IN THE COURT OF SESSION, KOTTAYAM DIVISION

Present: Sri. Gopakumar G., Addl. Sessions Judge-I.

Monday, the 16th day of March, 2020

Crl.M.P. Nos.195/2020 & 475/2020 in S.C.No. 457/2019
(Crime No.746/2018 of Kuravilangad Police Station)

Crl.M.P. No.195/2020 in S.C.No. 457/2019

Petitioner/Accused:-

Bishop Franco Mulakkal, aged 55 years,
S/o Ippunni, Bishop House, Civil Lane,
Jalandhar City- 144 001, Punjab State.

By Adv. M/s B. Raman Pillai & Associates.

Respondent/Complainant:-

State of Kerala, represented by
Special Public Prosecutor.

By Special Prosecutor Adv. Sri. Githesh J. Babu.

Crl.M.P. No.475/2020 in S.C.No. 457/2019

Petitioner/Defacto Complainant:-

By Adv. John S.Ralph,
Counsel for the Defacto Complainant

Respondent/Accused:-

Bishop Franco Mulakkal, aged 55 years,
S/o Ippunni, Bishop House, Civil Lane,
Jalandhar City- 144 001, Punjab State.

By Adv. M/s B. Raman Pillai & Associates.

These Crl.M.Ps having been finally heard on 07.03.2020 and the court on 16.03.2020 passed the following:-

COMMON ORDER

The sole accused in S.C. No.457/2019 has filed Crl.M.P No.195/2020 to discharge himself from the charges levelled. Victim has filed Crl.M.P No: 475/2020 through his counsel to give a direction to the investigating officer to file 5 different final reports as against the present final report.

2. Accused is a Bishop of the diocese of Jalandhar, belonging to Latin Catholic Rite**.** The victim in this case was a nun, assigned with the duty of Mother Superior at Kuravilangadu mission home. Earlier, she was the head of a Congregation named Missionaries of Jesus, which was managing 12 monasteries in Punjab 3 in Bihar and 3 in Kerala. She joined Jalandhar diocese on 1994.

3. Prosecution alleges that on 05.05.2014, while the accused was staying at guest room No.20, at the old age home belonging to St. Francis Mission Home Kuravilangadu, by using his official position, control and

dominance over the victim, he called her to the said room and asked her to iron his cassock. While she was returning after ironing the cassock, he asked her to get him the papers relating to the construction works carried out in the kitchen. When the victim returned with the papers, he locked her inside the room, grabbed her, and forcefully removed her religious dress and veil. It is also alleged that after removing her undergarments he forcefully inserted his fingers into her vagina and attempted to thrust his sexual organ into her mouth. According to the prosecution he compelled the victim to hold his sexual organ, to do onanism. According to the prosecution, after committing sexual assault on the victim the accused threatened her that if she discloses the sexual assault to others, she would be done away with, and thus instilled fear of death on her.

4. According to the prosecution, subsequently, on 06.05.2014 at 11.30 p.m., 11.07.2014 at 10 p.m., 05.01.2015 at 10.30 p.m., 15.01.2015 at 10.30 p.m., 22.04.2015, 22.05.2015, 27.07.2015, 21.08.2015, 05.11.2015, 17.01.2016, 29.04.2016 and on 23.09.2016 between 10 p.m. and 12 a.m., the accused ruthlessly

exploited her and committed repeated acts of penetrative sexual intercourse with the victim, against her consent by making use of his official position, control and dominance over her and thus committed the offences punishable u/s 342, 376(2)(k), 376(2)(n), 376 C (a), 377 and 506(ii) of IPC. A final report has been filed against the accused alleging commission of the above offences.

Contentions in Crl.M.P No.195/2020

5. Crl.M.P No.195/2020 is a petition filed by the accused seeking discharge. According to the petitioner, the version of the victim itself is inconsistent on many aspects. Many relevant materials are being suppressed. The long delay in lodging the complaint stands unexplained. The learned counsel further pointed out that from the statement of the victim itself it has come out that after the first incident, on the next day morning, she had accompanied the petitioner to perform the baptism of victim's sister's children. She welcomed him and served food to him. The entire function was videoed and the victim was found jovial, cheerful and respectful. The video was reportedly seized by

the investigating officer but the same has not seen light till date.

6. Learned counsel further argued that the 13 days specified in the final report were manipulated using the records available in Mission Home. But still, there is nothing in the records to prove that the accused stayed at the Mission Home on 05.05.2014.

7. According to the petitioner, the victim approached the police only when the blackmailing tactics adopted by herself and her family reached the police authorities, through a formal complaint by the PRO of the diocese, which resulted in the registration of crime No.725/2018 of Kuravilangadu police station on 23.06.2018. Her request to shift herself and her associates to Bihar or to permit them to continue at Kuravilangadu Mission Home for a period of at least one year was also rejected, which also might have prompted her to lodge a false and frivolous complaint.

8. In the statement dated 27.06.2018 which forms the basis for registering the FIR, the only factual allegation,

to constitute the offence of rape is “insertion of finger into her vagina”. It is specifically asserted therein that although the Bishop had attempted to have intercourse with her, she successfully resisted it. The victim did not narrate to the doctor, as evident from her medical record, about any penetrative sex other than the allegation of fingering. The failure to carry out per vaginal examination at that time has much significance, having regard to the fact that the investigation agency was definitely aware of the existence of the allegation in the letter of Jaya (CW.16), wherein she had made allegations of adulterous conduct involving her husband and the victim. It is in this background that the subsequent statements of CW1, narrating a totally different type of occurrence has to be appreciated. Although rape is alleged on 12 other dates also, no other act is described. Victim also has no claim that she approached any of the above authorities in the Latin Rite.

9. Leaving aside many other infirmities in her statement, if the above basic infirmities and broad probabilities in her evidence is considered in the proper perspective it is clear that there is total absence of any

material to proceed against the petitioner on the basis of the evidence of CW1. The fact that CW1 has shared such information by herself or through CW5 to the driver of a taxi stand is sufficient to show the bogus nature of her claim that the delay in approaching police is due to her efforts to find a solution through church. The complaint preferred by CW16 is a vital document which cuts at the root of the prosecution's attempt to paint CW1 as a pious nun who happened to be sexually violated by the petitioner against her will. On these grounds, it is contended that the accused may be discharged.

10. The learned special prosecutor has filed a counter negating the various contentions raised.

Contentions in Crl.M.P No: 475/2020

11. According to the victim, altogether 13 incidents of rape were reported. These incidents spread over a period of 3 years. As per sec. 219 Cr. P.C. only 3 counts spreading over a period of 12 months alone can be tried together in one trial. Hence, the final report has to be

split into 5, for which necessary direction has to be given to the investigating officer.

12. Neither the prosecution nor the defence has filed any written objection to the demand. But both have raised their oral objection to the demand.

13. Preliminary hearing on charge was held along with the rival arguments on the Crl.M.P's.

Arguments advanced

14. The learned counsel for the accused firstly stressed on the aspect of delay. He pointed out that though the prosecution has produced copy of two letters, one addressed to Mar George Kardinal Alencherry (CW 25) and another addressed to Mar Sebastian Vadakkel (CW 27), no attempt is made to trace out the originals. Though it is mentioned that some mobile messages are attached in the said letters, those messages are not produced. Moreover, the victim herself has mentioned in those letters that by a bare perusal of the message, nothing obnoxious could be made out. She never made any complaint about any sexual

assault in those letters. The mail and letter allegedly sent to Nuncio is also not traced out.

15. He further pointed out that in the First Information Statement given by the victim her only allegation was that the accused inserted his finger into her vagina. There was no allegation of any penile penetration. In the wound certificate of the victim she has narrated a history of fingering alone. Moreover, crucial portion of the history given by her has been struck off. Learned counsel further pointed out that prior to the complaint allegedly made by the victim, CW16 who is a relative of the victim had made a complaint, wherein it is alleged that the victim had illicit intercourse with her husband. He further stressed on the fact that the victim has admitted in her 161 statement that the husband of CW16 had sent obscene messages to her, and one of those messages was forwarded to CW16. According to the prosecution, CW16 has subsequently retracted from the complaint and she has given a statement before the police that the matters stated in her complaint were false and that the text messages allegedly sent from the cell phone of her husband were in fact manipulated by

her. But the investigating officer has failed to seize the mobile phones which were used to exchange the text messages.

16. Change of stand of the victim that she was in fact raped by the accused has to be appreciated in the background of the allegations levelled by CW16, argues the counsel. The medical examination of the victim revealed that her hymen was torn which pointed towards a sexual intercourse. Probable to make herself safe from the allegation of sexual intercourse with the husband of CW16, she had come up with the history of rape against the accused in her subsequent statement, argues the learned counsel for the accused.

17. The learned counsel further argued that the victim has in her 164 statement admitted that she never disclosed to anyone else that she was forced to sleep with the accused. In the said circumstances, the version of CWs 3 to 5 who have only hearsay knowledge about the incident cannot have any relevance.

18. He further pointed out that though in the complaint dated 27.06.2018 allegedly given by the victim the allegation of rape is mentioned. The said complaint is neither produced along with First Information Statement. There was long delay in producing the same. CW26 who was a Bishop of Pala Diocese and CW28 who was the priest of Kuravilangadu church in their 161 statements have deposed that the victim never spoke to them about the sexual assault committed on her. According to the victim, she had confessed to CW31 about the sexual assault done on her. CW31 has in his 161 statement testified that he never used to hear confession at the retreat center. The learned counsel concluded his argument and contended that the entire materials produced by the prosecution would reveal that the attempt of prosecution is only to malign the reputation of the accused. There is no reasonable material to frame charge against him and hence, he may be discharged.

19. In answer to Crl.M.P No. 475/2020, the learned counsel argued that the victim cannot seek for such a relief herself. She can only aid the prosecution. He also relied on

the dictum laid down in 2006(2) ILR 62, 2002 (2) SCC 135, AIR 1979 SC 366, and AIR 2020 SC 100.

20. The learned special prosecutor countered the argument and contended that the victim had spoken to the magistrate and to the investigating officer about her ordeal. The details of the forceful sexual assault to which she was subjected to have been narrated in those statements. The learned prosecutor argued that at this stage, what the court needs to see is whether a prima facie case has been made out or not. The court is not expected to appreciate the veracity and reliability of the statements of the victim and other witnesses.

21. He pointed out that the accused was enjoying vast power and authority over the victim, and was exercising his control over victim and her associate nuns. Four years after the first incident victim had made a complaint to Nuncio, the immediate authority below the Pope of Vathikan. She had also preferred a complaint before CW25 and CW26.

22. Apart from the statement of the victim, CWs 2 to 8 have also given separate statements supporting the case of the victim. CW11 and CW12 have stated that they have experienced similar treatment from the Bishop. The presence of the accused at Kuravilangadu mission home on the days of the alleged incident has come out from the chronicle maintained at the mission home. He pointed out that CW16 did not proceed with her complaint. She has stated that the said complaint was created by her to tarnish the image of the victim. On these grounds, he argued that there is no scope for a discharge.

23. In answer to Crl.M.P No. 475/2020, the learned prosecutor argued that the several acts narrated in the final report are intrinsically connected together to form part of the same transaction. The authority of the accused over the victim was misused on all those instances and hence there is nothing wrong in jointly trying all those crimes, which form part of a single transaction.

24. He also relied on the dictum laid down in 1977 scc (cri) 404, and 2020 (1) KHC 965 and 2020 2 SCC 217.

25. From the rival contentions made, the following points arise for consideration :-

1) Is there any prima facie material, to proceed against the accused?

2) Is the victim entitled to file independent petition, contrary to the stand taken by the Special Prosecutor?

3) Can the offences be tried together ?

26. **Point No.1**:- The crux of the prosecution case is that the accused compelled the victim using his authority and power to have forceful sexual intercourse with her. First incident occurred on 05.05.2014, while the last happened on 23.09.2016. The FIR was registered on 23.06.2018. Going by the prosecution case, prior to the registration of the FIR the victim had made complaints to CW25, CW26 and CW27. She had also preferred an e-mail to Nuncio, who is the religious head of Latin rite, immediately below the Pope at Vathican.

27. Allegations of forceful rape has been made against the accused in the complaint preferred to Nuncio,

though such an allegation is absent in the written complaint preferred to CW25 and CW27. Though the originals of these complaints are not produced before the court, at this stage, this court cannot come to a conclusion that no such complaints were in fact preferred to any of those persons. Even otherwise the question whether there was sufficient reason for the delay caused in reporting a crime to the superiors, including religious heads, or to the authorities under law is a matter which needs to be appreciated during trial. In some circumstances, even a single day's delay can be fatal to the prosecution, while in other, even long delay can be overlooked on getting proper explanation during the trial. The prosecution case cannot be stifled at the inception itself on account of delay. Moreover, many grounds have been placed to explain the delay caused. The position and authority of the accused and the weak position of the victim are projected as some of the reasons for the delay which are sufficient to pass the scrutiny of a prima facie case, as envisaged at this stage.

28. The next aspect is regarding the character and prior conduct of the victim in the light of the complaint

made by CW16 against her. Going by Sec. 53 A of the Evidence Act, the bad character of a prosecutrix is not a relevant fact in deciding whether rape was committed on her or not, when the aspect of consent is under issue. Further, going by the 161 statement of CW16, the victim never had any illicit relationship with her husband. The question whether the said statement is believable or not is something which can be decided after a full-fledged trial. Prima-facie, there is no ground to discard the 161 statement allegedly given by CW16. Similarly, at this stage nothing can be concluded from the alleged failure of the investigation agency to retrieve the text messages.

29. It is true that in the First Information Statement as well as in the medical examination certificate of the victim, the victim has narrated about fingering alone. There is no specific allegation of any penile penetration. Going by the prosecution case, the incident had firstly happened on 05.05.2014. After 2013 amendment, inserting finger into the vagina of the victim would very well come within the definition of rape. Hence, even if it is argued that there was only fingering the same would very well amount

to rape. Moreover, the Victim has in her 161 statement and in the statement given before the Magistrate, disclosed about penile penetration.

30. Apart from the versions of CW1, the prosecution also relies on the statements of CWs 2 to 6, who have also given statements before the police and the magistrate pointing out that the victim had narrated about her ordeal to them. It is true that in page 33 of her 164 statement, she has stated that, though she disclosed to her junior sisters that she might be forced to share bed with the accused, she did not disclose to them that she was already forced to share bed with him. CW2 was not present at that time. CW3, CW4 and CW5 alone were there at that time. CW3 and CW5 have stated before the magistrate that CW1 disclosed to them that she had been raped by the Bishop. CW4 on the other hand has stated that CW1 disclosed to them that she had been sexually assaulted by the Bishop. By relying on the 164 statements of the victim, and CWs 3, 4 and 5, at this stage, it cannot be concluded that the victim never disclosed any of these facts to CWs 3 to 5. One must remember that a witness can retract from any part of her

statement even if the same is given to the magistrate and hence the statements contained therein cannot be regarded as conclusive proof, either about the guilt of the accused or about his innocence. CW2 has stated before the magistrate that she was told by the victim about the penetrative sexual intercourse committed by the accused. CW2 is a nun belonging to Franciscan Clarist Congregation, while CWs 3 to 6 are sisters attached to Missionaries of Jesus Congregations. Their statements cannot be brushed aside at this stage, when what is required is only a prima facie case.

31. One must remember that u/s 114(A) of the Evidence Act it has to be presumed that the statement of the victim regarding absence of consent is true. Of course, the presumption would apply at the stage of trial alone. But when the victim consistently speaks before the police and the magistrate that she has been raped on 13 occasions, due weightage has to be given to her statements especially when the question of prima facie case alone is under consideration.

32. Hon'ble Apex court has in **Amit Kapoor v. Ramesh Chander and another (2012) 9 SCC 460**, has held that:

> *"17. Framing of a charge is an exercise of jurisdiction by the trial court in terms of Section 228 of the Code, unless the accused is discharged under Section 227 of the Code. Under both these provisions, the court is required to consider the record of the case and documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the court and in its opinion there is ground for presuming that the accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the section exists, then the court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a presumption of law as such. The satisfaction of the court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for exercise of such jurisdiction. It may even be weaker than a prima facie case. There is a fine distinction between the language of Sections 227 and 228 of the Code. Section 227 is the expression of a definite opinion and judgment of the*

> *Court while Section 228 is tentative. Thus, to say that at the stage of framing of charge, the Court should form an opinion that the accused is certainly guilty of committing an offence, is an approach which is impermissible in terms of Section 228 of the Code.*

It was also held that

> "*If the scales of pan as to the guilt or innocence of the accused are something like even at the conclusion of the trial, then, on the theory of benefit of doubt the case is to end in his acquittal. But if, on the other hand, it is so at the initial stage of making an order under Section 227 or Section 228, then in such a situation ordinarily and generally the order which will have to be made will be one under Section 228 and not under Section 227.*"

A trial judge is not even required to record detailed reasons as to why such charge is framed. On perusal of record and hearing of parties, if the judge is of the opinion that there is sufficient ground for presuming that the accused has committed the offence triable by the Court of Session, he shall frame the charge against the accused for such offence.

(See **Dinesh Tiwari v. State of Uttar Pradesh and another (2014) 13 SCC 137**).

33. The statement of the victim reveals that she was asked to come to the guest room where the accused was staying under the pretext of submitting some official papers and when she entered the room, she was wrongfully confined to the room by the accused who locked the room from inside. Thus, prima facie materials are available to frame charge u/s 342 of the IPC.

34. According to the prosecution, the accused was in a position of control or dominance over the victim. Admittedly the accused is a Bishop and the victim is a nun. Prima facie materials are available to show that he was in a position of control and dominance over her. I have already come to a conclusion that the statement of the victim prima facie leads to a conclusion that she was raped on multiple occasions including fingering and forced her to do other sexual acts, not amounting to rape. Thus, there are ample materials to frame charges u/s 376(2)(k) and 376(2)(n) and 376 C(a) of IPC.

35. As per the prosecution case, on 05.05.2014, the accused made the victim hold his sexual organ and forced her to stimulate his genital with hand, until he ejaculated. Such an act would not come within the purview of rape as defined u/s 375. It is also alleged that the accused attempted to thrust his sexual organ into the mouth of the victim. It is also alleged that he rubbed his sexual organ on her lips.

36. Insertion of male sexual organ into the mouth of a female victim comes within the purview of rape and the same cannot be regarded as an offence against the order of nature. It was held in **Vinod Thankarajan and Another v. State of Kerala and Others (2020 (1) KHC 852)** that where the alleged acts of oral sex are said to have been committed by a male accused on a female victim on or after 03.02.2013, then it would come within the ambit of S.375 of the IPC and not within S.377 of the IPC.

37. Now the question is whether the act of performing onanism would come within the purview of S.377 IPC. For holding a person liable for carnal intercourse

against order of nature, penial penetration is mandatory. Hon'ble Madras High court has in **Brother John Antony v. State (1992 Cr.L.J 1352)** held that when a male organ is held tight by the hands of the victim, it would amount to penetration. It was opined that

> *24. As already referred to, in the case on hand, the male organ of the petitioner is said to be held tight by the hands of the victims, creating an orifice like thing for manipulation and movement of the penis by way of insertion and withdrawal. In the process of such manipulation, the visiting male organ is enveloped at least partially by the organism visited, namely, the hands which held tight the penis. The sexual appetite was thus quenched by the ejaculation of semen into the hands of the victims, as prima facie revealed by the statements of various victim boys. 25. In this view of the matter, the alleged over acts of the petitioner falling under the second category also have to be construed as falling within the ambit and sweep of S.377, IPC requiring him to face the ordeal of trial.*

Hence, I hold that a charge under Sec 377 IPC would also lie against the accused. That apart, rubbing a male sexual

organ on her lips would definitely amount to outraging her modesty punishable under sec 354 IPC.

38. The victim has stated that she was threatened with dire consequences, including threat of death. Hence, I hold there are prima facie materials to frame charge u/s 506(ii) of IPC. This point is accordingly answered.

39. **Point Nos.2 and 3**:- These two points are answered together. Victim is empowered under Sec. 24(8) to engage a lawyer of her choice, with the prime objective of assisting the prosecution. It is trite law that the role of such counsel is to act as an aide of the prosecution and not as a substitute. The nature of relationship between a prosecutor and a victim's counsel and the manner in which he is expected to aid the prosecution was explained in **Rekha Murarka v. State of West Bengal and Another (AIR 2020 SC 100)**, wherein it was held that

> *"12.4 In this regard, given that the modalities of each case are different, we find that the extent of assistance and the manner of giving it would*

depend on the facts and circumstances of each case. Though we cannot detail and discuss all possible scenarios that may arise during a criminal prosecution, we find that a victim's counsel should ordinarily not be given the right to make oral arguments or examine and cross - examine witnesses. As stated in S.301(2), the private party's pleader is subject to the directions of the Public Prosecutor. In our considered opinion, the same principle should apply to the victim's counsel under the proviso to S.24(8), as it adequately ensures that the interests of the victim are represented. If the victim's counsel feels that a certain aspect has gone unaddressed in the examination of the witnesses or the arguments advanced by the Public Prosecutor, he may route any questions or points through the Public Prosecutor himself. This would not only preserve the paramount position of the Public Prosecutor under the scheme of the CrPC, but also ensure that there is no inconsistency between the case advanced by the Public Prosecutor and the victim's counsel.

12.5. ***However, even if there is a situation where the Public Prosecutor fails to highlight some issue of importance despite***

> ***it having been suggested by the victim's counsel, the victim's counsel may still not be given the unbridled mantle of making oral arguments or examining witnesses. This is because in such cases, he still has a recourse by channeling his questions or arguments through the Judge first. For instance, if the victim's counsel finds that the Public Prosecutor has not examined a witness properly and not incorporated his suggestions either, he may bring certain questions to the notice of the Court. If the Judge finds merit in them, he may take action accordingly by invoking his powers under S.311 of the CrPC or S.165 of the Indian Evidence Act, 1872.*** *In this regard, we agree with the observations made by the Tripura High Court in Smt. Uma Saha v. State of Tripura (supra) that the victim's counsel has a limited right of assisting the prosecution, which may extend to suggesting questions to the Court or the prosecution, but not putting them by himself. (* ***Emphasis supplied*** *)*

Thus, it can be concluded that, though the role of the assisting counsel is secondary to that of the prosecutor, he is not subservient to him. Ordinarily, both of them should

sail together and the assisting counsel should act as a second fiddle. But when there is disagreement with the stand taken by the prosecutor, he can point out his difference of opinion to the court. It is for the court to take a decision on his call.

40. The learned counsel for the victim did not submit any oral argument before this court. Though the learned special prosecutor did not agree with the request for 5 split charges, I propose to deal with the request on merits.

41. It is true that under Sec.219 Cr. P.C. only 3 offences of the same kind, committed within a space of 12 months alone can be tried against an accused, at a single trial. But the rule is not without any exemption. One such exemption is provided in Sec 220(1) Cr. P.C. as per which, offences committed in the same transaction, or forming part of the same transaction can be jointly tried. The gist of the prosecution case against the accused is that using his authority and position as a Bishop, he threatened, compelled and induced the victim to indulge in sexual intercourse with

him, and despite her stiff resistance raped her on 13 occasions. It is alleged that in each of the occasions, the predator manipulated his position and authority over the victim and prevailed upon her by threatening the victim with dire consequences. In other words, according to the prosecution there was a common design and purpose in each of these crimes.

42. The term "same transaction" is not defined in the act. In **Balbir v. State of Haryana [AIR 2000 SC 11],** hon'ble Apex court has held that:

> *12. For several offences to be part of the same transaction, the test which has to be applied is whether they are so related to one another in point of purpose or of cause and effect, or as principal and subsidiary, so as to result in one continuous action. Thus, where there is commonality of purpose or design, where there is continuity of action, then all those persons involved can be accused of the same or different offences "committed in the course of the same transaction".*

In **Joseph @ Baby v. Sub Inspector of Police, Munnar and Others (2014 (1) KLD 667)** our high court has also considered this aspect and held that:

> *In the present case, about 40 accused persons are involved in the incident happened in between 16/01/1996 to 26/02/1996. It is not possible to mention in the charge the exact date and time regarding the offences committed by each accused. Therefore, there is no defect in the charge framed by the Court below. S.223 of the CrPC provides that persons accused of the same offence committed in the course of the same transaction, persons accused of an offence and persons accused of abetment of, or attempt to commit such offence and persons accused of different offences committed in the course of same transaction can be charged and tried together. Since the accused are involved in different offences in the course of the same transaction, the Court below is fully justified in jointly charging and trying the accused persons.*

These authoritative pronouncements point out that the expression, "same transaction" need not be given an artificial or technical interpretation. On the other hand the

question whether two or more incidents could be included within the term "same transaction" depends very much on the facts of the case at hand. Many factors like proximity of time, unity or proximity of place, continuity of action, commonality of purpose or design, etc. needs to be taken into account. As far as this case is concerned, there is only a single accused and a sole victim. As already pointed out, there is commonality of purpose and design in the crimes. One incident led to another which in turn led to the other. One incident alone cannot be viewed in isolation. On the other hand each of these incidents are closely connected to each other, so as to form part of the same transaction, necessitating a joint trial.

43. There is one more reason for preferring a joint trial. Among the offences charged, Sec.376(2)(n) provides for an aggregated form of punishment, on proof of repeated acts of rape, which depends on proof of multiple acts of rape. Offence under sec. 376(2)(n) IPC is a different offence from an offence provided under sec 376 (1) IPC. In other words, multiple acts of rape punishable under sec.376 (1) IPC, if combined together would result in a different and

grave offence punishable under S.376(2)(n). In such a scenario each of these offences can be tried together under Sec. 220(4) along with a charge under Sec. 376(2)(n) so that if there is proof of at least two instances of rape, the accused can be convicted for repeated acts of rape. Hence, I hold that there is no need for a direction for split charges. Instead the offences can be tried together under Sec.220(1) and 220(4) of Cr.P.C. These points are accordingly answered.

44. From the foregoing discussions, the following conclusions are reached;

1. It is held that the thirteen instances of rape and other sexual assault alleged by the prosecution are closely connected in proximity of place, continuity of action, commonality of purpose and design, that they can be treated as one forming a single transaction and can be tried together under sec 220(1) of Cr.P.C.

2. It is also held that since there are allegations of repeated acts of rape,

proof of more than one instance of rape would result in the commission of 376(2)(n) IPC, which being a distinct offence, each of the single instances of rape can be tried along with the distinct offence of 376(2)(n) IPC, under sec. 220(4) of Cr.P.C.

3. It is held that there are prima-facie materials to frame charges under sec. 342, 376(2)(k), 376(2)(n), 376 C(a), 377, 354 and 506(ii) of IPC.

4. Crl.M.P. 195/2020 and Crl.M.P. 475/2020 are consequently dismissed.

Dictated to the Confidential Assistant, transcribed and typed by him, corrected by me and pronounced in open Court on this the 16th day of March, 2020.

Sd/-
Gopakumar G.,
Addl. Sessions Judge–I.

// True Copy //

By Order,

Copied by :
Compared by :

Sheristadar.

Copy of Common Order in
Crl.M.P. Nos.195/2020
& 475/2020 in
S.C.No.457/2019
Dated :16.03.2020