

Harikumar, vs State of Kerala,

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Court : Kerala

Decided On : May-30-2023

Judge : Honourable Mrs. Justice Mary Joseph

Appeal No. : CRL.A/1020/2019

Appellant : Harikumar,

Respondent : State of Kerala,

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MRS. JUSTICE MARY JOSEPH
TUESDAY, THE 30TH DAY OF MAY 2023 / 9TH JYASHTA, 1945
CRIME NO.335/2018 OF Chavara Police Station, Kollam AGAINST THE
JUDGMENT IN SC NO.511/2018 OF THE 1ST ADDITIONAL DISTRICT
& SESSIONS JUDGE, KOLLAM DATED 5.12.2018 (SPECIAL COURT
UNDER POCSO ACT, KOLLAM) APPELLANT/ACCUSED:
HARIKUMAR, AGED 40 YEARS S/O.SADASIVAN, C.NO.3175,
CENTRAL PRISON AND CORRECTIONAL HOME, POOJAPPURA,
THIRUVANANTHAPURAM AND RESIDED VALLUVACHALIL VEEDU,
NORTH OF PUTHENCHANTHAI JN., NADUVATHUCHERRI MURI,
PANMANA VILLAGE. BY ADV ADV. SIDHARTH A. MENON(STATE

BRIEF) RESPONDENT/COMPLAINANT: 1 STATE OF KERALA, REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA. 2 THE INSPECTOR OF POLICE, CHAVARA POLICE STATION. SMT.SEENA.C, PUBLIC PROSECUTOR THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 30.05.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: :: 2 ::

JUDGMENT

Dated this the 30th May, 2023

The appeal on hand is directed against a judgment

passed by 1st Additional District and Sessions Judge, Kollam (for short the trial court) on 5.12.2018 in S.C.No.511/18. The appellant is the sole accused in the above case. For the sake of convenience, the appellant will hereinafter be referred to as the accused in accordance with his status before the trial court.

2. S.C.No.511/18 was originated from Crime

No.335/2018 registered at Chavara Police Station. The accused is none other than the father of the victim of the alleged incident, who was only aged 10 years. As per the case of the prosecution, on a day, three days prior to 22.02.2018, the accused committed penetrative sexual assault on her at house bearing No.XII/242 of Panmana Panchayat, belonging to him. The sexual assault allegedly committed include insertion of his finger into the vagina of

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the child, catching her breasts and fondling on her private parts. The offence alleged was repeated thrice. Thus, it was alleged that the accused has committed offences punishable under Sections 376(2)(f)(i) of the Indian Penal Code (for short the IPC) and Sections 3(a),(4), 5(l),(n), 6, 7 and 8 of the Protection of Children from Sexual Offences Act, 2012 (for short the POCSO Act). On the basis of the proceedings forwarded by the Chairperson of the Child Welfare Committee (for short 'CWC') the crime above was registered

by the Sub Inspector of Police, Chavara. After the registration of the crime, investigation was conducted by the Sub Inspector of Police, Chavara and on concluding the same, a chargesheet was also laid before the Special Court for trial of the offences allegedly committed by him. The court has taken cognizance on the final report chargesheeting the accused for the above offences and registered it on its file as S.C.No.511/18. On production of :: 4 ::

the accused before the court, he was served with copies of all relevant records proposed to be relied on by the prosecution. Upon perusal of the records of the prosecution and after hearing the learned Public Prosecutor and the learned counsel for the defence, charge was framed against the accused under Sections 3 r/w Section 4, 7 r/w Section 8, 5(l) r/w Section 6 and 5(n) r/w Section 6 of the POCSO Act and also Section 376(2)(f)(i) IPC. Charge was read over and explained to the accused but, he pleaded not guilty and claimed to face the trial.

3. Thereupon, the trial was commenced before the

court below. Evidence adduced by the prosecution consists of the depositions of PWs 1 to 17 and Exts.P1 to P18. On closure of the evidence of the prosecution, the accused was questioned under Section 313(1)(b) of the Code of Criminal Procedure, 1973 (for short the Cr.P.C.) with reference to the incriminating circumstances brought out in evidence against

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him. The incriminating circumstances put to him were denied and a written statement was filed contending false implication by the Police in the case. According to him, his wife was working in Pulari Bakery at the relevant time and the employees of the bakery used to call her over telephone at night. It was alleged that being prejudiced by the act of the accused restraining her from attending the calls, false allegations were raised and the case in question was fabricated against him. According to him, the accused has not done the alleged acts on the child.

4. After examining the accused under Section 313(1)(b) Cr.P.C., the learned Public Prosecutor as well as the learned counsel for the defence were heard.

5. The trial court could not find any reasons from the

arguments advanced to record an order of acquittal of the accused under Section 232 Cr.P.C and therefore he was called upon to adduce evidence in defence. He failed to do :: 6 ::

so. On appreciation of the entire evidence and evaluation of the arguments advanced by the respective counsel, the trial court arrived at a finding that the accused is not guilty of the offence under Section 376(2)(f)(i)IPC but guilty of the offences punishable under Sections 3(a),(4), 5(l), (n), 6, 7 and 8 of the POCSO Act. The Trial court thus acquitted him for the offence under Section 376 (2)(f)(i)IPC and convicted him for the offence under Section 5(l) and (n) read with Section 6 of the POCSO Act. The trial court sentenced him to undergo rigorous imprisonment for 10 years and to pay fine of `25,000/- under Section 5(l) read with Section 6 of the POCSO Act and also to undergo simple imprisonment for three years in default of payment of fine. The accused was

also convicted and sentenced to undergo rigorous imprisonment for ten years and to pay fine of `25,000/- under Section 5(n) read with Section 6 of the POCSO Act and to undergo simple imprisonment for three months in :: 7 ::

default of payment of fine. Though the accused was found guilty and convicted under Sections 3 read with Section 4 and Section 7 read with Section 8 of the POCSO Act, separate sentence was not awarded for that. Sentences awarded were directed to run concurrently and the fine amount on realisation was directed to be disbursed in favour of PW2 as compensation under Section 357(3)Cr.P.C. Set off was also allowed for the period already undergone by the accused in custody.

6. The appeal on hand is one forwarded from jail.

Therefore, the task of contesting the case on behalf of the accused was entrusted to Adv.Sidharth A. Menon on State Brief. According to the learned counsel the

allegations of the prosecution were factually false and the case is a foisted one. According to him, the minor child was made use of by her mother to concoct the case on hand falsely against her husband due to the prejudice she had to him for restraining

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her from attending the incoming calls of her co-workers, during night. The learned counsel has invited the attention of this Court to various aspects of the case that would convince it on the falsity involved in the allegations. The statement of the minor girl was recorded by the police under Section 161 Cr.P.C. Her statement was also recorded by the Magistrate under Section 164 Cr.P.C. Inviting the courts

attentions to some material discrepancies in those statements, it was urged that, if the trial court had taken due care of those, the falsity in the allegations would have been revealed to it and the accused would have been acquitted. According to him, the trial court failed to appreciate the evidence of the prosecution in its proper perspective and thus the judgment of conviction and sentence of the accused under challenge, was passed.

7. The learned counsel contended furthermore that the main offence allegedly committed by the accused on the :: 9 ::

minor girl is aggravated penetrative sexual assault. According to him, the accused was chargesheeted by the police for that offence and a charge was also framed by the

trial court for that offence. According to him, medical evidence adduced by the prosecution is totally insufficient to establish that the accused has committed aggravated penetrative sexual assault on the minor child. The learned counsel canvassed on that basis for reversal of the finding of guilt of the accused for that offence.

8. The learned counsel contended furthermore that

the statements recorded from the minor girl under Section 161 and 164 Cr.P.C as well as the version spoken by herself and her mother as PW2 and PW1 when read as a whole, it could be gathered that the information about the incident was spoken by the minor girl to one Mrs.Radhika who is her mothers friend. Therefore, the lady to whom the minor girl had allegedly divulged the information about the incident

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firstly is a crucial witness and she ought to have been cited by the prosecution and examined. According to him, the statement recorded from the minor girl under Section 164 Cr.P.C, did not incorporate in it an allegation against the accused that the offensive acts were repeated on her by him thrice, but during her examination before the trial court as a witness she has categorically stated that the alleged acts were repeated on her by the accused thrice. According to him, the medical examination of the child did not reveal any signs of penetration and that was also not certified in Ext.P8. Therefore, the trial court is unjustified and incorrect in finding the accused guilty under Section 5 read with Section 6 of the POCSO Act and convicting and sentencing him.

9. The learned Public Prosecutor canvassed for maintaining the finding of guilt of the accused for all offences and the order of conviction passed and the sentence :: 11 :: imposed contending that those have been arrived at on a proper appreciation of the evidence adduced by the prosecution.

10. In the case on hand the mother of the victim was

examined as PW1 and she deposed that the victim was her minor daughter who was studying in 6 th Standard at Anuvelil Govt. U.P. School. According to her, one Mrs.Manju a neighbour told her about the information transpired to her by her friends that her minor daughter was sexually assaulted by her father and that the information about that was divulged to her friends by the minor girl itself. PW1 asked her daughter about the information received and she admitted that her father had caught her breasts, fondled her vagina and inserted his finger there. PW1 informed the matter to one Lakshmi, a teacher of the minor girl, who in turn

reported it to CWC and then to the Police. Police took the child and entrusted her to CWC. The child was also medically examined and the accused was arrested.

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11. The victim was examined as PW2 and according to

her, her father sexually assaulted her by catching her breasts, fondling her vagina and inserting his finger there. She also said that the assault was when her grandmother was out of the house in connection with her work and the sexual assault was repeated thrice. Admittedly the matter was not divulged to PW1, but to one Mrs.Radhika. Admittedly a statement was given by the victim to the Magistrate of Chavara under Section 164 Cr.P.C. In cross examination when it was put to her as suggestion that the father did the acts on her only out of his love and affection, she denied that.

12. PW3 is the teacher of Govt. HSS, Ambalappuzha

and according to her PW1 and PW2 were known to her. According to her, on getting information about the incident, she enquired PW2 about that and she divulged all aspects of the sexual assault committed on her by her father. PW3 :: 13 :: then transpired the information received by her to CWC, Kollam. The Councillor attached to Childline, was examined as PW4 and he deposed that out of her fear that the child failed to reveal the information of sexual assault to anyone other than Mrs.Radhika. PW4 went to Anuvelil School alongwith a member of her team to converse with the child. Being convinced from the version of PW2 about the incident, Ext.P2 report was given to CWC.

13. On the basis of Ext.P2 and a report obtained by the

Headmistress of the School where PW2 was studying, proceedings were issued by PW5 to Chavara Police to set the law in motion. PW6, the Headmistress of Anuvelil Govt. U.P. School also gave evidence that PW2 when enquired about the incident had revealed the acts of sexual assault committed by her father on her. The extract of the admission register of the child was obtained by the prosecution and marked through him in evidence as Ext.P5,

:: 14 :: wherefrom the date of birth of PW2 was revealed as 20.04.2007.

14. PW9, a doctor attached to Victoria Hospital,

Kollam deposed that the victim was examined by her at 12.15 p.m. on 07.03.2018 and a certificate was issued. The same was marked in evidence as Ext.P8. According to him, the history of the incident recorded in Ext.P8 was furnished by PW1 and PW2.

15. PW10, a doctor attached to Taluk Hospital, Neendakara deposed to have examined the accused for testing his sexual capacity and issued Ext.P9 after being convinced of that affirmatively.

16. It was argued that PW2 had given an exaggerated

version during her examination before the court and that can only be the result of her tutoring by PW1. The trial Judge has recorded the experience he had in the court during examination of PW2. It was reported that PW2 was :: 15 :: weeping while tendering evidence. Therefore, it is difficult to take a view that PW2 was rendering a tutored version.

17. Girl child normally would be more affectionate to the father and would not speak lies against him especially in

matters involving seriousness. The prosecution was attempted to bring some prejudice for PW1 towards the accused for restraining her from attending the incoming calls of her co-workers during night. It is difficult to believe that for such a grudge, a mother would make the child a scapegoat. From the demeanour of the child reported by the trial court, it is also difficult to discard the version of PW2 as a tutored one.

18. Though the learned counsel invited the attention of

this Court about the discrepancies in the statement recorded under Section 164 Cr.P.C and the versions given by PW2 during the course of investigation as well as in the trial court, it is found that her version as PW2 was not attempted :: 16 :: to be contradicted with reference to the statement given by her either under Section

164 or 161 Cr.P.C. Therefore, the argument advanced by the learned counsel for the accused to discredit the version of PW2 is only to be discarded.

19. It is pertinent to note that the medical evidence

tendered by the prosecution in the case on hand is against the oral evidence tendered by PW2 about the incident. The medical evidence is silent about penetration into the labia majora or the vulva. Though the minor girl has spoken about emission of semen during the incident, nothing of that sort has come out in the scientific examination held. The minor girl has disclosed about the incident to her friends on a day succeeding the date of incident. The mother of one of her friends namely, Manju has spoken about the factum to the mother of the minor girl. The mother of the minor girl was examined as PW1. Admittedly, she was informed about the incident by Smt.Manju. She then reported to the teacher

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of the School where the minor girl was studying and the incident was conveyed by the teacher to the Chairperson of CWC. CWC has forwarded a report of the Child Line dated 27.02.2018 to the Police which was marked in evidence as Ext.P2. The incident alleged was occurred on 22.02.2018. Based on the report of CWC that PW17, the Sub Inspector of

Police registered the crime. The FIR was marked in

evidence as Ext.P14. The Sub inspector of Police was examined before the trial court as PW4. After registration of the crime, the minor child was sent to the Magistrate for recording her statement under Section 164 Cr.P.C. The incident alleged was occurred in the house belongs to the accused where the victim and the accused were residing. The certificate of ownership of the house was also procured by the prosecution and marked in evidence as Ext.P11 and it was proved through PW12, who is the Secretary of Grama Panchayat, Panmana. To establish the age of the minor girl,

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extract of the admission register from the School where she studied was produced and marked in evidence as Ext.P5. Ext.P5 was issued by none other than the Headmistress of the school who was examined by the prosecution as PW6. Therefore, the prosecution can be taken to have established successfully that the minor girl was aged only 10 years at the relevant time of the incident.

20. Immediately after the registration of the crime, the

minor girl was examined by a medical practitioner. True that the medical examination did not reveal any signs of penetration into the vagina of the minor girl as spoken by her. The doctor was examined before the trial court as PW9. The capability of the accused to have sexual act was brought in evidence by examining him medically. It was certified by the doctor who examined him in a certificate marked in evidence as Ext.P9 that his medical examination did not

:: 19 :: reveal anything to take a view that the accused was incapable of performing sexual acts.

21. PW2 had correctly spoken about the sexual assault

committed on her by the accused. The minor girl has also spoken about discharge of semen while commission of the acts by the accused, but scientific examination did not support that. Since the information about the incident was

divulged by PW2 to others much later, there is every probability for that evidence to be lost. The disappearance of that may be due to bathing or washing. The dress worn by the victim were sent for scientific examination and the report of examination is marked in evidence as Ext.P13. Ext.P13 was proved through PW14, who has spoken about lack of semen.

22. In this connection, this court finds it appropriate to

extract Sections 3 of the POCSO Act, which provides for the :: 20 :: circumstances in which a person is said to commit penetrative sexual assault. 3. Penetrative sexual assault-A person is said to commit "penetrative sexual assault" if--

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

23. Clause (b) above states that insertion to any extent of any object or a part of the body not being penis into the vagina, the urethra or anus of the child would also constitute

an offence of penetrative sexual assault. In the case on hand, PW2 had spoken in categorical terms that the accused put his finger into her vagina. She has not spoken about the :: 21 :: extent to which it was inserted. As stated in the extract of the provision constituting the offence above, insertion to any extent would attract penetrative sexual assault.

24. Section 5(l), (m) and (n) of the POCSO Act are also extracted hereunder:- 5. Aggravated penetrative sexual assault- xxxxxxxxx (l) whoever commits penetrative sexual assault on the child more than once or repeatedly; or

(m) whoever commits penetrative sexual assault on a child below twelve years; or

(n) whoever being a relative of the child through

blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child; xxxxxxxxx is said to commit aggravated penetrative sexual assault.

25. This Court is already convinced of the reliability of

PW2 as a witness and observed so in the discussion made hereinabove. She was aged only ten years at the time of commission of the offence and has spoken categorically :: 22 :: about all aspects of the incident. She has spoken that the offensive acts were repeated by the accused on her thrice. She has also spoken that on insertion of the finger by her father into her private area, spermatozoa emitted from his genital organ. The non-detection of spermatozoa in the dresses worn by the victim is justified by the late forwarding of those to the scientific laboratory for holding examination.

26. When PW2, the victim had spoken that the accused

inserted his finger into her private part and caused emission of semen, even in the absence of medical evidence of penetration, it would attract penetrative sexual assault. The child was established by the prosecution as below 12 years and therefore, the accused can be said to have committed aggravated penetrative sexual assault on her as dealt with under Section 5 of the POCSO Act. The commission of the offences under Section 5(l), and (n) of the POCSO Act is established as proved by the prosecution beyond reasonable

:: 23 :: doubt. The trial court has correctly entered into a finding of guilt of the accused for the offences under Sections 5(l) and

(n) of the POCSO Act. Accordingly it passed orders of

conviction against him for the offences and sentenced him under Section 6 of the POCSO Act. The trial court is undoubtedly justified in doing so and the judgment under challenge is only to be confirmed. Since the sentence imposed being the minimum liable to be imposed under Section 6 of the POCSO Act as in the year 2018 when the offences were committed by the accused, modification sought for is only to be declined. This Court do accordingly. Criminal Appeal fails for the reasons and is dismissed. The judgment under challenge is confirmed. Sd/- MARY JOSEPH JUDGE jes