

XXX vs State of Kerala

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Court : Kerala

Decided On : Jan-22-2024

Judge : Honourable Mr. Justice P.B.Suresh Kumar, Honourable Mr. Justice Johnson John

Appeal No. : CRL.A/863/2022

Appellant : XXX

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR & THE HONOURABLE MR. JUSTICE JOHNSON JOHN MONDAY, THE 22ND DAY OF JANUARY 2024 / 2ND MAGHA, 1945 CRL.A NO. 863 OF 2022 AGAINST THE JUDGMENT DATED 25.09.2018 IN SC 148/2017 OF ADDITIONAL SESSIONS COURT - I, KALPETTA APPELLANT: XXX AGED XXX YEARS, XXXXXX BY ADV MANJU ANTONEY RESPONDENT: STATE OF KERALA REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM., PIN - 682031 SMT.AMBIKA DEVI S, SPL.G.P. THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 22.01.2024, THE COURT ON

THE SAME DAY DELIVERED THE FOLLOWING: CrI.A.No.863 of 2022

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P.B.SURESH KUMAR & JOHNSON JOHN, JJ.

----- Criminal Appeal No.863 of 2022

----- Dated this the 22nd day of January,

2024

JUDGMENT

P.B.Suresh Kumar, J.

The sole accused in S.C. No.148 of 2017 on the files

of the Additional Session Court-I, Kalpetta who stands convicted for the offences punishable under Sections 376(2)(f), 376(2)(i) and 376(2)(n) of the Indian Penal Code (IPC) and Sections 5(j) (ii), 5(l) and 5(n) read with Section 6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) and sentenced for the offences punishable under Sections 376(2)(f), 376(2)(i) and 376(2)(n) IPC and Section 5(j)(ii) read with Section 6 of the POCSO Act challenges in this appeal, his conviction and sentence in the said case.

2. The accused is none other than the father of the victim. The victim was studying in a residential school for CrI.A.No.863 of 2022 3

Plus Two course. She used to come to her house only during vacations. She has four siblings. The parents of the victim and her siblings were residing in a hut at a place called 'Mangappadi'. The accusation in the case as contained in the final report is that the accused had committed rape on the victim on a day during April, 2016 and thereafter on two other occasions, in the hut in which they were residing when she came home for vacation after her Plus One course. On the final report being laid before the Court of Session which is designated as Special Court under the POCSO Act, charges were framed against the accused for the offences punishable under Sections 376(2)(f), 376(2)(i) and 376(2)(n) IPC and Sections 5(j)(ii), 5(l) and 5(n) read with Section 6 of the POCSO Act. As the accused denied

the charges which were read over and explained to him, the prosecution examined 13 witnesses as PWs 1 to 13 and proved through them as many as 21 documents as Exts.P1 to P21. On completion of the evidence tendered by the prosecution, the accused was questioned under Section 313(1)(b) of the Code of Criminal Procedure (the

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Code), and he denied the incriminating circumstances brought out in evidence. Since the court did not find the case to be one fit for acquittal under Section 232 of the Code, although the accused was called upon to enter on his defence, he did not adduce any evidence. The Special Court, thereupon, on an exhaustive consideration of the facts and circumstances of the case and also the law on the point, found the accused guilty of the offences mentioned hereinabove. Even though the accused was found guilty of the offences aforesaid, in the light of the provision contained in Section 42 of the POCSO Act, he was sentenced only for the offences punishable under Sections 376(2)(f), 376(2)(i) and 376(2)(n) IPC and Section 5(j)(ii) read with Section 6 of the POCSO Act. The sentence imposed on the accused for all the offences under the IPC was the sentence of imprisonment for the remainder of his natural life and a fine of Rs.1,00,000/- each for all the said offences. The sentence imposed on the accused for the offence under the POCSO Act was the sentence of rigorous imprisonment for life and to pay a fine of Rs.1,00,000/-. The substantive sentences were ordered

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3. Heard the learned counsel for the accused as also the learned Special Public Prosecutor.

4. The point that falls for consideration is whether the prosecution has proved beyond reasonable doubt, the guilt of the accused in terms of the charges framed against him.

5. Before dealing with the arguments advanced by

the learned counsel for the accused, it is necessary to refer to the evidence let in by the prosecution to prove the guilt of the accused, and the findings rendered by the Special Court.

6. The following were the points formulated for decision by the Special Court:

1. Whether the PW2, victim, was a child as defined under Section 2(d) of Protection of Children from Sexual Offences Act, 2012, at the time of commission of the offences by the accused, as alleged by the prosecution?

2. Whether the prosecution has proved beyond reasonable doubt that the accused, being the biological father of PW2, the victim, a female child aged 16 years, had CrI.A.No.863 of 2022 6

committed rape upon her on a day in April 2016 and thereafter repeatedly on two other occasions, and in consequence, she delivered a male child as alleged by the prosecution?

3. Whether the prosecution has proved beyond

reasonable doubt that the accused, being the biological father of PW2, the victim, a female child aged 16 years, had committed aggravated penetrative sexual assault upon her on a day in April 2016 and thereafter repeatedly on two other occasions, and in consequence, she delivered a male child as alleged by the prosecution?

4. What is the offence committed by the accused, if any, proved?

5. What should be the sentence and order?

7. Ext.P20 is the extract of the relevant page of

the Register of Birth pertaining to the victim. PW12, the Registrar of Birth and Death attached to the Vythiri Grama Panchayat was the witness examined by the prosecution to prove the said document. As per Ext.P20, the date of birth of the victim is 24.06.2000. The prosecution has also produced Ext.P21, a certified copy

of the School Admission Register of the victim. PW13, the Principal of the school was the witness examined to prove the said document. The entry in Ext.P21 as regards the date of birth of the victim is also as contained in

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Ext.P20. As noted, the first instance of sexual abuse as alleged by the prosecution took place on a day during April 2016. We therefore, concur with the finding rendered by the Special Court that the victim was a child under the age of 16 years when she was subjected to sexual assault by the accused for the first time.

8. The victim was examined in the proceedings as

PW2. PW2 deposed that on the afternoon of a day during April 2016, when she and the accused were alone at home, the accused forcefully made her lie down on a cot, removed her churidar pants and penetrated his genital organ into her vagina. PW2 also deposed that she felt pain then on account of the conduct of the accused and after sometime, the churidar top which she was wearing then was found wet. PW2 also deposed that the accused directed her then that she shall not disclose the said incident to anyone. It was also deposed by PW2 that the accused repeated the same act on her on two other occasions later when no one was at home. PW2 also deposed that though she had gone to the school on reopening, she

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suffered a sort of giddiness when she returned home for Onam vacation during the month of September. PW2 deposed that she was then taken by her mother to the hospital and she disclosed the occurrence to the doctor who examined her at the hospital when the doctor found that PW2 was pregnant. It was deposed by PW2 that the matter was informed to the police by the doctor and the police took the statement of PW2 at the hospital. PW2 also deposed that later, she gave a statement to the Magistrate also. Ext.P2 is the statement on the basis of which the crime was registered and Ext.P3 is the statement of the victim recorded under Section 164 of the Code. PW2 identified her signatures in the said statements.

PW2 also identified the accused in court. It was deposed by PW2 that she delivered a child subsequently by reason of the act committed by the accused. The evidence tendered by PW2 is consistent with Ext.P2 First Information Statement and also Ext.P3 statement given by her in terms of the provision contained in Section 164 of the Code. Even though PW2 was cross-examined by the learned counsel for the accused, there was no challenge

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9. PW3 is the mother of the victim. The evidence

of PW3 was consistent with the evidence given by PW2. PW3 reiterated in her evidence that the accused is the father of the victim. PW3 also deposed that the victim delivered a child

during January, 2017 at the Medical College Hospital, Kozhikode. The evidence tendered by PW2 and PW3 are corroborated by the evidence tendered by PW4, the Doctor who examined the victim at the Taluk Headquarters Hospital, Vythiri on 21.09.2016. Ext.P4 is the Victim Examination Report issued by PW4. The history related to the incident as recorded in Ext.P4 by PW4 is consistent with the prosecution case. It is stated in Ext.P4 that the findings of the examination are consistent with the history of the alleged sexual assault and that the victim was found pregnant.

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10. PW1 was the doctor who took the blood

samples of the accused for DNA profiling and he deposed to that effect in court. PW7 is the Senior Civil Police Officer attached to Vythiri Police Station who produced the accused before PW1 for taking his blood sample. PW7 deposed that he witnessed the seizure of the sealed packet containing the blood sample of the accused by the Circle Inspector of Police, Vythiri. Ext.P7 is the seizure mahazar

prepared in this regard. PW10 was the doctor who took the blood samples of the victim as also her new born child for DNA profiling and he deposed to that effect in court. Ext.P19 is the certificate issued by PW10 in this regard. Ext.P8 is the mahazar prepared while effecting seizure of the blood samples of the victim girl and her new born baby. PW7 is the witness to Ext.P8 seizure mahazar as well and he deposed the said fact also in his evidence. Ext.P16 is the report of the Forensic Science Laboratory. Ext.P16 report recites that DNA was extracted from the blood samples of the accused, the victim and her new born baby and the DNA profiles obtained from the samples disclosed that the accused is the biological

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11. From the evidence aforesaid, it is established

beyond reasonable doubt that the accused who is the father of the victim, committed penetrative sexual assault on her, as defined under Section 3 of the POCSO Act as also rape as defined under Section 375 IPC on the victim who was aged below 16 years, repeatedly. The finding rendered by the Special Court that the accused is guilty of the offences punishable under Sections 376(2)(f), 376(2)(i) and 376(2)(n) of IPC and Sections 5(j)(ii), 5(l) and 5(n) read with Section 6 of the POCSO Act, is therefore, in order.

12. The learned counsel for the accused contended

that the evidence tendered by PW2 as regards the sexual assaults committed by the accused is highly improbable and unbelievable, especially having regard to the fact that the victim and the remaining family including her four siblings were residing together at the relevant time in the hut, where the occurrences allegedly took place. According to the learned counsel, the evidence tendered by the victim cannot, therefore,

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be regarded as of a sterling quality to base the conviction of the accused solely on the said evidence. Placing reliance on the decision of the Apex Court in *Naveen v. State of M.P.*, 2023 SCC OnLine SC 1365, it was also argued by the learned

counsel that the blood samples of the accused was though taken on 21.09.2016 by PW1, the same was seized by the police only on 26.09.2016. According to the learned counsel, during this period, the blood samples of the accused remained at the hospital and therefore, the possibility of tampering with the same cannot be ruled out. It was argued by the learned counsel that in the circumstances, the Special Court ought not have placed any reliance on Ext.P16 report of the Forensic Science Laboratory.

13. We do not find any substance in the argument advanced by the learned counsel for the accused that the evidence tendered by PW2 as regards the sexual assaults committed by the accused is highly improbable and unbelievable. Merely for the reason that the family of the victim consisting of several members was residing in a small Crl.A.No.863 of 2022 13

hut, it cannot be said that the occurrence as alleged by the prosecution is not possible, especially in the light of the explanation offered by the victim in her evidence that the sexual assaults were committed by the accused when her mother was away for work and her siblings had gone out for playing. No doubt, it is seen from the materials on record that the blood samples of the accused was taken for DNA profiling on 21.09.2016 and the same was seized by the police only on 26.09.2016 and the same was kept in the meanwhile in the hospital itself. Merely for the reason that there was delay in

seizing the blood sample, it cannot be presumed that somebody must have meddled with the same. It is seen from the materials that the blood samples of the victim and her new born child were taken by PW10 on 16.01.2017 and was seized by the police on 17.01.2017 and submitted before the Jurisdictional Magistrate on the same day itself. The learned counsel for the accused has no case that the result of the DNA profiling done on the blood samples of the accused, the victim and her new born child are manipulated. The contention of the

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learned counsel is only that the blood sample of the accused was likely to be tampered with. As indicated in Ext.P16 itself, the result of DNA profiling as

reported in Ext.P16 report is possible only with the blood sample of an identical twin of the accused. The accused has no case that he has an identical twin. In the circumstances, the contention raised by the learned counsel for the accused in this regard is also liable to be rejected.

In the facts and circumstances, there is no merit in the appeal and the same is accordingly dismissed. Sd/- P.B.SURESH KUMAR, JUDGE. Sd/- JOHNSON JOHN, JUDGE. YKB

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