

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

TUESDAY, THE 15TH DAY OF DECEMBER 2015/24TH AGRAHAYANA, 1937

CRL.A.No. 798 of 2013 (G)

(AGAINST THE ORDER/JUDGMENT IN SC 444/2011 of I ADDL.SESIONS COURT,
ERNAKULAM DATED 14-06-2013 AGAINST CP NO.24/2011 OF JFCM KOLENCHERRY)

APPELLANT(S)/ACCUSED :

JAGADEESAN, AGED 26 YEARS,
S/O. THANKAPPAN, CHERIKUMKUZHIYIL VEEDU,
CHERIUKUMKUZHY COLONY, EZHAKKARANADU KARA,
MANEED VILLAGE.

BY ADVS.SRI.V.SETHUNATH
SRI.V.R.MANORANJAN (MUVATTUPUZHA)
SRI.M.AYYOObUKHAN

RESPONDENT(S)/COMPLAINANT :

STATE OF KERALA,
REPRESENTED BY THE CIRCLE INSPECTOR,
PUTHENCROZ POLICE STATION, BY PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.

R BY PUBLIC PROSECUTOR SMT.M.G.LISHA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 14-10-2015,
THE COURT ON 15/12/2015 DELIVERED THE FOLLOWING:

SUNIL THOMAS, J.

Cr.A. No. 798 of 2013

Dated this the 15th day of, December 2015

JUDGMENT

The sole accused, who stands convicted for offence punishable under Section 376 IPC in S.C.No.444/2011 of the Additional District and Sessions Judge Ernakulam, is the appellant herein.

2. The prosecution was launched by an FI Statement given by an eleven year old victim, who, on 4/7/2011 at 4.30. p.m. accompanied by her uncle/guardian, reported to the police that she was sexually abused by the accused. She was studying in Seventh standard and her parents were mentally challenged. Hence, she was looked after since her childhood by her uncle and aunt. Accused was residing near to the uncle's house and was a close relative. Another aunt was staying nearby, who had a son by name Amal. In the FI Statement, the victim stated that the accused and Amal had sexually exploited her on several occasions at the house of the

accused as well as at the house of the said Amal. According to her, the first act was done by Amal at the house of the victim. According to her, this used to happen when the uncle, aunt and the nearby residents were away from their home, engaged in their work. The accused allegedly came to know about the act committed by Amal and thereafter he also started sexually exploiting the victim. Since this was repeated on several occasions, she disclosed it to her aunt Ammini, who conveyed it to the mother of Amal. It was stopped for some time and even after lapse of few days, they started exploiting her. She contracted infection and had to be taken to the doctor. Ultimately, the matter was conveyed to her teacher, who reported it to the police. On the basis of the FI Statement, the crime was registered and after investigation, final report was laid before the court against the accused for offence punishable under Section 376 IPC. It was revealed that two other persons were also involved. Since Amal and the other two persons were juvenile, they faced trial before the Juvenile Justice Board.

3. Before the court below, the accused faced trial. On the side of the prosecution PWs 1 to 11 were examined and Exts.P1

to P10 were marked. On the side of the accused, DW1 was examined. The court below, on an evaluation of the available inputs, concluded that the accused has committed the offence alleged against him, convicted and sentenced him to undergo RI for a period of ten years and to pay a fine of Rs.50,000/- and in default, to undergo RI for two years. It was further provided that fine amount, if realized, should be paid to the accused under Section 357(1)(b) of Cr.P.C.

4. The accused, who is undergoing sentence, has approached this Court with this appeal. Heard both sides and examined the records.

5. The prosecution is essentially relying on the oral testimony of PW1. It is not in dispute that her parents are mentally challenged and hence she was looked after by her uncle, who was examined as DW1. The accused was the son of one uncle and the said Amal was the son of an aunt. All of them were residing in a colony in adjacent houses. The victim was studying in the 7th Standard, during the relevant time. She deposed that her mother was mentally sick and in the hospital, and that the accused was another uncle's son who was residing

nearby. PW1 further deposed that during day time, the elderly members of all the families used to go for work and on holidays she used to sit at home alone. It was stated that both the accused ravished her. She had stated in her evidence that it was done by them separately and against her will. According to her version, it started from the period when she was studying in the First Standard and continued till she reached the Seventh standard. She pleaded to the accused not to repeat it, but they continued to commit act. According to her, apart from the accused, Amal had also committed the said act. She ultimately had to report it to the teacher, who informed the police.

6. From the evidence tendered by her and with reference to class in which she was studying during the relevant time, it appears that the incident happened during the period prior to June 2011. According to her, the allegation was that it was a case of penetrative sex and she had specifically and categorically stated that the private part of the accused had entered her body. This was spoken by her in clear and categorical terms and there cannot be any dispute regarding the nature of allegation from the evidence tendered by the witness.

7. Version of PW1 gets a limited corroboration from PW2, who was the class teacher. She deposed that in 2010 November, an awareness class was conducted in the school. Students were made aware of such attempts from strangers. At the end of the class, the students were asked whether any of them had such an experience. None of the students responded. Thereafter, the teachers directed that if any of the student had such an experience, they may sit in the hall and others may leave. All the students left the class. After some time, PW1 returned and disclosed to the teacher that the neighbours had done such act towards her. In the cross examination, PW2 was questioned as to what exactly were the acts committed by the accused, as spoken by PW1, reply was that she had stated all those facts, which were disclosed by PW1 in the chief examination. The teacher immediately warned her not to go to the neighbours house, to watch T.V., since she had disclosed that the incidents happened when she visited the house of the uncle and aunt to watch T.V. Since she has further disclosed that it happened during the holidays, she was directed to be careful during those days. The teacher further deposed that on Fridays,

before she left the school, the teacher used to remind her of the warning.

8. According to the witnesses, PW1 was in the 6th class at that time. The teacher deposed that after 2-3 months after the incident, she was absent on few days continuously. Hence, the teacher enquired as to whether there were further repetition of above, to which she replied that she had contracted urinary infection. She had further stated that she was subjected to abuse thereafter and that she had visited the doctor, who had also made similar enquiries. PW1 had disclosed that she did not reveal the incident to the doctor. Immediately, the teacher called the aunt and the matter was conveyed to her. PW2 stated that aunt got frightened and that she was afraid of conveying it to others. However, she was warned to be more careful. According to PW2, the next year after reopening of the classes, she was absent on 22nd June, 2011. On further enquiry as to whether she was thereafter exploited by the accused, her reply was in the affirmative. Immediately, teacher reported the matter to the Headmistress and thereafter to the police.

9. Even though the teacher was cross examined and PW1

had also undergone lengthy cross examination, both the witnesses could not be demolished in cross examination on the material aspects. The version of PW1 appears to be more consistent and to the limited extent it gets corroboration on the peripheral incidents. The essential fact constituting the allegation of offence is spoken by PW1. It is pertinent to note that PW1 was not disclosing the incident initially. It appears that even when she was asked by the doctor, she did not reveal the alleged incident. It appears that her conduct has to be appreciated in the background in which she was living. She was of tender age and the allegation was the sexual exploitation by close relatives. She was not living with her parents, but at the mercy of her uncle and aunt. Even the version of PW2, the teacher, indicates that when the incident was disclosed by PW1, they were also a bit helpless and that they, rather initiating any action, only tried to warn the girl to avoid repetition of such incident. Even initially, the teacher attempted to conceal and not to report it to the child line authorities or to the police. Even when it was reported later that the exploitation continued, the teacher called the aunt who also could not muster the courage to

disclose it to her own relatives. According to PW1, when she disclosed it to the mother of Amal, she also appeared to have kept the incident secret. In this background, a girl of tender age cannot be expected to come out in open. It appears that the girl, being helpless, was suffering and not voluntarily disclosing the act till an apt opportunity came her. Even at that time, she seems to have not been disclosing it completely. This appears to be the explanation for the delay, which seems to be cogent and convincing.

10. The medical evidence was pressed into service by the prosecution to corroborate the version of PW1. PW4 was the doctor who had examined the victim. Ext.P3 is the wound certificate issued by the Doctor. It shows that hymen was torn and had an old tear. Vagina admitted one finger loose. The doctor had certified that there was nothing to suggest that there was no evidence of sexual intercourse in the recent past. The doctor had also noted that the incident happened about 11 months back and one Amal had attempted to sexually exploit her. The doctor had further noted that she had fungal infection.

11. The certificate of PW4 regarding past physical

relationship is seen couched in negative form. In the cross examination, the doctor clarified that the victim had disclosed few instances of penetrative sex. The doctor further deposed that he could not see any injuries, since it happened at least 45 days back. He added that he had specifically checked for injuries, but could not locate it. To a specific suggestion as to whether if a 25 year old normal male commits penetrative sex on a eleven year old girl, whether there would be injuries or bleeding, the doctor answered in the affirmative, but hasten to add that in this case, it could not be found, since it happened 45 days back. A specific contention was taken by the learned counsel for the accused that the doctor did not specifically state that there were indications of past physical relationship. I am not inclined to accept it. The finding of the doctor, that there were indications of physical relationship, clearly supports the prosecution case.

12. It is true that the version of PW1 is not completely free from doubt. The learned counsel for the appellant/accused vehemently contended that the version of PW1 suffers from various material irregularities, infirmities and raises several

doubts. In the chief examination, PW1 had initially stated that she was sexually assaulted by the accused from the First standard onwards, till she reached the Seventh standard. To a specific case as to who committed the act first, her answer was that Amal did it while she was in the First Standard. In further cross examination, she deposed that the accused first committed the act after Amal had committed. Evidently, the version of PW1 contradicts herself with respect to the above version. This was sought to be clarified in the re-examination. She clarified that it was the first accused who sexually assaulted her for the first time. It is true that this part of the evidence of PW1 is slightly shaky, since she initially said that it was the first accused who ravished her, that too, while she was at the First Standard. Thereafter she said that it was done by Amal. Though she has clarified this in re-examination, this stands out as a contradiction. However, whether that by itself is sufficient to disbelieve the other materials facts, has to be considered. With respect to all other material fact, her evidence appears to be consistent and cogent.

13. The learned counsel for the accused further contended

that initially when she disclosed the incident to the teacher, she revealed the complicity of the accused and Anil only. Later investigation revealed that two other youngsters were involved. The learned counsel further pointed out that even after disclosing the incident to the teacher, when the doctor asked about the sexual exploitation, she do not reveal it to the doctor. Even when the FIS was laid, she did not reveal the complicity of any other person than the present accused and Amal. It is true that the complicity of the remaining accused were brought out only much later. That does not by itself is sufficient to cast doubt on the version of PW1 having regard to her young age, social condition and the mental condition, which has been discussed earlier.

14. The accused had set up a case that the parents of the girl were mentally deranged and she herself was also of a low mental grow. According to the accused, she used to follow whatever others dictated. However, the oral testimony of PW1 does not reflect any instance of mental disability. She had spoken cogently, consistently and in a meticulous manner. It cannot be forgotten that she had studied upto 8th Standard.

The teacher also did not say that she was low mental capacity. The best person who could have spoken about her mental faculty, if any, would have been the teacher, to whom such a suggestion was not even put. Hence, I am inclined to reject the above contention of the accused.

15. PW5 is the Junior Consultant of the Taluk Hospital, Muvattupuzha. He had examined the accused on 4/7/2011 and issued Ext.P4 potency certificate. The doctor had recorded that there was nothing to suggest that the accused was capable of entering into the sexual relationship.

16. The prosecution case was that the victim was less than 16 years old at the time of the incident. Ext.P5 is certain extracts of the school certificate of the victim. It shows that her date of birth was 30/12/1999. PW3 the uncle had deposed that she was 11 years old and her date of birth was 30/12/1999. PW6 was the former Headmistress of the Government L.P.School who had issued Ext.P5 admission register entry extract. It shows that her date of birth was 30/12/1999. It bears the seal and signature of PW6. This was not cross examined. Ext.P10 was the extract of the birth register issued from the office of the Registrar of

Birth and Deaths, Corporation of Cochin. It also shows that the date of birth of the girl was 30/12/1999. In the above circumstances, the age of the girl is beyond any dispute. Essentially, the prosecution also did not seriously challenge the age of victim.

17. The defence set up by the accused, which is seen disclosed from the trend of cross examination and the reply given by him in his answer to 313 Cr.P.C. questioning, is that he has been falsely implicated. According to him, there was enmity between the father of the accused and that of Amal. To prove his defence, DW1, the aunt of the accused, who is also the wife of PW3 was examined. She deposed that she had brought up PW1 since her childhood. She deposed that PW1 had disclosed about the incident to her, but only revealed the name of Amal. She further stated that the family of Amal and the accused were in enimical terms. She further deposed that PW1 was feeble minded and will repeat whatever she was instructed. In the cross examination, DW1 admitted that PW1 used to sit alone when she went for work. She further admitted that it was her husband who had conveyed the date of birth to the concerned authorities.

The trend of the cross examination was suggestive of the defence that due to enmity with the father of the accused, he was falsely implicated.

18. It is pertinent to note that the allegation of enmity was with the father of Amal. It appears to be a very weak defence, since Amal himself was an accused. Hence, there is no reason why due to enmity between the family of Amal and that of the accused, PW1 should falsely implicate the accused also. Further there was nothing to show that there was any property dispute between both the families as claimed by PW1. The reason stated by the accused is not sufficient to suspect a false implication. There was not even a suggestion that PW1 or her family members had any grudge against the accused or reason to wrongly implicate the accused in the present case, of such serious nature. In fact, the very fact that deposition of DW1, who is the aunt of PW1, in favour of the accused itself negate the fact that there was no reason for PW1 to falsely implicate the accused in a case. The evidence of DW1, to the extent that it supports the accused, is only to be discarded.

19. The learned counsel for the accused vehemently

contended that the settled law is that the oral testimony of the victim can be relied on for sustaining the conviction, but it has to be approached with due care and caution. No doubt, the settled legal position is that conviction in an offence of this nature can be sustained exclusively on a sole testimony of the victim. However, it should be consistent, cogent and should independently be sufficient to inspire the confidence and should lead to the sole conclusion of guilt of accused. The learned counsel for the accused to buttress his arguments relied on various decisions. The decision reported in **Santhosh Madhavan @Amrutha Chaithanya v. Circle Inspector of Police[2008 (3) KLT 558]** was a matter arising from a bail application and has no application to the facts of the present case. He further relied on the decisions reported in **Arbind Singh v. State of Bihar [(1992) 0 Supreme (SC) 20995]**, **Chhagan Dame v.State of Gujarat [(1993) 0 Supreme (SC) 21402]**, **Panchhi & Ors. v.State of U.P.[(1998) 0 Supreme (SC) 29759]**, **Ashok Kumar v. State of Haryana [(2002) 0 Supreme (SC) 36755]**, **Sudhansu Sekhar Sahoo v. State of Orissa [(2002) 0 Supreme (SC) 1266]**, **Zafar v. State of**

U.P.[(2003)0 Supreme (SC) 36852], Tarvinder Kumar v State of Himachal Pradesh [(2004) 3 Crimes (HC) 396], Devider Singh v. State of Himachal Pradesh [(2003) 0 Supreme (SC)37711], Ramdas and Others v. State of Maharashtra [2007 KHC 3044], Kapildeo Mandal v. State of Bihar [(2007) 0 Supreme (SC) 44211], Abdul Salam v. Soumya@ Jasmin and Another[2008 (2) KHC 898], Vijayan v State of Kerala[2008 KHC 5310], Md.Kalam v. State of Bihar [(2008) 0 Supreme (SC) 973],Rajoo and Others v. State of M.P.[2009 KHC 4344), State of U.P. v. Nandu Vishwakarma[(2009) 0 Supreme (SC) 47436], Phool Singh v. State(NCT of Delhi) [(2009) 0 Supreme (Del) 1052], Rahim Beg. v. State of U.P.[(1972) 0 Supreme (SC) 251] Dinesh Jaiswal v. State of M.P.[2010(1) SCR 1063], State of Rajasthan v. Babu Meena[2013 KHC 4127), State of Mizoram v. David Lalthummawia and Others (2013 KHC 3268), Sukhram v. State of Madhya Pradesh [(1994) 0 Supreme (MP) 870], Chintu alias Chint Ram v. State of H.P. [(1997) 4 Crimes(HC) 343], Tarvinder Kumar v. State of Himachal Pradesh[(2004) 3 Crimes (HC) 396], which laid

down the same principle as referred to above. In the cases, in which the accused were acquitted, were essentially based on the appreciation of facts, wherein court concluded that the evidence of the victim was not reliable.

20. An appreciation of the entire evidence lead to a conclusion that the evidence tendered by PW1 gets corroboration from PWs 2,3 and the medical evidence. Evidence of the victim appears to be consistent, cogent and believable and is sufficient to sustain conviction. I am not inclined to interfere with the conclusion of the court below. The findings of the court below in this regard is only to be sustained.

21. It is pertinent to note that the court below has imposed a sentence of RI for a period of ten years and to pay a fine of Rs.50,000/-, and in default, to undergo RI for two years under Section 235(2) of Cr.P.C. Though the accused is only of 24 years of age and enrolled in an educational institution, the act committed by him is gruesome and non-justiciable. Hence, the sentence of the court below is sustained. The accused is sentenced to RI for 10 year and fine of Rs.50,000/-. Considering young age of the accused, and the period of imprisonment

already served by the accused, in case of default of fine of Rs.50,000/-, the accused will undergo only six months more rigorous imprisonment.

In the result, the appeal is allowed in part. While maintaining the conviction, sentence imposed by the court below is confirmed as RI for 10 years and with a fine of Rs.50,000/-, in default of which he shall undergo modified RI for six months more.

Sd/-

SUNIL THOMAS
Judge

dpk

/true copy/ PS to Judge.

