

Joseph @ Appachan vs State of Kerala Represented by the Public Prosecutor

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Court : Kerala

Decided On : Jul-30-2024

Judge : Honourable Mr.Justice P.G. Ajithkumar

Appeal No. : CRL.A/723/2023

Appellant : Joseph @ Appachan

Respondent : State of Kerala Represented by the Public Prosecutor

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR
TUESDAY, THE 30TH DAY OF JULY 2024 / 8TH SRAVANA, 1946
CRL.APPEAL NO. 723 OF 2023 AGAINST THE JUDGMENT DATED
30.01.2021 IN SC NO.63 OF 2019 OF ADDITIONAL SESSIONS
COURT-I, KALPETTA CRIME NO.230/2018 OF PADINJARETHARA
POLICE STATION, WAYANAD APPELLANT/CONVICT: JOSEPH @
APPACHAN AGED 76 YEARS, S/O THOMAS, VALIYA NIRAPPEL,
CHENNALODE P.O, KAVUMANDAM, PIN - 673121. BY ADV
S.DHEERENDRAKUMAR RESPONDENTS/STATE, DEFACTO

COMPLAINANT & PRISON OFFICIALS:

1 STATE OF KERALA REPRESENTED BY THE PUBLIC PROSECUTOR HIGH COURT OF KERALA, ERNAKULAM, PIN - 682031. 2 XXX (VICTIM), MINOR REPRESENTED BY HER FATHER XXX 3 S.H.O., PADINJARETHARA POLICE STATION PADINJARETHARA P.O., WAYANAD DISTRICT, PIN - 673575. 4 SUPERINTENDENT, CENTRAL PRISON & CORRECTIONAL HOME PALLIKUNNU, KANNUR, PIN - 67004. 5 WELFARE OFFICER (GR-1), CENTRAL PRISON & CORRECTIONAL HOME, PALLIKUNNU, KANNUR, PIN - 670004.

6 DIRECTOR GENERAL OF PRISONS & CORRECTIONAL SERVICES, PRISONS HEADQUARTERS, POOJAPPURA, THIRUVANANTHAPURAM, KERALA, PIN - 695012. BY SMT PUSHPALATHA M K., SR.PUBLIC PROSECUTOR THIS CRIMINAL APPEAL HAVING COME UP FOR FINAL HEARING ON 15.07.2024, THE COURT ON 30.07.2024 DELIVERED THE FOLLOWING:

P.G. AJITHKUMAR, J.

----- Dated this the 30th day of
July, 2024

JUDGMENT

This is an appeal against conviction. The appellant was convicted and sentenced for the offences punishable under Sections 376AB of the Indian Penal Code, 1860 (IPC) and Section 5(m) r/w 6 of the Protection of Children from Sexual Offences Act, 2012 (Po CSO Act). The sentence imposed is rigorous imprisonment for a period of 20 years and to pay a fine of Rs.25,000/-.

2. The prosecution was initiated against the appellant with the following allegations: The victim was aged about 8 years at the time of

occurrence. She went along with her father in an Omni van to the Veterinary Dispensary, Chennalode. Father went to the dispensary leaving the victim in the vehicle. She was sitting in the driver seat. It was on 20.08.2018. At about 3.00 p.m. the appellant came near the drivers door, the window glass of which remained lowered. He after having a chat with the victim had sexually assaulted her. He embraced her and inserted fingers to her urethra.

3. PW2, while passing by, saw the incident and

informed PW3, the father of the victim. The appellant was caught hold of by PW3 and was manhandled by him as well as the persons assembled. A statement was given by the victim

reaching the police station. Crime was registered and investigation ensued. Following filing of the final report, a trial had taken place. PWs.1 to 11 were examined and Exts.P1 to P10 were marked. MOs.1 and 2 were identified. On the defence side Ext.D1 was marked, which is the contradiction in the previous statement of PW6. During examination under Section 313(1)(b) of the Code the appellant maintained that he did not commit the offence. The learned Special Judge, after considering the evidence, found the accused guilty and sentenced him as mentioned above.

4. Heard the learned counsel for the appellant and the learned Public Prosecutor.

5. The prosecution relies on essentially the evidence

of PWs.1, 3 and 5 to prove the charge against the appellant. PW1 is the victim. PW3 is her father. PW5 was the Veterinary Doctor working at the Veterinary Dispensary, Chennalode. PW4 is the Gynecologist, who examined PW1 on the same day. She issued Ext.P4, the victims examination report. The infirmities found by PW4 on the examination of PW1 and also the alleged cause stated to her have also been placed reliance on by the prosecution.

6. PW2 was examined as an occurrence witness. But

she did not support the case of the prosecution fully. She deposed that while she reached near the Omni van at about 3.00 p.m. on 20.08.2018 saw PW1 sitting in the drivers seat crying. She went to the veterinary dispensary, identified PW3 and told him about it. Since she maintained that she did not see the appellant assaulting PW1, which is against her version before the police, she was allowed to be cross-examined by the learned Public Prosecutor. No further evidence could be elicited from her.

7. The learned Public Prosecutor submits that the evidence of PW1 is consistent and cogent, and in the light of

other attending circumstances, her evidence stands trustworthy. The evidence tendered by PW4 and Ext.P4 render sufficient corroboration to the oral testimony of PW1. Soon a

crime was registered and the assertions in Ext.P1 F.I.statement are quite in terms of what PW1 deposed in court. Therefore, the said statement also corroborates the oral evidence of PW1 in court. When there is nothing in evidence to show that there was even a remote possibility of false implication, the findings rendered by the trial court cannot be found fault with.

8. The learned counsel for the appellant would submit

that there are contradictions in the evidence of PW1, vis-a-vis, Exts.P1 and P2 and the same in the light of improbable nature of the allegations, there could not be a finding that the accused has committed such an offence. When PW2 deposed nothing about the incident although cited as an ocular witness, her evidence belies credibility of the prosecution

case. The investigating officer has seized MOs.1 and 2, the dress of PW1, but not the undergarments, examination of which would have enured positive evidence. If the incident really had occurred. The said failure is fatal to the prosecution. It is further pointed out that the appellant was brutally manhandled by PW3 and the police reached the spot to take the appellant to the hospital. Still, Ext.P1 statement was given only at 8.45 p.m., which shows that the case was manipulated. The

learned counsel for the appellant lastly had contended that the acts of the appellant even if taken as proved would not amount to an offence of penetrative sexual assault.

9. PW1, the victim, was aged only 8 years at the time

of occurrence. She was aged 10 years at the time when she was examined in court. She narrated the incident in detail. The appellant approached her offering sweets. She refused. However, the appellant had had a chat with her and started to molest her. Inserting his hands through the window, he assaulted her. Through the dress he inserted fingers to her vagina. She started crying.

10. PW2 noticed PW1 crying and immediately she

informed PW3, her father. PW1 had narrated the incident to PW3. By that time, the appellant went away, but he was brought back and manhandled. PW3 cogently deposed about those incidents before the court. Although PW2 did not support the case of the prosecution concerning the overtacts of the appellant, the other part of her deposition certainly rendered corroboration to the oral testimonies of PWs.1 and

3. PW5, the Veterinary Doctor, also deposed about the

occurrence. He did not see the incident, but only the subsequent events. The evidence of those witnesses go in tandem insofar as the molestation of PW1 by the appellant is concerned.

11. What was the real act of assault could be stated

only by PW1 since nobody else saw it. Of course, as told by the victim, her mother, PW6 also deposed before the court about the incident. When the victim was taken to the hospital, she narrated about the assaulting act to PW4, the Doctor. What PW1 deposed in court about the assault committed by

the appellant is exactly the version of PWs.4 and 6 as well. Therefore, it can be found that the incident as narrated by PW1 had occurred. A presumption under Section 29 or 30, as the case, then follows. Failure to examine scientifically the

undergarments of the victim is not a factor affecting the prosecution case in the nature of the offending act.

12. Following the incident the appellant was

manhandled by PW3. He has deposed before the court that after bringing the appellant back, he slapped at the cheek of the appellant. The evidence further would show that the onlookers also manhandled him and later took him to the hospital. Police came to the place of occurrence, obviously on getting information regarding the incident. There is no clarity as to who, whether police or local people took the appellant to the hospital. That, however, has no much relevance insofar as the proof about the sexual assault of PW1 is concerned. Therefore, I hold that the appellant had sexually assaulted PW1 while she was sitting on the drivers seat of the vehicle.

13. The question is whether the assault amounts to a

penetrative sexual assault. What PW1 deposed is that the appellant poked () at her urethra. Similar is her version in Ext.P1 and P2. Before the Doctor also she stated that the appellant poked. PW6, the mother, knew about the incident as stated to by PW1 only. Being the mother, she would have definitely elicited as to what really transpired. PW6 deposed about the incident that the assailant pressed at the urethra of PW1.

14. In order to amount an offence of penetrative sexual

assault as defined in Section 3 of the Po CSO Act, there shall be insertion, whatsoever less is the extent. This Court in Lukose v. State of Kerala [2020 SCC OnLine Ker.1952] considered the said question. Whether poking ones finger at the vagina of a minor amount to be act of insertion so as to attract the offence of penetrative sexual assault. After an

elaborate discussion, a learned Single Judge of this Court held

that poking/pricking at the lower private part of the victim girl would not amount to an offence of penetrative sexual assault as defined in Section 3 of the Po CSO

Act. The said view was affirmed by the Apex Court in Cigy Varghese v. Lukose @ Kunjumon (Judgment dated 22.02.2023 in CrI.Appeal No.1115 of 2022).

15. As stated above, the victim only stated that the

appellant using his fingers poked at her vagina. She did not assert that insertion occurred. Presumably, PW4 the Doctor and PW6, the mother, would have elicited the details of the assault. Neither of the said witnesses deposed in court anything further than what has been stated by PW1. In such circumstances, it can only be said that there is lack of evidence to prove that the appellant had inserted fingers to the private part of PW1. Hence, the offence proved to have been committed by the appellant is sexual assault as defined in Section 7 of the Po CSO Act and not a penetrative sexual assault.

16. PW1 was below the age of 12 years at the time of occurrence. Therefore, the offence the appellant has committed amounts to an aggravated sexual assault coming under Section 9(m) of the Po CSO Act. Hence, the appellant is convicted for that offence under Section 10 of the Po CSO Act.

17. Having considered the nature of the offence,

circumstances of the appellant and other mitigating circumstances, including his age, the appellant is sentenced to undergo rigorous imprisonment for a period of 5 years and to pay a fine of Rs.25,000/-. In default of payment of fine, the appellant shall undergo rigorous imprisonment for a period of three months. Accordingly, the appeal is allowed in part. Sd/- P.G. AJITHKUMAR, JUDGE dkr APPENDIX OF CRL.A 723/2023 PETITIONER ANNEXURES

ANNEXURE-1 TRUE COPY OF THE FIS & FIS IN CRIME

WAYANAD. ANNEXURE-2 TRUE COPY OF THE STATEMENT DATED CLASS MAGISTRATE-II, SULTHAN BATHERY, BY THE DE FCTO COMPLAINANT IN CRIME NO.230/2018 OF PADINJARETHARA POLICE STATION, WAYANAD DISTRICT. ANNEXURE-3 TRUE COPY OF THE DEPOSITION OF PW1 DATED 18.10.2019 IN SC 63/2019 ON THE FILES OF THE SPECIAL COURT FOR TRIAL OF OFFENCES UNDER POCSO ACT & CHILDREN'S COURT

(ADDITIONAL SESSIONS COURT-I), KALPETTA ANNEXURE-4 TRUE COPY OF THE DEPOSITION OF PW2 NON-DATED ON THE FILES OF THE SPECIAL COURT FOR TRIAL OF OFFENCES UNDER POCSO ACT & CHILDREN'S COURT (ADDITIONAL SESSIONS COURT-I), KALPETTA ANNEXURE-5 TRUE COPY OF THE DEPOSITION OF PW3 DATED 18.10.2019 IN SC 63/2019 ON THE FILES OF THE SPECIAL COURT FOR TRIAL OF OFFENCES UNDER POCSO ACT & CHILDREN'S COURT (ADDITIONAL SESSIONS COURT-I), KALPETTA ANNEXURE-6 TRUE COPY OF THE DEPOSITION OF PW11 DATED 12.11.2020 IN SC 63/2019 ON THE FILES OF THE SPECIAL COURT FOR TRIAL OF OFFENCES UNDER POCSO ACT & CHILDREN'S COURT (ADDITIONAL SESSIONS COURT-I), KALPETTA ANNEXURE-7 TRUE COPY OF THE DEPOSITION OF PW4 DATED 12.11.2020 IN SC 63/2019 ON THE FILES OF THE SPECIAL COURT FOR TRIAL OF OFFENCES UNDER POCSO ACT & CHILDREN'S COURT (ADDITIONAL SESSIONS COURT-I), KALPETTA ANNEXURE-8 TRUE COPY OF THE REPORT OF MEDICO- LEGAL EXAMINATION IN CRIME NO.230/2018 OF PADINJARETHARA POLICE STATION DATED 21.08.2018 ISSUED BY THE DISTRICT HOSPITAL, WAYANAD. ANNEXURE-9 A TRUE COPY OF THE COVER PAGE, PAGE CONTAINING LIBRARY CONGRESS CATALOGING AND PAGE NOS. 1,2,3,4,5,6,7 & 8 OF THE MEDICAL TEXT BOOK NAMED VULVAR DISEASE, A CLINICOPATHOLOGICAL APPROACH EDITED BY DEBRA S. HELLER AND ROBERT C. WALLACH ANNEXURE-10 A TRUE COPY OF THE COVER PAGE, PAGE CONTAINING LIBRARY CONGRESS CATALOGING AND PAGE NOS. 385 & 680 OF THE OXFORD CONCISE MEDICAL DICTIONARY (9TH EDITION). ANNEXURE-11 A TRUE COPY OF THE EMAIL DETAILS DATED APPELLANT DHEERENDRAKUMAR S. ANNEXURE-12 A TRUE COPY OF THE EMAIL DETAILS DATED APPELLANT DHEERENDRAKUMAR S.