema and an injection. According to him, "she was not terrified", "her heart beat was normal", though "she was very weak", and "after the treatment, patient was relieved of her symptoms". He says that "repeated intercourse may cause constipation". P.W.29 nurse administered enema. According to her, she had been with P.W.3 for about 30 minutes. P.W.3 did not during this time reveal her plight to this nurse also. This evidence of P.W.28, P.W.29 and Ext.P25 also do not reveal any rape.

P.W.3 could have, if she had been in the beastly clutches of the accused, told the doctor her true situation, if she had been in such predicament. The inescapable probability is that even on such second occasion when she visited the doctor she did not suffer from any such ailment as to make intercourse painful and unbearable. Her physical condition then cannot convincingly contra indicate consent.

92. As already mentioned above, her sojourn of 40 days ended on 26/2/96 when she reappeared in the office of her father, P.W.1. According to him, she was very weak and was not in a position to walk. Inspite of that she was not taken to any doctor on that day. Her mother is a nurse in a Hospital. She also did not take her to any hospital. She was brought near the police station of P.W.82 who was investigating the man missing case registered as per Ext.P1(a) FIR. He did not take her statement. He did not even see her. She was not produced before a Magistrate. Inspite of all these she was allowed to go home with P.W.1. According to P.W.1, she disclosed the entire story to her mother. She, being a paramedical staff, did not think of taking her to hospital. Next day also she was not taken to hospital. She was brought to the police station by P.W.1 again. These reveal at least a doubt that she was not in such an unhealthy position as P.W.3 or P.W.1 says in court. The theory that she could not have consented to any sexual intercourse on 25/2/96 or the immediately preceding days is not supported by her physical condition as perceived by P.W.1 or his wife, who did not take her to a doctor till 28/2/96.

93. She was taken to a doctor for medical examination only on 28/2/96 by P.W.95. P.W.73 is the Doctor who examined her at about 2.30 P.M. on that day. Ext.P95 is the report of that medical examination. It did not reveal any struggle by P.W.3, perhaps because of the passage of time as submitted by the Public Prosecutor. But it is crucial that even P.W.3 had no case of any such violent physical resistence by her against the rapist at any time.

94. Vaginal examination was painful, valva was oedematous. There was infection. There was purulent foul smelling discharge. P.W.73 says that intra uterine contraceptive device can also cause infection. In chief-examination he says that "she would have suffered severe pain during the sexual act if it had continued as stated by her during the period of infection'. In further cross, he says that, he examined vaginal wall and that he

did not find it lacerated. He also agreed that during violent intercourse "laceration in vaginal wall occurs posteriorly". In further cross-examination by the accused he answered specific questions as follows:

"On the condition you had seen when P.W.3 was examined by you, I put it you that it is not possible to have sexual intercourse with P.W.3(Q).

It is possible provided force and intimidation is used (A). If force is used she would cry loudly (Q) Yes (A)".

P.W.3 has no case that she had even wept while during the alleged rapes continuously, much less any loud cry. Even on the night of 24/2/96, there was, allegedly, rape on her. In spite of that no resistance mark was found on her body. According to P.W.73, the Doctor "there was no signs or evidence of resistance". According to him, sign of resistance is the most common feature in a case of rape and as she was subjected to violent sexual intercourse "there can be signs of resistance". Of course, as submitted by the Special Public Prosecutor, signs of resistance is not a conclusive factor to determine consent as such. But, in the over all circumstances of this case and alleged rapes continuously for days together by several persons, necessarily, it must be reckoned as a relevant input. Thus, the medical evidence in this case also does not offer any specific and satisfactory probative corroboration to the testimony of P.W.3.

95. We are unable to persuade ourselves to accept the omnibus explanation that P.W.3, a girl of less than 17 years of age, was terrified and all the pieces of conduct and circumstances which are incongruent to the theory of absence of consent deserves to be ignored on that score. The Investigating Officer - P.W.97 appears to have felt, perhaps rightly, as it seems to us, that he need not unduly worry about the acceptability of the evidence of P.W.3 about want of conseent. He appears to have swallowed the later assertions of P.W.3 leaving it to the court to consider whether P.W.3 should be believed or the benefit of doubt should be conceded to the accused. One should not approach the question of acceptability of the evidence in an over simplified manner - that P.W.3 is a girl of tender age i.e. sixteen plus; that she has no reason to consent to sexual intercourse; that love, lust or money could not

have persuaded her to consent; and that consequently she would not have consented.

96. Money she needed. She was willing to raise the same even by objectionable manner admittedly - by misappropriating Rs.450/to be paid as hostel fees, and by clandestinely pledging her ornaments to the jeweller. She was admittedly willing to "go on a tour" with Accused No.1 without any specific plan for marriage and family life with him. She cladestinely took her mother's sarees and cash with her when she left her home planning all the time to deceive her parents. The learned Sessions Judge was too unsuspecting, non-cautious and willing to accept P.W.3's evidence on want of consent. Perhaps the error in approach lay there. The question of consent was decided by the learned Sessions Judge without cautious consideration, without critical assessment, without assessment of probabilities, without refering alertly to the law relating to burden of proof and benefit of doubt. We are unable to endorse that very approach. The appreciation of evidence by court cannot be that of an indulgent unfortunate parent of the victim girl. Even in the wake of the unfortunate plight of P.W.3 and the trauma of the parents, the court cannot lose its poise and be swayed. Objective and critical analysis is the unavoidable duty of the court.

97. We do also note that the learned Sessions Judge did not at all consider the question whether there was manifestation of the alleged absence of consent on the part of P.W.3 and whether the same was signified to those who had sexual intercourse with her. Going by the case of the prosecution, many of the accused went to her only assuming that she is a prosotitute. Going to a prostitute is improper and immoral. It offends the sense of righteousness of the enlightened members of the polity. But the criminal court is not pronouncing on morality but culpability. When most of them entered her room or she (P.W.3) entered their room, the male indictees were guilty only of the immorality of going to a woman, who they thought was a prostitute. It becomes rape only when she conveyed her unwillingness within the closed room. Her omnibus statement that to all who approached her inside the closed room she had verbally conveyed and signified her absence of consent cannot be readily swallowed considering the anterior, immediate and subsequent conduct of hers. At any rate, we are persuaded to favourably consider the plea for benefit of doubt.

98. That most, if not all, the accused had not

specifically pleaded consent cannot persuade this Court not to consider that plea which arises on probabilities and on the basis of arguments raised. The conduct alleged is certainly immoral, by accepted norms of respectable behaviour. That the accused did not admit their indiscretion/immorality cannot persuade us to ignore that contention.

99. While assessing broad proabilities, we must note that P.W.3 and her parents needed an explanation to be offered for consumption by the other members of the family and public. They could not have accepted the theory of voluntary departure and immoral life of P.W.3, even if that were true even. To save their honour, a version that pictures P.W.3 as an unwilling victim was essential. The theory that no victim would advance a false version of rape as it would harm her as much or more than it would harm the indictee has no application in the facts of the instant case.

100. Here was a case where an explanation which absolves P.W.3 of contumacious behaviour was needed to save P.W.3 and her family. The hypothesis of the accused that such theory was pressed into service on 27/2/96, after P.W.3 returned on 26/2/96 after due contemplation and reflection deserves cautious consideration. That hypothesis cannot be discounted without careful evaluation.

101. In such circumstances, we find that there is no satisfactory proof of absence of consent so far as P.W.3 is concerned or to show that the alleged rapist did have the knowledge that she was not consenting willingly. The benefit of doubt shall have to be given to the accused so far as the accusation for the offence punishable under Sec.376(1) IPC is concerned. Therefore, giving them the benefit of doubt, the conviction under Sec.376(1) IPC shall have to be reversed in this case.

102. But the offence punishable under Sec.376(2)(g) IPC, as rightly pointed out by the Special Public Prosecutor is on a different pedestal. The consent aspect when spoken to by the victim gives rise to a presumption that occurrence was in the manner that she had spoken to, going by Sec.114A of the Evidence Act. P.W.3 had stated that there was no consent from her part when more than one person raped her.

103. A detailed examination of the evidence given by P.W.3 reveals that there had been only two occasions, when there were more than one person simultaneously inside the room when such alleged intercourse had been committed

on her. One is in Hotel Trisea in Kanyakumari and the other in Hotel Geeth at Trivandrum. On the morning when she reached Hotel Trisea along with Dharmarajan, Accused Nos.2, 3 and P.W.8, Dharmarajan committed rape in the presence of others and Accused No.3 had asked that she shall keep quiet; otherwise she would have to face the consequences. The second occasion is the one when Accused Nos.4 and 28 were found lying naked on either side of P.W.3, by P.W.10 room boy of Hotel Geeth who came there raising objection against three persons occupying a double room and to supply an extra bed for them. There was a wordy quarrel between Accused No.4 and P.W10 at that time.

104. On the first occasion, P.W.3 had gone to Trisea Lodge with Dharmarajan and Accused No.3 from Theni. Necessarily, in the light of the facts discussed above, her theory of absence of consent cannot be believed as such without due assurance. Sec.114A enacts only a rebuttable presumption of fact and not law. The amount of circumstances ncessary to rebut the presumption would certainly vary from case to case. The consent aspect has already been discussed above and found that it cannot be held beyond doubt that there was absence of consent. These are the circumstances in rebuttal of the presumption also. The only corroboration for her evidence on gang rape is from P.W.8. She was an accused initially. She was later transformed as a witness. It was held in Vemireddy Satyanarayan Reddy v. State of Hyderabad (1956 SC 379) as follows:

> "There is no warrant for the extreme pro-position that if a man sees the perpetration of a crime and does not give information of it to anyone else, he might well be regarded in law as an accomplice and that he could be put in the dock with the actual criminals. Indeed, there can be no doubt that the evidence of such a man should be scanned with much caution and the Court must be fully satisfied that he is a witness of truth, especially when no other person was present at the time to see the murder.
>
> Though he was not an accomplice, the Court would still want corroboration on material particulars as he is the only witness to the crime and as it would be unsafe to hang the accused (four in this case) on his sole testimony unless the

> Court feels convinced that he is speaking the truth. Such corroboration need not, however, be on the question of the actual commission of the offence; What the law requires is that there should be such corroboration of the material part of the story connecting the accused with the crime as will satisfy reasonable minds that the man can be regarded as a truthful witness."

It is not therefore safe to implicitly believe P.W.8. P.W.8 who continued on the array of accused was on fine morning transposed from the array of accused to the array of witnesses by PW.97. From the date of her arrest viz., 9/4/96 till 24/8/99 when she was deleted from the array of accused as per Ext.P181 report, she was an accused. The remand report submitted after her arrest shows that her statement under Sec.161 Cr.P.C. was recorded. But after she was transposed as a witness it is asserted that there was no earlier statement recorded from her. The contention of the accused that the prosecution is suppressing that statement and the present 161 and 164 statements were obtained by her on the price of her transposition from the array of accused to that of witnesses does appear to be one with force. One weak piece of evidence cannot be strengthened by another one of the same type. So the alleged gang rape at Hotel Trisea is not conclusively proved.

105. Coming to the second occasion, when P.W.10 found P.W.3 in between the two naked males, she had been hiding her face in the bed lying face down. P.W.10 has spoken so. Even in spite of quarrel between Accused No.4 and P.W.10, she did not seek any help from P.W.10 to get out of the pains of the alleged gang rape committed by Accused Nos.4 and 28. Therefore, absence of consent is not at all discernible from that conduct. It is also to be noted that Accused Nos.4 and 28 had been sleeping inside the room on either side of P.W.3 without even locking the door from inside. That is evident from what P.W.10 had spoken to. According to him, when he knocked the door there was no response Hence he just opened the door and found three persons inside the room. It does not stand to commonsense that two persons will commit gang rape without even taking the precaution of locking the room. When the room had not been locked, it would have been easy for her to escape or to attract the attention of others, so that she could be rescued. The confidence of the male indictees

is indicative of the situation inside the room. It is certainly not suggestive or confirmative of the theory of absence of consent. The presumption available in terms of Sec.114A of the Evidence Act stands rebutted in so far as the accused are concerned in respect of the said two incidents.

106. The other incidents of gang rape alleged by the prosecution is in the Panchayat Rest House in Kumaly and elsewhere. It is true, as spoken to by P.W.3, more than one person had sexual intercourse with her in the same place on the same day. It has also come out in her evidence that more than one person had simultaneously approached her or was brought to show her. But her evidence is that there was none other than the individual rapist when the alleged rape had occurred. At the risk of repetition, we must note that according to the prosecution, more than one person came to her for the purpose of illicit sexual intercourse. Till they entered the room and she allegedly signified her unwillingness, they had no intention or common intention of committing rape or gang rape. Admittedly, at that place, at the time of alleged rape none else than the alleged rapist was present. Their individual separate acts of intercourse become rape only when inside the room P.W.3 allegedly signified her unwilligness. Ingredients of common intention to commit rape or jointness in action are significantly absent. In order to bring a rape within the definition of gang rape, as per Explanation-I to Sec.376 IPC a woman must have been raped by " one or more in a group of persons acting in furtherance of their common intention". In such circumstances, each such person shall be deemed to have committed gang rape. The Special Public Prosecutor is well justified in contending that there need not be a completed act of rape by all the companion rapists. His contention is supported by the decision reported in Bhupinder Sharma v. State of Himachal Pradesh (AIR 2003 SC 4684) where it was held that:

> "In cases of gang rape the proof of completed act of rape by each accused on the victim is not required. The statutory intention in introducing Explanation (1) in relation to Section 372(2)(g) appears to have been done with a view to effectively deal with the growing menace of gang rape. In such circumstances, it is not necessary that the prosecution should adduce clinching proof

of a completed act of rape by each one of the accused on the victim or on each one of the victims where there are more than one in order to find the accused guilty of gang rape and convict them under Section 376, IPC. (See Promod Mahto and Others v. The State of Bihar (AIR 1989 SC 1475)".

But at the same time, all the persons must be acting in a group in furtherance of their common intention, thereby the rapists must form a group at the time of the commission of the offence.

107. The Public Prosecutor submits that rape by one after another also comes within the definition of `gang rape', even if one is not present when the other committed rape. He cited the decision in Pramod Mahto and Others v. State of Bihar (1990 SCC (Cri) 206) where it was held that:

"Once it is established that the appellants had acted in concert and entered the house of the victims and thereafter raped P.W.1 Jaiboon Nisa, then all of them would be guilty under Section 376 IPC in terms of Explanation I to clause (g) of sub-section (2) of Section 376 IPC irrespective of whether she had been raped by one or more of them. The Explanation in question reads as under:

"Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section."

This dictum does not in any way support his contention.

108. A measure of jointness in action and forming of a single group is essential. It was held by the Supreme Court in Ashok Kumar v. State of Haryana (AIR 2003 SC 777) that:

"Charge against the appellant is under S.376(2)(g), IPC. In order to establish an offence under S.376(2)(g), IPC, read with Explanation I thereto, the prosecution must adduce evidence to indicate that more than one accused hadf acted in concert and in such an event, if rape had been committed by even one, all the accused will be

> guilty irrespective of the fact that she had been raped by one or more of them and it is not necessary for the prosecution to adduce evidence of a completed act of rape by each one of the accused. In other words, this provision embodies a principle of joint liability and the essence of that liability is the existence of common intention; that common intention presupposes prior concert which may be determined from the conduct of offenders revealed during the course of action and it could arise and be formed suddenly, but, there must be meeting of minds. It is not enough to have the same intention independently of each of the offender. In such cases, there must be criminal sharing marking out a ccertain measure of jointness in the commission of offence."

The person acting in a group in furtherance of their common intention is distinguishable from several persons coming with the similar intention of having sexual intercourse with a girl individually. Then there will not be, acting in furtherance of common intention by group of persons as enjoined by the Explanation I to Sec.376. Even going by the evidence of P.W.3, persons came together with the similar intention and approached her for intercourse. But at the time of intercourse, as spoken to by her, there was presence of only one. Even if she expressed unwillingness to that person who had intercourse to make such intercourse amount to rape, it cannot be said that the person waiting outside for his turn of intercourse is a party joined in a group in the commission of the offence of rape allegedly committed by the person already inside. There was no act in furtherance of common intention by the person who was waiting out side who did not know that the girl had not consented. If at all there was any intention, it was only immoral similar intention of having intercourse and not a culpable common intention to commit rape.

109. Thus there is no proof of any gang rape committed by any of the accused in this case. Consequently, the conviction in that regard shall also have to be set aside.

110. There is also an allegation against Dharmarajan that he had robbed PW.3 of her money and ornaments. He was found guilty of the offence punishable under Sec.392 IPC. Even going by the evidence of P.W.3, she was alone in the room on several occasions including in

Metro Lodge at Kottayam, Anand Lodge at Ernakulam and in the house of Accused No.16 at Vanimel in Calicut. If at all he had an intention of taking away the jewellery or cash from the hands of P.W.3, it was easy for him to grab it when she was alone with him there. On the other hand, the case of P.W.3 is that she had been taken to the jewelers and on the way while in autorickshaw and in the jewellery shop she was forced to part with the jewellery like ear stud, ear drops, silver anklets etc. That story cannot be believed. If at all Dharmarajan had an intention to rob her, he had ample opportunity to do so in several places at Kottayam, Ernakulam and at Vanimel while she was alone in a room with him. The idea of taking the victim also to the jewellers and threatening and compelling her there to part with ornaments does not inspire us. The allegation of robbery is thus inherently improbable and not convincing. Therefore, the conviction under Sec.392 IPC in so far as Dharmarajan is concerned also cannot be stated to be justified. The evidence of P.Ws.34 and 35, the owner and the salesman in the jewelleries concerned where the ornaments of P.W.3 had been sold is also not helpful so far as the prosecution is concerned. It will, at best, be revealed from their evidence that P.W.3 was also a party to give away the ornaments to Dharmarajan for being sold. What are recovered are only M.Os.19 and 20 ingots and not the ornaments allegedly taken away. Necessarily the conviction under Sec.392 IPC is not justified and it is to be reversed.

111. Now we will come to other offences under Secs.366A and 372 IPC relating to sex trade. The offences under Secs.372 and 373 IPC have been alleged against all the accused in the 1st case. But all of them have been acquitted of the offences under the said counts. No appeal has been preferred by the State against the acquittal of the 35 accused in S.C.No.187/99 of the offences punishable under Secs.372 and 373 relating to sex trade. So we cannot, in the absence of an appeal by the State, examine whether the said 35 persons are guilty of the offence of sex trade punishable under Sections 372 and 373 IPC.

112. Accused No.1 in the first case alone had been convicted under Sec.366A IPC principaly. Accused Nos.1 to 8, 12, 14 and 17 had been convicted for the offence under Sec.120B read with Sec.366A IPC. The conspiracy has already been found against the prosecution. Placing reliance on the indications regarding letter of P.W.3, involvement of accused No.1 has been ruled out as he had no

role in the alleged conspiracy. Even according to the prosecution, he had no role at all except on the initial day to kidnap the girl. Kidnapping is also found against the prosecution. So there arises no question of commission of the offence under Sec.366A by accused No.1 in the light of the prosecution case itself. Therefore, the conviction of Accused No.1 under Sec.366A IPC and Accused Nos.1 to 8, 12, 14 and 17 for the offence of conspiracy to commit that offence cannot be sustained.

113. Even going by the admitted case of Dharmarajan in his Sec.313 statement, P.W.3 had come in his hands at the park in Ernakulam. Thereafter, as further admitted by him, he had taken her from the park to Anand Lodge in Ernakulam, to Palakkad, to Vanimel, to Kumali and to Theni. During the journey and stay at those places, there had been sexual intercourses by several with P.W.3. Admittedly, P.W.3 was below the age of 18 years and was therefore a minor. P.W.3 has also deposed that she had been moved from place to place and subjected to sexual intercourse. Dharmarajan has no case that she is in any way related to him. She did not and could not have moved from place to place on her own. So, in order to take the girl with him, there must have been inducement; in whatsoever form. Thus, it is clear from the evidence of P.W.3 and as admitted by Dharmarajan that he had taken P.W.3 from place to place. At such places she had been subjected to illicit intercourse. She was thus taken from place to place knowing that she was likely to be used for such purpose. The intercourse, the others had with P.W.3 was illicit intercourse. Thus, going by the evidence of P.W.3 and in the light of the admitted stand of Dharmarajan, it has been conclusively and beyond doubt proved that the offence under Sec.366A IPC has been committed by Dharmarajan.

114. It has also come out in the evidence of P.W.3 that several other persons did have inter course with her. This had happened and could only happen if Dharmarajan had disposed her for that purpose. Otherwise she will not come in the hands of others for such intercourse. She was not married to any one of them. So those are illicit intercourses coming within Explanation 2 to Sec.372 IPC. Thus, it is clear that Dharmarajan has committed the offence punishable under Sec.372 IPC as well.

115. It is submitted by counsel for Dharmarajan that there was no monetary transaction to reveal the offence under Sec.372 IPC and there is no evidence to show

that PW.3 had been sold for money or let to hire for money. Apart from the facts admitted by him, it is clear that Dharmarajan had taken her to several places including to Kanyakumari and thereafter from the house of Accused No.38 to Kuravilangadu. Exts.P59 and P59(a) and the evidence of P.W.47 show that Dharmarajan has taken P.W.3 to Hylux Lodge in Palghat. Q.8 identified by P.W.76 handwriting expert corroborates this aspect. Exts.P62 and 62(a) prove his presence with P.W.3 at Indira Lodge, Kambam. This is duly fortified by Q.22 and 22(a). P.W.50 the Manager of Thottam Lodge, Muvattupuzha, testifies his presence with P.W.3 there. Exts.P74 and 74(a) fortified by Q.29 and 29(a) satisfactorily prove this fact. P.W.4 Receptionist in Aroma Lodge identifies Dharmarajan as the son-in-law of one among their permanent customers and that he had been there with a girl. P.W.3 deposes that she had been taken there. Thus, it is proved beyond doubt that he had taken P.W.3 to several places. There is also evidence that during the sojourn there had been intercourses with her by several and such intercourses are illicit intercourses so far as a girl like P.W.3 under the age of 18 years was concerned. There is evidence from the mouth of P.W.3 herself. It is also the admitted case of Dharmarajan that she had been taken from place to place. This was done knowing that it was likely that she would be seduced and offered for illicit intercourse with others. Accused Dharmarajan can, in these circumstances, safely be held to have committed the offences punishable under Secs.366A and 372 IPC subject of course to the decision on the question of unfairness in investigation/ trial and consequent prejudice.

116. We have not in detail adverted to the evidence of P.W.3 about the details of her movements after she left the hostel on 16/1/96 and reached her father's office on 26/2/96. We are satsified broadly that her evidence regarding her movements and the persons with whom she had intercourses need not be doubted. The Investigators have cross checked such movements. Inasmuch as we have conceded the benefit of doubt to the indictees on the question of consent we are not proceeding to consider the evidence in detail. We do take note of the contentions raised by some of the accused that there is no sure substantive evidence of identification in court and that the learned Sessions Judge has improperly chosen to place reliance on evidence of identification in the Test Identification parade in the absence of substantive evidence of identification. Contentions have also been

raised by the accused regarding the propriety of the Test Identification parade held. In view of our findings rendered earlier, we are not embarking on a detailed discussion on those aspects.

117. We shall now consider the contentions regarding infraction of procedural safeguards in the interests of fair trial and the consequent prejudice that has resulted. In this regard it is contended by the accused including Dharmarajan that the prosecution having not furnished to the accused the entire statements given by P.W.3 to the Investigating Officers, there was prejudice in moulding their defence. Even according to the prosecution the statements of P.W.3 recorded by P.W.93 on 8/3/96, 10/3/96 and 15/3/96 which in any view of the matter the prosecution is bound to produce and furnish compies had not been produced in court initially as enjoined under Sec.173(5) Cr.P.C. and copies thereof were not furnished to the accused as enjoined under Sec.207(iii) Cr.P.C. According to the accused, two other statements from P.W.3 were also not furnished to them. This disabled them to mould their defence from the initial stage, before P.W.3 faced cross-examination. It may be true that the said statements had been produced belatedly in the first case. That did not wipe off the prejudice already occasioned, it is submitted. Though produced, copies were not furnished to them, it is further contended. Certainly, these are contentions which have to be considered at length.

118. The decision cited by the accused in this regard reported in Kottaya v. Emperor (AIR (34) 1947 P.C.67) fortifies this contention. When the statements relied on by the prosecution are not made available to the accused, "an inference, which is almost irresistible, of prejudice to the accused" arises. The counsel for the accused has also relied on the decision of a Division Bench of this Court reported in Murali v. State of Kerala (2003 (3) KLT 226) where this Court had held that non-supply of Sec.161 statement obtained from the occurrence witnesses will cause prejudice. At the same time, the learned Public Prosecutor has relied on the decision reported in Sunita Devi v. State of Bihar (AIR 2004 SCW 7116) to substantiate that every non-supply shall not be reckoned as amounting to prejudice. There must be proof of miscarriage of justice as held in by a Full Bench of this Court in Rugmini v. State of Kerala (1986 KLT 1356).

119. In the decision of the Privy Council it had been held that the non-supply of certain statements relied

on by the prosecution will result in an irresistible inference of prejudice to the accused. There cannot be two opinions on this proposition of law. It has also been held by a Division Bench of this Court in Murali's case to which one among us (Abdul Gafoor,J.) was party that non-supply of the document would result in prejudice. But that decision has to be read in the light of the facts therein. The facts in Murali's case were that P.W.2 deposed that he had seen the injury being inflicted by the accused on his step-father, the deceased. But some how or other the accused got smell about an earlier statement made by that witness to the police wherein he had not stated that he had seen the occurrence. The copy of the statement available with the officer superior to the Investigating Officer was summoned to be produced. P.W.23, the Investigating Officer, thereupon deposed that he had recorded an earlier statement from P.W.2, wherein he had not stated that he had seen the occurrence. It was also revealed that P.W.23 had counselled P.W.2 and obtained a different statement as was spoken to before the trial court. Thereafter, the original of the the earlier statement given by P.W.2 was torn off. It was in the above circumstances P.W.23 admitted that he had obtained statement of P.W.2 wherein P.W.2 had stated that he had not seen the occurrence. It had also come out in that case that P.W.4 had come to the scene of occurrence and had seen the accused waiting there. After he had gone, he heard the cry and rushed back to the scene of occurrence to see the deceased lying injured and the accused running away with weapon. It had also come out in evidence that Sec.161 statement recorded from P.W.4 on 13/7/96 had not been produced before the court below. The court could not guess what really he had told to the police on 13/7/96. Equally so was the accused. Therefore, in that case the version of both the occurrence witnesses was not in conformity with the statements that had been given earlier to the Investigating Officer, as admitted by P.W.23 in that case. It is in that situation that the non-production or non-furnishing of copies of Sec.161 statements recorded from the only occurrence witnesses were found to be causing prejudice in a case of murder. Necessarily that dictum cannot ipso facto apply to this case in toto to hold that there was total prejudice. In the recent decision of the Supreme Court reported in Sunita Devi v. State of Bihar (AIR 2004 SCW 7116) the Apex Court has made it clear that:

"The documents in terms of Sections 207 and 208 are

> supplied to make the accused aware of the materials which are sought to be utilized against him. The object is to enable the accused to defend himself properly. The idea behind the supply of copies is to put him on notice of what he has to meet at the trial. The effect of non-supply of copies has been considered by this Court in Noor Khan v. State of Rajasthan (AIR 1964 SC 286) and Shakila Abdul Gafar Khan (Smt.) v. Vasant Raghunath Dhoble and Another (2003 (7) SCC 749). It was held that non-supply is not necessarily prejudicial to the accused. The Court has to give a definite finding about the prejudice or otherwise."

It was thus held that non-supply of any document is not necessarily prejudicial to the accused always. The court has to give a definite finding about the prejudice or otherwise occasioned. It is, in these circumstances, that we have to consider the effect of non-supply or belated supply of the copies of the statements from P.W.3.

120. Non-production/non-furnishing of the statements taken from PW.3 under Section 161 Cr.P.C. is the reason for prejudice, according to the appellants. Altogether, ten statements were allegedly obtained from PW.3 - one by PW.82, three by PW.93, two by PW.91 and two more statements by PW.97. Apart from these admitted eight, it is also admitted by the prosecution that a statement stated to be taken from PW.3 on 28.2.1996 by PW.95 also forms part of the case diary. But, according to the prosecution, this is not a truly recorded one. So, they disown it. This statement, for the purpose of consideration of the contention regarding prejudice, will hereafter be referred to as the "disowned statement".

121. It is alleged by the counsel for the appellant/accused that on 27.2.1996, a statement had been taken by PW.82 from PW.3 as transcribed by DW.10, who is also DW.6 in the second case. It is submitted that this is the real statement obtained by PW.82 from PW.3 and not the one now forming part of the case records. But the prosecution does not admit such a statement. According to them, the statement recorded by PW.82 is the one now available in the case records. We will, for the sake of convenience, to discuss the aspects on this point, describe the statement admittedly taken by PW.82, now forming part of the case records, as the `admitted statement' and the statement claimed by the appellants as taken originally

from PW.3, which is disputed by the prosecution, as "Ext.C2", marking it so. Ext.C2 is the "disputed statement."

122. It is the contention of the appellants that in order to move a bail application on behalf of Regi, the 4th accused, one among his friends had approached some political leaders to obtain certain case records, so as to instruct his advocate. In that attempt, his friend came in contact with DW.1 in the second case and he had obtained a photo copy of Ext.C2 statement of PW.3 then available in the case records with the help of a police constable. It was produced in the court during trial, but the court did not allow it to be admitted in evidence. Thereupon, it is common case that, that issue had come up for consideration before this court and this court in Dharmarajan v. State of Kerala {2002(2) KLT 161} held as follows:

> "The impugned order cannot be sustained and is set aside. If the learned Sessions Judge is satisfied on the basis of the materials available before him in the course of trial that the statement of the prosecutrix, alleged to have been recorded by the investigating officer (ASI-P.K.Balakrishnan) on 27.2.1996, is in fact recorded by him personally or at his dictation or direction by another police officer, effective opportunity should be given to the accused/revision petitioner after supplying copy of that statement to test the veracity of the evidence given by her by allowing him to contradict her with that previous statement in the manner provided under S.145 of the Evidence Act drawing attention of her to that part of the statement."

In the light of this pronouncement, it was the bounden duty of the court below to examine as to whether such statement had really been recorded by PW.82. When such a dispute had arisen, necessarily, it goes deep into the root of the case. Any court is bound to examine it at the threshold itself, even without any direction. Accordingly, in the second case, it was specifically dealt with and found by the court below that no such Ext.C2 statement had really been recorded at the instance of PW.82 from PW.3 and that there was no occasion for DW.10 to transcribe that statement. The decision in that regard also is very much assailed in these appeals.

123. It has also come out that three statements

recorded by PW.93 Circle Inspector, Devicolam from PW.3 on 8.3.1996, 10.3.1996 and 15.3.1996 were also not produced in the court or furnished to the accused in the first case. Of course, later, on a petition and after hearing, based on an order, those three statements were produced in court far belatedly, after the examination of PW.3 was over in that case. Those statements will be referred to as the statements dated 8.3.1996, 10.3.1996 or 15.3.1996, as the case may be, even though the second among them does not bear any date. Even in the second case, those were not initially produced by the prosecuting agency. The accused Dharmarajan had to move a petition for production and it is based on an order from the court, those had been produced and made available before the commencement of the examination of PW.3, who was examined as PW.1 in that case. Thus, Ext.C2, disowned statement and the statements dated 8.3.1996, 10.3.1996 and 15.3.1996 are the five statements not produced or furnished to the accused resulting in alleged prejudice.

124. So, we have now to consider which among the two statements, stated to be recorded on questioning by PW.82, is the real statement recorded from PW.3 on 27.2.1996. For this purpose, we have to go through the case diary and ascertain the contents of the "admitted statement", notwithstanding the provision contained in Section 162 Cr.P.C., but keeping in mind that it should not be made use of as evidence in this case. At the same time, as the copies of Ext.C2 are with either party and as either party has knowledge about its contents and as it is referred to in the impugned judgment, the contents thereof shall also be dealt with, keeping in mind the same precaution. That was why we refrained from considering this aspect earlier in this judgment, while discussing the evidence adduced.

125. To substantiate that Ext.C2 is the real statement recorded from PW.3 by PW.82, several aspects are pointed out by the appellants. First, it is submitted that a copy of this was obtained on behalf of the accused, by DW.1 for the purpose of moving a bail application. Secondly, it is submitted that when the case diary was made available to the District and Sessions Judge, Thodupuzha, during the hearing of that bail application, the Judge seems to have examined this statement given by the victim. This is evident from the reference to the prosecution case made mention of in the bail order Ext.D14, which is Ext.D29 in the second case. The reference to the statement of the

victim therein has similarity to the contents contained in Ext.C2. Thirdly it is submitted that Ext.X2 crime ledger kept by PW.95 shows that the pages relating to the case diary mentioned in Ext.X2 correspond to the number of the pages of Ext.C2, rather than the "admitted statement". Fourthly, it is submitted that Ext.C2 refers to one Sivaji, who is alleged to have molested the victim. But in the admitted statement, no such name is appearing. The name "Stephenji" appears therein. Linking Ext.C2 to the statement dated 10.3.1996 recorded by PW.93, it is submitted that PW.3 had clarified to PW.93 that she had stated that:

"

."

(I have stated to police as Stephenji. I have not stated as Sivaji).

This portion of that statement has come in evidence as Ext.D2(b). If PW.3 had to say so to PW.93 on 10.3.1996, there must have been a reference to Sivaji in any of her earlier statements, so that PW.93 had to get a clarification. On the basis of Ext.D2(b) it is submitted that the existence of Ext.C2 is probabilised. Fifthly, it is also submitted referring to the evidence of the victim who was examined as PW.1 in the second case that she had deposed in the court below that Dharmarajan had taken her to the Park in Ernakulam before they checked into Anand Lodge at Ernakulam, on 17.1.1996. Ext.C2 also refers to the visit to the park along with Dharmarajan on the said day. There was no reference to the visit to the park in any statement including the admitted one recorded by PW.82. Sixthly, it is contended by the appellants that Ext.C2 also contains a version by the victim that she had gone along with Dharmarajan for a Hindi movie, after checking into the Anand Lodge, Ernakulam at about 6.45 P.M. To substantiate this, Dharmarajan had attempted to produce a newspaper dated 17.1.1996 to show that a Hindi film "Gambler" was being exhibited in one among the theatres in Ernakulam. Almost similar name is referred to in Ext.C2. But the court did not permit due proof of the said news paper by summoning its circulation manager, on the ground that it was a protracting tactic adopted by the accused. It is submitted that this aspect is referred to, to show that the accused Dharmarajan had taken effective steps to prove the

real existence of Ext.C2 referring to this movie aspect as well.

126. Existence of Ext.C2 is sought to be substantiated by pointing out reference to certain minute details like name of one class mate of PW.3 viz., Little Flower, names of her teachers viz., Sister Linet and Sister Andrissamma, route to the house of Accused No.39 where PW.3 had stayed etc. which were known to PW.3 alone at that time. So Ext.C2 could not have been recorded without PW.3 disclosing those facts known to her alone. These details were not available in any other records.

127. The existence of Ext.C2 is also sought to be substantiated by referring to the "disowned statement" stated to be recorded by PW.95, as well. It is, admittedly, a part of the case records. That statement has been recorded on the next day i.e. 28.2.1996. There is much dispute from the side of prosecution about the veracity of the `disowned statement', as according to them, it was one manufactured by PW.95 to screen off several of the accused. `Disowned statement' also refers to one `Vikasini', with whom PW.3 had been entrusted by Dharmarajan for a stay for four days. The very same name appears in Ext.C2 in the same context. Referring to the `disowned statement', it is submitted that existence of Ext.C2 is thus fortified. The admitted statement does not refer to Vikasini. Instead, it refers to that person as "Vilasini". If Ext.C2 was not there and the admitted statement was the real statement, the name Vikasini could not have crept into the disowned statement, it is contended.

128. It is further submitted that the contention of the prosecutor that there was no occasion for P.W.95 to record `disowned statement' is belied by Ext.X 11(a), weekly diary of PW.95, which shows that the victim had been questioned on 28.2.1996 at about 10.30 A.M. Ext.X 11(a) is a document duly kept in the normal course of duty. There is no reason to disbelieve it. In her evidence PW.3 also admits that she had been questioned by PW.95. It is also evident from Ext.X 11(a) that PW.3 had been taken by PW.95 to PW.73, the doctor, for medical examination at 1 P.M. on that day. PW.3 had also deposed before the court below that she had come to the Munnar Police Station by about 11 O' clock. Necessarily, there was much probability of her being questioned by PW.95, who had admittedly taken up investigation of the case by that time. The entry in Ext.X 11(a) that she had been questioned by him at 10.30 A.M. on

that day becomes more probable in the light of the evidence on record as discussed above.

129. When PW.3 had admitted that PW.95 had questioned her, necessarily, facts revealed in that questioning, in the normal course, as in the case of any investigating officer, must have been reduced to writing based on the note he may prepare. It is also spoken to by PW.3 that she came to the station at 11 A.M. and that she had been taken to the doctor from the station at 1 P.M. Necessarily, there was sufficient time available for questioning PW.3 and to ascertain the details from her. As admitted by the prosecution, PW.95 had been entrusted with the investigation of the case by that time. It is also to be noted that an investigating officer like the Circle Inspector who takes up investigation immediately would have questioned the victim in the normal circumstances and in the normal course of his duty. It is also to be noted that, even according to PW.93, the investigating officer who succeeded PW.95, the `disowned statement' was available in the case diary when he had taken up investigation of the case, on transfer from PW.95 on 8.3.1996. Thus, these details are sufficient enough to show that the disowned statement dated 28.2.1996 is one duly recorded by PW.95, the investigating officer in this case at that time in the normal conduct of the investigation and there was all probabilities that it has been recorded after the admitted questioning of PW.3 on 28.2.1996, it is submitted.

130. It is also submitted to substantiate this point, that Accused No.28, George Cherian was implicated as an accused only by Ext.P157 report dated 21.3.1996. His name appears in the "admitted statement" dated 27.2.1996. Allegedly based on the `admitted statement', a list of accused was submitted to the court on 11.3.1996 as per Ext.P166 report. But that report does not contain the name of Accused No.28 George Cherian. Had the `admitted statement' been in the case records, necessarily, there was no reason for not including the name of Accused No.28 in Ext.P166 report dated 11.3.1996. Absence of the name of Accused No.28 in the list of eighteen accused mentioned in Ext.P166 shows that the victim had not disclosed his complicity on that date. There is yet another report, Ext.P121 dated 18.3.1996 adding 8 more accused. There also his name was not included. Such non inclusion of Accused No.28 at that time is more probable on the basis of the contents of Ext.C2 and the `disowned statement', both of which did not refer at all about the complicity of A28

George Cherian. So, the non-inclusion of the name of Accused 28 in Ext.P166 report or in the latter report Ext.P121 dated 18.3.1996 suggests that the admitted statement was not available in the case records until 18.3.1996, the counsel contends.

131. It is further submitted that the statement admittedly recorded by PW.93 from PW.3 on 10.3.1996 (undated) shows that she had spoken to him as follows:

"

."

(The ASI and CI of Munnar station had taken my statement. What I have stated therein are correct).

This has been duly confronted to PW.3 and marked as Ext.D2 in the second case and PW.93 had admitted that he had recorded the said statement, as spoken to by PW.3. If she had to say that she had given a statement to ASI and CI of Munnar Station, there must have been a statement taken by the C.I. of Munnar Station, who is none other than PW.95. The only statement of PW.3 recorded by PW.95 available in the case diary is the `disowned statement'. Therefore, that also probabilises the existence of the `disowned statement', it is submitted. It was unlikely that the Munnar CI referred to in Ext.D2 could be PW.93 who was himself recording that statement. That explanation is improbable, artificial and unworthy of acceptance.

132. It is further submitted that the prosecution is now introducing a statement dated 8.3.1996 said to be taken by PW.93 from PW.3 which reveals as follows:

"

."

(I have not given a statement as now read over to me to the CI, Munnar. CI Munnar had never taken any detailed statement from me, nor had he questioned me in detail).

This statement, admittedly taken by PW.93, from PW.3 does

not reveal anything more. Necessarily, any inquisitive investigating officer, with an urge to find out the truth, should have questioned her further then and there to ascertain what were the details that she had (or had not) spoken to PW.95, Circle Inspector, Munnar, when he questioned her. This aspect is not seen pursued on 8.3.1996 or at any time thereafter by PW.93 or any of the later three investigating officers. That is indeed strange. If such a statement was really recorded, it must have occurred to PW.93 that his predecessor PW.95 was guilty of gross indiscretion. No investigating officer worth his salt would have left matters there without subjecting PW.3 to closer questioning to ascertain what portion of the disowned statement was true and what not. In this regard, our attention is drawn to the three statements produced by the prosecution as of 8.3.1996, 10.3.1996 and 15.3.1996 and pointed out that the statement recorded on 8.3.1996 contains the date, that recorded on 10.3.1996 does not contain any date, whereas that recorded on 15.3.1996 is given a date. It is submitted that the statement now produced as of 8.3.1996 is one prepared later and ante dated 8.3.1996 to cover up the `disowned statement'. This is evident from Ext.X 13 dated 14.3.1996, which does not refer to the statement taken on 8.3.1996. To quench our curiosity, we requested the Public Prosecutor to show us any entry made by any Investigating Officer after PW.95 handed over investigation to indicate that the subsequent Investigators had perceived any such indiscretion on the part of PW.95. In fact, the subsequent report marked as Ext.X 13 prepared by PW.91 would indicate that the subsequent Investigating Officers/superior officers had no grievance that PW.95 had committed any such indiscretion except a casual statement made by PW.97 at the time of filing the charge sheet that action may have to be contemplated against PW.95 after completion of trial. There is no contemporaneous entry which would indicate that PW.93 or subsequent Investigating Officers had expressed reservations about the investigation conducted by PW.95. No such contemporaneous record is available in the case diary until PW.97 chose to submit his final report.

133. In answer to these contentions, the Public Prosecutor submits that PW.82 had categorically disclosed in the court below that so long as he was in charge of the investigation, until the afternoon of 27.2.1996, PW.3 had been questioned by him once only and he himself had taken down the admitted statement in his own handwriting, without

the aid of any scribe. Therefore, there was no occasion for DW.10 to record a statement from PW.3 upon questioning by him. This evidence of PW.82 is sufficient to discard Ext.C2, the prosecutor submits. Our attention is also invited to the evidence given by PW.95. When he commenced investigation, he had never seen Ext.C2 in the case records. It is also submitted by the Public Prosecutor that there was no occasion for DW.10 to write down Ext.C2 because, even according to DW.10, he had been deputed for the investigation of Crime No.34/96, as is revealed by Ext.X 10 case diary relating to that case. There is a report, Ext.P102 by DW.10 revealing the investigative steps that he had taken in connection with Ext.X 10 case at Kumali, Kambam and Theni, which lie far away from Munnar. Therefore, based on the contents of that report given by DW.10 to PW.95, there was no occasion for him to be present in Munnar Police Station earlier than 5 P.M. on 27.2.1996. The report Ext.P119 detailing the counts of offences, based on the information revealed by PW.3 to PW.82 had reached the magistrate on 27.2.1996 itself. Therefore, the statement given by PW.3 to PW.82 could not have been transcribed by DW.10.

134. It is further submitted by the Special Prosecutor that the evidence of DW.1 that he had obtained a copy from the police station at Devicolam also cannot be believed. According to that witness, he had obtained a photo copy of Ext.C2 on a Maundy Thursday which was really on 4.4.1996. By that date, the case diary had already been transferred to PW.91. So, there was no occasion for DW.1 to get copy of Ext.C2 from the Devicolam Police Station. Therefore, what he had stated before the court below cannot be believed.

135. The Public Prosecutor also submitted that reference in Ext.D 14 bail order about the case of the prosecution is not with reference to what the victim had spoken to the investigating officers, but with reference to the notes of investigating officers based on the information collected from the accused persons as well. That was why Ext.D14 order refers to a cash transaction of Rs.1,600/-. It does not have any bearing on Ext.C2.

136. It is further submitted that PW.93 had to cross check with PW.3 about Sivaji on 10.3.1996 and had to obtain a clarification, because on arrest of Accused No.4 on 10.3.1996 at about 10.45 P.M. at his house, he had said about Sivaji. He referred to Accused No.10 as Sivaji. It is to clarify that position that PW.3 was questioned on the

mid night of 10.3.1996 itself and therefore, reference to Sivaji in the statement dated 10.3.1996 has nothing to do with Ext.C2.

137. Coming to the `disowned statement', it is submitted by the Public Prosecutor that PW.3 had categorically deposed before the court below that PW.95 had never recorded a statement. Therefore, much veracity cannot be attributed to the `disowned statement' dated 28.2.1996, or to the contents therein. It is submitted that, it was prepared only to screen off several of the accused. Even according to PW.95, the disowned statement had been recorded by none other than PW.96. Based on his diary produced in court and Ext.P178 note book of PW.96, it is contended that PW.96 was not available in Munnar at the time when PW.3 was questioned by PW.95 and therefore, there was no occasion for him to record the disowned statement.

138. It is further submitted that the reference to Vikasini in the `disowned statement' was designed by PW.95 and 96 deliberately to probabilise the contents in Ext.C2. They prepared the disowned statement with a motive to substitute the `admitted statement' which they could not do as the case diary had been transferred to PW.93. So reference to Vikasini in the disowned statement and Ext.C2 does not have any bearing at all.

139. Referring to the class mate of PW.3 named Little Flower, the two teachers and to the route to the house of PW.18, a relative of Accused No.3 Jamal at Elappara, mentioned in the `disowned statement', it is submitted by the Special Public Prosecutor that those are included to probabilise that PW.3 was questioned.

140. With reference to the contention regarding non-inclusion of Accused No.28 in the array of accused until 21.3.1996 in Ext.P157 statement, it is submitted by the Public Prosecutor that it was only an inadvertent mistake.

141. So, according to the Public Prosecutor, there cannot be any prejudice at all with reference to Ext.C2 which had never been recorded from PW.3. Therefore, it is not a statement under Section 161 Cr.P.C. The `disowned statement' had also never been recorded. So, these are not really part of the case records or documents, the copies whereof have to be produced in court and furnished to the accused. Necessarily, no prejudice whatsoever arises in this case.

142. It is a statutory requirement in terms of Section 173(5) Cr.P.C. that all documents and statements

recorded from the witnesses on whom the prosecution proposes to rely, have to be produced in court. That includes all the statements, if more statements had been taken from a particular witness and not any one statement or the final one. If the prosecution chooses to place reliance on any witness, all statements of that witness recorded under Section 161 Cr.P.C. have to be produced, whether the prosecution wants to rely on or disown any one of such statements. Section 207(iii) Cr.P.C. further enjoins that copies of all such statements and documents shall be furnished to the accused. These are the mandates to ensure a fair trial.

143. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society. A trial which is primarily aimed at ascertaining truth has to be fair to all concerned. As held by the Supreme Court in Zahira Habibulla H.Sheikh v. State of Gujarat {2004 (4) S.C.C.158}.

> "There can be no analytical all comprehensive or exhaustive definition of the concept of fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind, viz., whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted."

The Apex Court further pointed out:

> "Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an overhasty stage-managed, tailored and partisan trial."

Denial of fair trial is as much injustice to the accused as

is to the victim and the society. Thus assurance of fair trial is the first imperative of justice. The fair trial for a criminal offence consists not only in technical observance of the frame and forms of law, but also in recognition and just application of its principles in substance, to find out truth and prevent miscarriage of justice. As pointed out by the Apex Court:

> "It is as much the duty of the Prosecutor as of the Court to ensure that full and material facts are brought on record so that there might not be miscarriage of justice."

Therefore, it need not be stated in the background of the statutory provisions, that non-production or non-furnishing of the relevant documents or the statements will result in prejudice so far as the accused is concerned.

144. It is now trite law in the light of the decision in Pulukuri Kottaya and others v. Emperor {AIR (34) 1947 PC 67} that the non-furnishing of the copies shall result in irresistible conclusion of prejudice. Therefore, it need not further be enquired into whether non furnishing of a relevant document or statement recorded will result in prejudice.

145. But, when more statements are recorded from a particular witness and few of such statements had been given to the accused, it must be shown what is the extent of prejudice caused to the accused in not furnishing the copies of one or few of such statements. In such circumstances, prejudice cannot be assumed to hold that trial was totally unfair. The extent of prejudice shall have to be examined by the court. In the decision reported in Rugmini v. State of Kerala {1986 KLT 1356}, it has been held, though in yet another context that:

> "The question whether such irregularities, if any would lead to miscarriage of justice is a matter to be decided during trial and in the light of evidence."

The Supreme Court has also held in the decision reported in Sunitha Devi v. State of Bihar and another (AIR 2004 SCW 7116), examining the case law on the subject that:

> "the court has to give a definite finding about the

prejudice or otherwise".

146. In this case, the court below had come to the conclusion that Ext.C2 had never been recorded. Therefore, there was no prejudice in not furnishing the said copy. But that finding has to be again tested in this appeal based on the contentions and the law as aforesaid. We have to come to a definite finding as to which among the statements - `admitted statement' or Ext.C2 was really recorded on 27-2-1996.

147. The contention centered around Ext.P157 dated 27-2-1996 is a weighty contention. It is the admitted case of the prosecution that Accused No.28 George Cherian had been included among accused only on 21-3-1996. If the admitted statement had been on record on 27-2-1996, normally, he should have been included when the first list of accused was furnished to the court on 11-3-1996 as per Ext.P166 report. If there were any omissions due to oversight in including his name, his name could have, necessarily, been included in Ext.P121 report dated 18-3-1996, because that report was filed by yet another investigating officer who could, after examining the case diary detect that omission based on the contents in the `admitted statement'. That Accused No.28 was included only on 21-3-1996 shows that there was no material until that date divulged by PW.3 regarding the complicity of Accused No.28. The admitted statement cannot be in existence, therefore, until 21-3-1996. This convincingly shows the probability of the existence of not only Ext.C2, but also the `disowned statement' stated to be recorded by PW.95. Both these statements do not refer to any criminal act said to be committed by Accused No.28, though his name has been specifically referred to by PW.3. Further those statements exonerate Accused No.28 from any complicity and he was styled as a person who prompted and persuaded PW.3 to escape from the clutches of Accused No.4. Necessarily, PWs.82, 93, 95, and PW.85 Dy.S.P. Jose who investigated the case, successively could not have omitted to notice the alleged omission of each of their previous investigating officers in not including Accused No.28 in the array of accused. It was not an omission at all. It was only on 21.3.1996 he was included. Necessarily, it is thus probable that Ext.C2 was in existence all the while and not the `admitted statement'.

148. As regards the evidence given by DW.1, in the second case it has to be borne in mind that the defence

need not conclusively, disclose the source from which a photo copy of Ext.C2 had been obtained by DW.1. It may be a practice that deserves condemnation. As far as DW.1 is concerned, he could manage a copy because of the defect in the police machinery in the State, perhaps. Anyhow, when viewed in the angle of defence, necessarily, it cannot be omitted to be reckoned though obtained not through fair means.

149. Both sides agree that Ext.D14 bail order refers to payment of Rs.1,600/-, when Dharmarajan sent PW.3 home on 26.2.1996. That version given by PW.3 is available only in Ext.C2. When the court, while passing Ext.D14 order, referred to some facts as the prosecution case and when admittedly the case diary had been passed on to the court for reference and when it is discernible from the order that the case diary had been perused by the court, the prosecution case recited in para 4 of Ext.D14 must necessarily be as stated by the victim as then disclosed by the case diary. Therefore, the reference to these aspects in Ext.D14 probabilises the existence of Ext.C2. It is very difficult to swallow the contention of the Public Prosecutor that the court in Ext.D14 had referred to such particulars from out of the statement of the accused Dharmarajan or from the notings of the investigating officer based on the disclosure made by Dharmarajan. This circumstance also probabilises the existence of Ext.C2.

150. Of course, the Public Prosecutor is well justified in submitting that much veracity need not be attributed to Ext.X2 crime ledger which had been prepared, kept and maintained at the office of PW.95, the Circle Inspector.

151. But the explanation given by the Public Prosecutor with regard to the reference to Sivaji in Ext.D2(b) in the second case is most unconvincing. We have extracted supra the real words of the victim as recorded by PW.93 that what she had stated to the police was Stephenji and that she had never said to the police as Sivaji. From the tenor of the statement dated 10.3.1996, we find that Ext.D2(b) therein was with reference to her own previous statement referring to Sivaji. It cannot be with reference to a statement said to be given by Accused No.4 as suggested by the Public Prosecutor. Accused No.4 was arrested at about 10.45 P.M. on 10.3.1996 from his house at Kottayam. Even admittedly, as submitted before us, his statement was not recorded on 10.3.1996. It was recorded only on the next day. So, there arises no situation for

obtaining any clarification on Sivaji from PW.3 on 10.3.1996. Therefore, the reference to Sivaji appearing in Ext.D2(b) in the second case could not be based on the statement given by Accused No.4; but can only be with reference to the statement given by PW.3 herself on an earlier occasion. The only such statement is Ext.C2. This also convincingly probabilises the existence of Ext.C2.

152. There is yet another aspect as well. Even going by the prosecution case, Stephenji is a close friend of Accused No.4 Reji, who had, while at Kuravilangad, telephoned to Stephenji to come there to have an intercourse with PW.3. Such an invitation can only be to a close friend in the normal circumstance. Mistake in the name of such a close friend as Sivaji instead of Stephenji by Accused No.4 is certainly incompatible to commonsense. Therefore, on that reason also the contention advanced by the Public Prosecutor cannot be accepted, again probabilising the existence of Ext.C2.

153. Though, not of much importance, the admitted version of PW.3, when examined in the second case as PW.1, is that she had visited the park on 17.1.1996 at Ernakulam. This also appears in Ext.C2. This is also in tune with the check out time from Metro Lodge at Kottayam on the morning of 17.1.1996 {Ext.P-57(a)} and the checking in, in Anand Lodge at Ernakulam at about 6.45 P.M. {Ext.P-58(a)} on the same day. Necessarily, PW.3 and Dharmajan would have spent this long time during day light somewhere together. This also probabilises the existence of Ext.C2.

154. Further, reference to Little Flower, the class mate, two teachers of PW.3 and the route to certain places where she had been taken and other minor and intricate details in Ext.C2 also probabilise that such information could have been divulged to the one who had recorded it only by PW.3, as such details were not available at that time from anywhere else. This also probabilises the existence of Ext.C2.

155. Further, the name of the film mentioned in Ext.C2 has also resemblance to the Hindi film `Gambler' shown on 17.1.1996 in one of the theatres at Ernakulam as disclosed by the news paper attempted to be brought in evidence by Dharmarajan, as mentioned above. As per Ext.C2, PW.3 has seen the film with Dharmarajan after their check in at Anand Lodge at about 6.45 P.M. Gambler is the only Hindi cinema exhibited at that time in Ernakulam, going by the said news paper. This could not have been known to the policemen in Munnar on 27.2.1996 except as

told by PW.3. This also probabilises the existence of Ext.C2.

156. It is admitted by PW.3 that PW.95 had questioned her on 28.2.1996. PW.95 started the investigation of the case only on that day. As admitted by PW.3 she reached the police station at about 11 A.M. and at about 1 P.M. she had been taken from the police station to PW.73 doctor for detailed examination. Necessarily, she was available in the station for two hours. So, in all probabilities, PW.95 who took up investigation of the case on that day would have questioned her for ascertaining details and recorded such details. He would have thus prepared a statement with the details he had gathered from PW.3 with regard to the commission of the offence. Even though PW.96 who had transcribed the statement recorded by PW.95 was deputed for investigation of Crime 34/96, {Ext.X 10 (e) in the second case}, at Kumali on 27th and 28th February, 1996, it cannot be stated that he would not have been available on 28th, to transcribe that statement. Ext.P178 note book shows that he was available on 28th night in Munnar police station. The entries in such note book need not be taken as gospel truth with every minute details therein. As he had been present on that day, necessarily, whatever information gathered by PW.95 on questioning PW.3 could have been transcribed by PW.96. So, the disowned statement cannot be brushed aside and it being one recorded under Section 161 Cr.P.C. by PW.95, a copy thereof must be produced before the court and furnished to the accused, as insisted by the Code.

157. When such statement is thus available, reference therein to Vikasini, has much force to relate it to Ext.C2. This Vikasini is none other than Accused No.39, who is named, as now disclosed, as "Vilasini". Vikasini is an uncommon name in Kerala. Necessarily, the name appearing as Vikasini in the `disowned statement' must have crept in there, because of the reference to that name in Ext.C2 thereby again probabilising the existence of Ext.C2 apart from the `disowned statement'.

158. The existence of the disowned statement is also probabilised by reason of the reference to a statement given by PW.3 to Munnar Circle Inspector as contained in her another statement dated 10.3.1996 (Ext.D2 in the second case) recorded by PW.93. It is again probabilised by the statement dated 8.3.1996 in which PW.3 refers that she had not given a statement to PW.95 as had been read over to her. In such circumstances, as already mentioned above,

the officer who recorded that statement, ought to have ascertained from her as to what had been really spoken by her to PW.95, because as admitted by her PW.95 had questioned her. It is the duty of the investigating officer like PW.93 when he had his fingers on the `disowned statement' to put each of the statements contained therein to PW.3 to ascertain the veracity of each of such statement. As it has not been done so by PW.93 who recorded the statement dated 8.3.1996, the probability is that PW.95 would have recorded the statement from PW.3. These details are sufficient enough to probabilises the existence of the `disowned statement'.

159. In the light of the controversy with regard to the two statements dated 27.2.1996, we had, taking much pain, compared both the statements as transcribed. Though the contents are almost same, no allegation of rape against Dharmarajan had been revealed by PW.3 in Ext.C2. She has also not attributed any absence of consent specifically to any of the present alleged rapes. We have also noticed that something more is added with reference to the complicity of Dharmarajan and with regard to the ingredients of rape in the `admitted statement' dated 27.2.1996 as an improvement to Ext.C2, the disputed statement. A close examination of both these statements discloses, from the striking off and corrections at different places in the `admitted statement', that it had been attempted to be copied and improved from Ext.C2. The contention of the Public Prosecutor that PW.95 designed the `disowned statement' to probabilise the existence of Ext.C2 which he, along with PW.96, wanted to substitute later in place of the `admitted statement' is too far fetched and is supported with no evidence or probabilities.

160. Thus, these are the situations and circumstances which probabilises that the first statement given by PW.3 to any of the investigating officer was Ext.C2 and not the `admitted statement' and that the `disowned statement' is the one recorded by PW.95 on questioning PW.3 on 28.2.1996.

161. The accused in that regard had on all probabilities discharged their burden to show that there had been a first statement earlier than the `admitted statement'. It has been withheld not only from the accused, but from the court as well. When that statement did not reveal the offence of rape so far as Dharmarajan is concerned and it did not spell out absence of consent from PW.3 in respect of some of the alleged rapes, necessarily,

all the accused could have made use of it to contradict PW.3, moulding their defence on that aspect from the beginning of the trial itself. Non furnishing of Ext.C2 amounts to denial of a fair opportunity to mould their defence. Equally so is the non production/non furnishing of the `disowned statement' which is really found to be recorded on questioning PW.3 by PW.95. This necessarily results in prejudice.

162. This controversy could not have occurred, if the police had adopted a fair and reasonable method as prescribed in the Code in the matter of registration of the crime. As already mentioned by us, Ext.P1 first information statement nor Ext.P1(a) FIR reveals commission of any cognizable offence for the police to proceed with the investigation. The statement given by PW.1 - father of PW.3, is that she had gone out of the house. He did not have a suspicion even that she had been kidnapped or abducted. What PW.1 had revealed to PW.82, while giving the first information was that

"

."

(I do not know why she had run away).

This does not reveal any commission or suspicion of commission of a cognizable offence to attract Section 154 Cr.P.C. which obliges a police officer to obtain a signed statement and to record it in the FIR book. Merely because certain instructions contained in the Police Manual oblige the Station House Officer to record a man missing case in the FIR book, it will not make it an F.I. Statement under Section 154 to proceed with the investigation in terms of Section 156 Cr.P.C. An offence has been revealed only by the statement given by PW.3 to PW.82 on 27.2.1996. Necessarily, going by the statutory provisions, that must be taken as the revealing of information regarding commission of a cognizable offence to be entered in the FIR book to proceed with the investigation. In this regard, the law has been made explicitly clear by the decision reported in Mani Mohan Ghose v. Emperor [AIR 1931 Calcutta 745}. It was held as follows:

"The conditions as to writing in S.154 of the Code are merely procedural. If there is an "information

relating to the commission of a cognizable offence" it falls under S.154 and becomes admissible in evidence as such, even though the police officer may have neglected to record it in accordance with law. Owing to this neglect in particular cases, the Courts have laid down from time to time that the information which starts the investigation is the real first information under S.154 and should be treated in evidence as such. It does not depend on the sweet will of the police officer, who may or may not have recorded it. But the condition as to the character of the statements is really two fold: first it must be an information and secondly, it must relate to a cognizable offence on the face of it and not merely in the light of subsequent events."

It was therefore incumbent even in man missing cases to register an FIR under Section 154, when the offence is first revealed subsequently. In State of Assam v. Upendra Nath, Rajkhowa {1975 Crl.L.J. 354}, it was held that:

"An information to have the status of first information report under Sec.154 must be an information relating to the commission of a cognizable offence and it must not be vague but definite enough to enable the police to start investigation."

It has also been held in Arun Kumar v. State {AIR 1962 Calcutta 504} that :

"A first information report has to answer certain tests, namely that it must relate to a cognizable offence. A report that some body is missing is not an information relating to the commission of a cognizable offence under Section 154 of the Code of Criminal Procedure."

163. So, had the information given by PW.3 on 27.2.1996, been registered as FIR, necessarily, it would have reached the court immediately and there would not have been any controversy as to which of the two statements dated 27.2.1996 really forms the first statement given by

PW.3. Certainly, as submitted by the Public Prosecutor, the police adopted the prevailing practice of registering man missing cases in FIR form and further statements being taken under Section 161 Cr.P.C.

164. In such circumstances, we make it clear that it will be advantageous to the police and the machinery for administration of criminal justice to follow the procedure in terms of the Code strictly in future. However, as the police has, in this case, only adopted the practice that was being followed till then, the non registration of the statement dated 27.2.1996 given by PW.3 as an FIR will not result in vitiation of the investigation nor the trial.

165. But, at the same time, when the existence of Ext.C2 is probabilised and when Ext.C2 did not attach any complicity on Dharmarajan and even does not spell out absence of consent, necessarily, the non-production and non furnishing of the copy thereof will result in prejudice so far as the allegations of rape and gang rape are concerned.

166. We have already come to the conclusion that the allegations of the offences punishable under Section 376(1) and 376(2)(g) have not been established beyond doubt. Apart from that, the accused are also prejudiced in that context because of non furnishing of copies of Ext.C2.

167. So far as the accused other than Dharmarajan are concerned, they had not been provided with the copies of Ext.C2, the `disowned statement', the statements dated 8.2.1996, 10.3.1996 and 15.3.1996 until the completion of the cross-examination of PW.3. We have already adverted to the importance and significance of those statements in the search for truth in this case. The accused had to file a petition seeking copies thereof which had been objected to by the prosecution. Ext.D37 marked in the second case is that objection wherein the existence of Ext.C2 has been disputed. All the other four statements had been produced in the court at that stage. It is submitted by the counsel for the accused that the belated production of those statements will not satisfy the requirement of law. Apart from that, copies of such statements must be furnished to the accused. They have not received it. It is submitted by the Public Prosecutor that a memo was filed showing service of copies. Had it been so, necessarily, that aspect ought to have been referred to in Ext.D37, objection filed by the prosecutor. Though it is submitted that the copies of the statements have been furnished subsequently and memo had been filed showing service of copies, we are not able to place our fingers on such a memo to come to the

conclusion that there was furnishing of such statements. The judgment does not show specifically that the copies were furnished. Even if those copies had been furnished later at the fag end of trial, after completion of the cross-examination of PW.3, for days together, it will not serve any purpose to cure the damage that the accused have already suffered because of absence of those documents at the time of her examination. Thus prejudice had resulted therefrom at the time of cross-examination of PW.3. They have also moulded their defence based on the then available details only. They were disabled to mould their defence effectively after receiving the copies in time. So it caused prejudice to the accused in the first case totally. The details including the arraying of Accused No.28 and the reference to Sivaji that we have examined earlier are of much importance for the other accused to mould their defence with reference to the said statements which contained very important details which could have been made use of by them for moulding their defence strategy. Therefore, belated production cannot cure the defect of prejudice arising out of non production in time and non furnishing of copies in time, even assuming that such copies were furnished after Ext.D37.

168. It is true, as contended by the counsel and as discussed above, departure from the mandatory and protective statutory procedure will cause prejudice. But the court has to examine whether that prejudice will affect the case in its entirety or not, as held by the Supreme Court in Sunitha Devi v. State of Bihar and another {2004 AIR SCW 7116}. So, we have to examine whether such non production/non furnishing disabled Dharmarajan from meeting the charges under Sections 366 A and 372 IPC, that he had been called upon to meet.

169. In that regard, we have to make it clear that the departure from the statutory provisions now disclosed with regard to the non furnishing of Ext.C2 is not so violent as to strike at the root of the trial in respect of the said two offences. If the procedure adopted was one which the Code positively prohibited, it was possible that the procedure had worked out actual injustice to the accused. Violation must be so obvious that they will speak for themselves as, for example, a refusal to give the accused a hearing, a refusal to allow him to defend himself, a refusal to explain the nature of the charge to him and so forth, so that prejudice shall be so patent through out and the procedure adopted shall be so abhorrent

to well established notions of natural justice that the trial is reduced to mockery and does not conform to the norms envisaged by law. So, in the complete absence of any substantial injustice or in the complete absence of anything that outrages what is due to natural justice in criminal cases, it cannot be said that non-supply of Ext.C2 goes to the root of the trial vitiating it totally. Because the real question is whether disregard of a particular provision amounts to substantial denial of a just and fair trial as contemplated by the Code and understood by the comprehensive expression "Natural Justice".

170. Even if the non furnishing of Ext.C2 resulted in prejudice, so far as Dharmarajan is concerned, it can result in prejudice only with reference to the details contained therein vis-a-vis the allegation of conspiracy, kidnapping, rape and gang rape. That prejudice will not percolate into other allegations. He has even admitted taking the girl from place to place. During such time, several others had illicit intercourse with her. The other statements recorded by the other investigating officers, on closer scrutiny of the details revealed during the course of the investigation, were given to him. It contained the particulars for meeting the allegation of the offences made punishable under Section 366 A and 372 IPC. Furnishing of Ext.C2 would not have placed him in any better position substantially in the defence of those charges.

171. Thus, in this case, as the other statements containing details regarding those allegations had been furnished, it cannot be said that in the matter of trial of the said offences, there had been any prejudice so far as Dharmarajan is concerned, much less substantial prejudice or miscarriage of justice.

172. Going by the evidence of PW.3 and by the admitted case of Dharmarajan, it is conclusive that Dharmarajan had taken PW.3 from place to place and during that journey, it is clear that, she was subjected to sexual intercourse by others. That sexual intercourse is illicit intercourse as she was a minor at that time, and she was not related to any one by marriage. Even according to Dharmarajan, he did not have any relation with that girl. If as admitted by Dharmarajan the girl had followed him from Ernakulam to different places mentioned in his statement under Section 313 Cr.P.C., necessarily, it was on inducement by Dharmarajan. Dharmarajan has thus induced PW.3 who was admittedly under the age of 18 years to go

from place to place and she had been subjected to illicit intercourse during that period. The irresistible conclusion, therefore, is that he has committed the offence punishable under Section 366 A IPC.

173. It is also clear from the same evidence and the stand taken by Dharmarajan in his Section 313 statement that he had disposed of PW.3 while she had been taken from place to place, to several other persons for immoral purpose. It is clear from the evidence of PW.3 that she had been subjected to illicit intercourse by several of the accused in the first case during the period when Dharmarajan had admittedly taken her from place to place and at other places as spoken to by PW.3. Of course, there is no specific evidence of collection of money to find him guilty of selling of the girl or letting her for hire.

174. PW.95, when he questioned PW.3 and recorded the `disowned statement', had thought of collecting proof from the details he had gathered and recorded therein. At that stage, it would appear that the attempt was to concentrate on this aspect of inducing the minor girl to illicit intercourse. But that idea had not been properly conceived by other investigating officers to proceed in that line, in which case, the 1st or 2nd degree of the offence under Sections 372 and 373 IPC would be revealed. Anyhow, it has been conclusively proved based on the evidence on record that PW.3 had been at least disposed of to others by Dharmarajan for illicit intercourse or for unlawful and immoral purposes thereby committing the offence punishable under Section 372 IPC also.

175. Under those two counts, he had been found guilty, by the court below. But no separate sentence has been ordered as the maximum sentence of life imprisonment for the offence punishable under Section 376 (2)(g) was imposed, which we have now vacated. As we have confirmed the conviction under the said two provisions, so far as Dharmarajan is concerned, we have also to pass an order of sentence on those counts.

176. We are also conscious of the contentions urged by the Public Prosecutor that going by Charge I in the first case as conspiracy for commission of the offence including that for wrongful confinement, rape and gang rape, at difference place has been made against the other accused as well, they must also be found guilty of the offence under Sections 366 A and 372 IPC. There was specific allegation of conspiracy for wrongful confinement, for rape and for gang rape and also the allegation of

substantive offence under Sections 372 and 373 IPC, so far as the accused in the first case are concerned. But all of them had been found not guilty and were acquitted of the offences under Sections 372 and 373 IPC. In such circumstances, they cannot be found guilty of the offences under Sections 372 or 373 in these appeals filed by them.

177. The specific charge of the offence under Section 366 A IPC was made only against the first accused and not against others. It is submitted that Charge No.1 regarding conspiracy also takes in the allegation of conspiracy for commission of the offence under Section 366 A as well. There is specific charge of conspiracy for wrongful confinement, rape and gang rape at different places, which cannot be done without moving her from place to place. Therefore, they should also be roped within the conviction under Section 366 A, the Public Prosecutor submits.

178. The prosecution has raised a charge under Section 120 B as charge No.1. Only the allegations of conspiracy for wrongful confinement, rape and gang rape are specifically raised therein. The allegation of conspiracy for the offence under Section 366 A IPC can never be spelt out from that charge. Moreover, there is no evidence regarding the conspiracy for the purpose of commission of offence under Section 366 A or on any inducement to PW.3 said to be made by any of the accused in the first case to move her from place to place for the purpose of illicit intercourse by any one of them. In the absence of such evidence regarding the conspiracy for the offence under Section 366 A in this case, we cannot accept that contention of the Public Prosecutor. There was also no charge of the offence under Section 366 A as such against any of the accused in the first case, except accused No.1 who did not have, as admitted by the prosecution, any role except for alleged kidnapping which is found against the prosecution. Therefore, any of the accused in the first case cannot be stated to have committed the offence under Section 366 A.

179. But, when Dharmarajan is found guilty of disposing of a minor for unlawful and immoral purpose, there must be another one or more guilty of obtaining that girl for unlawful and immoral purpose, made punishable under Section 373 IPC. The offences punishable under Sections 372 and 373 are that relating to sex trade. The accused in the first case were charged with those offences. They also faced trial on that count. The court below, in

the first case, acquitted all of them of the said two offences. Unfortunately, the State did not prefer an appeal against such acquittal. Even in the scenario of the said accused filing several appeals as mentioned above, assailing conviction on other counts, and the pendency of such appeals for about four years, the State did not seem to have taken that aspect seriously. When thus there is no appeal by the State against the acquittal of the accused in the first case of the offences of sex trade, punishable under Sections 372 and 373 IPC, we cannot punish them on those counts, in the appeals filed by them.

180. We have now to decide the quantum of punishment so far as Dharmarajan is concerned for the offences punishable under Sections 366 A and 372 IPC. At this juncture, the counsel for Dharmarajan Sri.Thomas Mathew was heard on the question of sentence.

181. It is submitted by him that the court below did not pass any sentence after having found him guilty of the offences under Sections 366 A and 372 IPC. Sentence was imposed only for the offence under Section 376(2)(g) IPC. Therefore, unless there is an appeal under Section 377 Cr.P.C. by the State seeking enhancement of the sentence under Sections 366 A and 372 IPC, this court may not pass an order of sentence on Dharmarajan on those two counts, it is urged. It is further submitted that he is now placed in a very difficult situation having lost his mother. He is facing divorce proceedings from his wife. He has to maintain his aged father and a child. He has already suffered imprisonment for two years and 92 days including that at the pre-trial stage. In such circumstances, a most lenient view may be taken in his case to minimise the sentence, prays the learned counsel. It is also submitted that, such approach may be adopted when all the other accused have been acquitted.

182. With regard to the contention raised in terms of Section 377 Cr.P.C., we are afraid, we cannot accept it. A reading of the impugned judgment will show that there was conviction on all the counts including under Sections 366 A and 372 IPC; but no separate sentence on those two counts was imposed, as the court below felt that the imposition of the maximum sentence provided for the offence punishable under Section 376(2)(g) would be sufficient the interests of justice. When a person had thus been ordered to be imprisoned for life, the court below felt that no separate term of sentence need be passed for other offences.

183. When there was a conviction, the court below

was obliged to impose a sentence on each of the several counts of conviction and it could, at the best, have directed that the sentences should run concurrently, rather than imposing no sentence, in the light of the more severe sentence passed for a graver offence. In such circumstances, the State need not have taken an appeal under Section 377 Cr.P.C. for enhancement of sentence, because there was no sentence at all on those two counts. On the other hand, when one is found guilty of an offence, he has to suffer the sentence provided for, for that offence. This being not the case of enhancement of sentence, when his appeal is allowed in part setting aside the conviction for the offence on which he had been sentenced for a longer term, he shall have to face sentence in respect of the convictions which we are confirming in this appeal filed by him. Therefore, we are of the view that we must impose sentence under the said two counts. We have such power in terms of clause (b) of Section 386, if not clause (e) thereof.

184. Taking into account the nature of the offence committed and the plight of the victim, who had been subjected to such offence for about long 40 days, we feel that no leniency need be shown to such an accused. We are of the view that taking into account all circumstances, a sentence of rigorous imprisonment for 5 years with a fine of Rs.25,000/-, on each of the said two counts of offences shall meet the ends of justice in this case. In default of payment of fine as aforesaid, he shall undergo simple imprisonment for one year each on those two counts.

185. Accordingly, we allow Crl.A.No.877/02 as aforesaid, setting aside the conviction of the appellant therein on all the counts except under Sections 366 A and 372 IPC and modify the sentence passed on him by the court below, as aforesaid, for the said two offences. We make it further clear that fine, if realised, shall be paid to the victim, PW.1 in Sessions Case No.241 of 2001 leading to Crl.A.No.877/02. The substantive sentences of imprisonment shall run concurrently. He will also be entitled to set off under Section 428 Cr.P.C. The court below shall issue non-bailable warrant against him to execute the sentence.

186. The remaining criminal appeals arising from S.C.No.187/99 are allowed setting aside the conviction of the appellants therein and vacating the order of sentence passed on them. Bail bonds executed by them shall stand cancelled.

187. Now, we will have to consider the three

Crl.M.Cs. filed by PWs.95, 96 and DW.10. In the light of our findings as above, it cannot be said that any of them has gone wrong warranting any strictures against them. We have already set aside the impugned judgments, except insofar as the conviction under Section 366 A and 372 IPC so far as Dharmarajan is concerned. Consequently, the strictures made against them shall stand vacated. Crl.M.Cs. therefore succeed.

188. We are indebted to the counsel appearing in these cases, including the special public prosecutor for the able assistance rendered to us to dispose of these appeals and Crl.M.Cs. The arguments have been long and meticulous. We have been taken through all the relevant inputs even minor ones in detail. We place on record our indebtedness to counsel, in that regard.

189. At the same time, we shall express ourselves that we had been slightly disturbed by the attitude shown by the print and electronic media during the hearing of these appeals. Two or three days before, there appeared a news item in more than one vernacular daily that this court had come to the conclusion that the investigation done by certain officers was not proper, even before the hearing was complete.

190. Any report appearing in leading daily news papers will be read by thousands of people and they will carry impressions on its basis. We are afraid that if the report comes on like this, the business of the court will be affected. We feel that those who are making such reports are unmindful of the repercussions of such reports. Many of the legal reporters are lawyers who are in the know of what is happening in the court rooms. Nobody accepts a mute judge. A mute Judge may not be able to render justice. A Judge may have to convey ideas and express doubts. An effective adjudicatory machinery can work only by conveying ideas. When the Judges are posing questions to one, it will, in certain situations, be couched with the contentions to the contra placed before the court by his adversary. Such questions however hard it may be, shall be answered giving the response on that particular contention to the court. If a reporter of a news paper who casually comes to the court room and hears such questions then, and forms a wrong idea that the court has formed an opinion; and consequently reports his impression as the views expressed by the court, it will not be a responsible journalistic approach with an anchor on the society in general. It may help in generating sensation, which is of

no use. Misplaced sensation can drive even the earnest truth seekers away from the right path pursued by them. Of course, the courts will certainly not be carried away by such incorrect reports or sensation created thereby. But the public at large should not be allowed to carry wrong notion on the views of the court. Therefore, it is high time that the journalists reporting the proceedings in court, shall bestow care and responsibility to report the proceedings truly and correctly. The legal reporters must understand and comprehend the sublime processes that go on in courts. Discussion, debate, exchange of ideas and attempt to meet one reason with a better one are the foundations of that noble process. Search for truth becomes effective and purposive only when the adjudicator expresses doubts and exchanges ideas. Queries from the bench and clarifications sought must be understood and their impact comprehended by the law reporters. If they cannot comprehend and perceive the soul of such sublime interactions in court, they must desist from such reporting.

191. We were again disturbed that almost all the daily news papers today have carried reports about the contents of this judgment, which is not even complete now. Our judgment bears the date of today. Evil is that a report on its contents was published by media yesterday and today morning. It is true that after hearing almost for long two months and bearing all the materials with much clarity in our minds, we thought of delivering our judgment with the able assistance of the counsel and in their presence forthwith. Moreover, it is the duty of the court to deliver the judgment as quickly as possible so that the parties will get the fruit of their appeal right from the mouth of the court itself at once. A pronouncement can be called a judgment only when the last word is pronounced and a date is given to that pronouncement. Until then, it is possible that certain observations or conclusions in one or two segments already dictated earlier may be modified. Moreover, in a Division Bench, it is also possible that the opinion expressed by one judge need not always be accepted by the other judge, who may form a different opinion. A judgment of a Division Bench will be conclusive only when its delivery is complete and the other judge sitting in the court concurs with the view so expressed by such delivery by the other. Until then, it cannot be termed as a Judgment. It is not proper, we feel, for the responsible media people to serve half-baked judgment to the public and

in case any mistake occurred in the dictation is corrected later, it will create again a chaos as to what prompted the court to deviate from the mistaken portion, which has been published by the media as the verdict of the court.

192. Therefore, it is high time, to caution the media, both print and electronic, that the proceedings in court must be published with much care and restraint and only after ascertaining the truth and not from any truncated or partial version. The sublimity of the court process must be imbibed by the reporter when he makes the report. No harm will occur in such circumstances, if the publication is delayed by a day. It will not affect anybody's right to information which means the right to receive correct and true information. Report on a document like the judgment shall be based on its complete contents. It cannot be reduced to the type of report on a public speech or address. We hope that the media and the public will take this observation in its true spirit. We do not in any way mean to curb the free press in their activity. What is required is only a responsibility with some amount of restraint to deliver the true information to the public, so far as the court proceedings, which the people of the country consider with high esteem, are concerned and not to cause embarrassment to courts.

193. It is advisable that there shall be some guidelines in that regard so that one can follow the same with clarity and certainly.

194. We, therefore, appeal to the Press Council of India that they shall consider framing some regulations with regard to the reporting of proceedings in the court including the judgment.

195. A copy of this judgment shall be sent to the Press Council of India. In the meantime, we are hopeful that the media will conceive in true spirit the sentiments expressed above and exercise restraints and constraints wherever necessary in reporting the proceedings of the court.

(K.A.ABDUL GAFOOR)
JUDGE.

tm/nan/sk/-

CONCURRING OBSERVATIONS BY JUSTICE R. BASANT.

196. I have heard the judgment dictated by my learned brother immediately after conclusion of the very long arguments which have spread over a period of two months. I do wholly concur with the final conclusion that the appellants in all these appeals are entitled to the benefit of doubt in respect of all offences alleged against them-except Dharmarajan the principal accused in so far as it relates to the offences punishable under sections 366A and 372 of the Indian Penal code. I do also concur with the sentence imposed on him for the said offences. But I feel obliged to give expression to a few disturbing thoughts that are aroused in my mind after considering the facts in this case.

197. We have attempted on the facts of this case to draw the frontier line between consent and mere passive resignation and acquiescence. It is the unavoidable but onerous duty of courts on the facts of each case to identify, ascertain and demarcate that real, yet elusive and difficult, line between voluntary consent and passive acqueiscence, subject of course to the law relating to burden of proof and benefit of doubt. This by any standards has not been an easy task in this case. We are not unmindful of the plight of the victim lass in distress. Consent in the law of rape need not always be a prudent or even intelligent one. It is easy to assume that no minor if prudent and intelligent, and if her faculties of reasoning and sense of righteous behaviour are properly developed and intact, would choose in the Indian context to consent to extra marital and pre marital sexual intercourse. Law in its wisdom chooses to concede to a girl, below 18 but above sixteen, the right to consent to sexual intercourse. That legislative wisdom cannot be questioned by the courts. The courts under the present law can only enqire whether consent in fact is there and whether such consent if any is vitiated. If such consent is given by a girl aged less than 16years the same can be ignored. But if the minor girl is aged above 16years, the courts can only enquire whether such consent was there and whether such consent if any is vitiated on any of the grounds enumerated in S.90 IPC or clauses thirdly to fifthly in S. 375 IPC; not whether it was moral or proper for the girl to give consent and for the indictee to accept and act on such consent of a minor. Her age, by itself, cannot be reckoned as sufficient to vitiate consent. Criminality and culpability according to law, and not morality of the consent or that of the indictee, are the

questions before a criminal court.

198. The age at which a female offspring is reckoned as available (or competent to give the requisite consent) for sexual intercourse has often been reckoned as one safe indicia to assess the culture of a polity. Refined societies treat their children with concern and compassion. In the march of civilizations towards progress, puberty was earlier reckoned as the biological rubicon which had to be crossed by a female child to be eligible for according consent in marriage and sexual activity. But as civilisations advanced it was considered atrocious that the line could be drawn at such an early age. Hence the Indian legislature in its wisdom has now drawn the line at sixteen years.

199. To me, it rebels against logic and reason that a system which considers a person aged less than 18 years to be a child/ minor, not competent to take major decisions affecting herself or others for the puposes of the Indian Majority Act, Contract Act, Juvenile Justice Act, Child Marriage Restraint Act, Representation of Peoples Act -- nay for even Secs. 361, 366, 368 etc of the Indian Penal Code, should concede to such child the right to consent to sexual intercourse. Marry, she cannot at that age even with the consent of her parents. She cannot be taken out of the keeping of her lawful guardian even with her consent for lesser purposes. But consent she can to sexual intercouse so long as she does not go out of the keeping of her lawful guardian ! Strange propositions ! Is law the quintessence of the enlightened common sense of the community? One is compelled to lament in resignation that there can be nothing more uncommon than common sense.

200. The Law Commission of India did attempt in its 84th report to bring up the age of consent in rape to 18 years in tune with other enactments and consistent with refined and modern notions regarding the concern and compassion which society should bestow on its younger members. The consent for intercourse allegedly given by PW3, on which aspect we have chosen to concede the benefit of doubt to the appellants, could easily have been ignored if that suggestion of the Commission were accepted by the Parliament. But alas that was not accepted. With the result the age of consent in an offence of rape continues to be 16 years even today.

201. In the fiercely consumerist society that we live in, a young girl child is also exposed to so many temptations that it is difficult for the child which has

not been groomed in proper atmosphere with a proper value system inculcated in it, to resist such temptations. Such children can be termed deviants but cannot be merely condemned and left to their fate . They too deserve the sympathy of the system as it is no crime of theirs that they are born and forced to grow up in such atmosphere. It is the duty of the secular state to give the requisite education to instil a proper value system in such future citizens. That must be reckoned as the incident of the constitutional obligation of the State to give free primary education. That obligation cannot be relegated by the State to religious or optional institutions. They too deserve the protection of the law against unintelligent, imprudent and immoral consent being extracted from them at that early age. No one should be permitted by law to rely on such alleged consent given by a minor aged less than 18 years, the fond child of law and equity. I may sum up by stating that raising the age of consent for sexual intercourse to 18 consistent with the stipulations in the saner subsequent enactments appears to be the unavoidable imperative before the system. At least the Kerala Legislature must take bold efforts to bring in suitable local amendments to S.375 of the Indian Penal Code and give leadership to others.

202. Making of the law in a democratic polity is an agonisingly slow process. The needs of the society have to be perceived by the polity. Opinion makers have to perceive the need. Public opinion has to be generated, Such public opinion must get expressed on the floor of the legislature and must get translated into legislative action. Legislative stipulations have to be enforced by the executive and interpreted by the adjudicators. It is only then that relief is ultimately enjoyed by the polity.

203. Wait, we must. But the process has to start here and now. Such unfortunate incidents like the one in this case, which seem to be too frequent in the Kerala scenario of late, should not be viewed merely as god sent opportunities for improving stakes in the electoral battles to follow. They must make the enlightened polity aware of the need for changes in the law. Meaningful discussions must be aroused. Observations by courts may help to accellerate the pace of the march towards ideal laws. The purpose of this added note is just that.

Dated this the 20th day of January, 2005.

(JUSTICE R. BASANT)

Nan/

K.A.ABDUL GAFOOR &
R.BASANT, JJ.

Crl.A.Nos. 590, 591, 599, 600, 602, 603, 604
605, 606 to 619, 627, 632, 633, 633 and 637 of 2000
877 of 2002, Crl.M.C. Nos.7136 of 2001,
3862 of 2002 & 4141 of 2003

JUDGMENT

20th January, 2005.
