IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MRS. JUSTICE M.B. SNEHALATHA

FRIDAY, THE 2ND DAY OF AUGUST 2024 / 11TH SRAVANA, 1946

CRL.A NO. 892 OF 2019

CRIME NO.1549/2012 OF Cherthala Police Station, Alappuzha

AGAINST THE JUDGMENT DATED IN SC NO.377 OF 2013 OF SESSIONS COURT, ALAPPUZHA ARISING OUT OF JUDGMENT DATED IN CP NO.7 OF 2013 OF JUDICIAL MAGISTRATE OF FIRST CLASS -I, CHERTHALA

APPELLANT/ACCUSED:

ANEESH ,C.NO.3243
AGED 32 YEARS
S/O BHUVANACHANDRAN, CENTRAL PRISON AND CORRECTIONAL HOME, POOJAPPURA, THIRUVANANTHAPURAM AND RESIDED AT CHERUPURAVELI VEEDU, PALLIPURAM, PANCHAYAT WARD 2, CHERTHALA.

BY ADV LIJOY P.VARGHESE

RESPONDENT/COMPLAINANT:

1 **THE STATE OF KERALA**
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA.

2 **STATE OF KERALA**
REPRESENTED BY ADV. C.V.LUMUMBA, DISTRICT GOVERNMENT PLEADER AND PUBLIC PROSECUTOR.

BY ADVS.
SMT.BINDU O.V.-SPL.PUBLIC PROSECUTOR
ADV.LIJOY P.VARGHESE -STATE BRIEF
SMT.AMBIKA DEVI S, SPL.G.P. (ATROCITIES AGAINST WOMEN AND CHILDREN AND WELFARE OF W AND C)(GP-38)

THIS CRIMINAL APPEAL HAVING COME UP FOR HEARING ON 11.7.2024. THE COURT ON 02.08.2024 DELIVERED THE FOLLOWING:

CR

P.B.SURESH KUMAR & M.B.SNEHALATHA, JJ.

Crl.Appeal No.892 of 2019

Dated, this the 2nd August, 2024

JUDGMENT

M.B.Snehalatha, J

This appeal under Section 374(2) of Cr.P.C by the accused in S.C.No.377/2013 of Sessions Court, Alappuzha has been filed through the Superintendent of Central Prison, Thiruvananthapuram under Section 383 of Cr.P.C challenging the conviction entered and sentence passed against him for the offences punishable under Sections 366 and 376(1) of Indian Penal Code (for short 'IPC'), Sections 3(1)(xi) and 3(2)(v) of the Scheduled Caste/Scheduled Tribe (Prevention of Atrocities) Act, 1989 (for short 'SC/ST (POA) Act') and Section 23 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (for short 'JJ Act').

2. In short, the prosecution case is as follows:

On 15.10.2012, the accused enticed the victim minor girl, who belongs to Scheduled Caste out of the keeping her lawful guardian with

the intention to seduce her into illicit intercourse and thereafter on 16.10.2012 the accused committed rape on her at the rented house of his friend at Parassinikkadavu and thereby committed the offences punishable under Sections 366 and 376 (1) IPC, Sections 3(1)(xi) and 3(2)(v) of the SC/ST (POA) Act and Section 23 of the JJ Act.

3. During the period of the alleged incident in this case, the victim girl was studying in a school at Cherthala in 11th standard.

4. On 15.10.2012 when the victim girl failed to return from the school in the evening even after the time at which she usually reaches, her father viz. PW2 lodged Ext.P1 complaint before the police and a crime was registered under Section 57 of the Kerala Police Act under the head 'man missing'. Subsequently, when the victim girl was traced out by the police, she was produced before the Jurisdictional Magistrate. Based on the statement of the victim regarding the sexual assault suffered by her, the then Circle Inspector of Police, Cherthala, filed Ext.P10 report before the court to alter the section of offence into Sections 366 and 376(1) IPC, Sections 3(1)(xi) and 3(2)(v) of the SC/ST (POA) Act and Section 23 of the JJ Act.

5. The Deputy Superintendent of Police, Chethala arrested the accused, completed the investigation and filed final report against the accused before the Judicial First Class Magistrate Court I, Cherthala. The learned Magistrate received the same as C.P.No.7/2013 and after complying the legal formalities under Section 207 of the Code of Criminal Procedure [Cr.P.C], the case was committed to the Court of Sessions, Alappuzha for trial and disposal. The learned Sessions Judge framed charge against the accused for the offences under Sections 366 and 376(1) IPC, Sections 3(1)(xi) and 3(2)(v) of the SC/ST (POA) Act and Section 23 of the JJ Act. Charge was read over and explained to the accused. The accused abjured guilt, alleged false implication and claimed to be tried.

6. To bring home the guilt of the accused, prosecution examined PWs 1 to 12 and marked Exts.P1 to P16 documents. MOs 1 to 9 are the material objects. After closing the prosecution evidence, accused was examined under Section 313(1)(b) Cr.P.C. Accused maintained that he is innocent and he was falsely implicated. As the trial court found that it was not a fit case for acquittal under Section 232 Cr.P.C, accused was called upon to

enter on his defence and to adduce any evidence, which he might have in support thereof. No defence evidence was adduced by the accused. Ext.D1 viz. the portion of 161 Cr.P.C statement of PW3 was marked on his side.

7. On an appreciation of the evidence, both oral and documentary, the learned Sessions Judge found the accused guilty of the offences punishable under Sections 366 & 376(1) IPC, Sections 3(1)(xi) and 3(2)(v) of the SC/ST (POA) Act and Section 23 of the JJ Act. By the judgment impugned, the accused was convicted and sentenced as given below:

Offence under Section	Punishment
366 IPC	Rigorous imprisonment for 7 years and fine of ₹50,000/-, in default of payment of fine, to undergo imprisonment for two months.
376 IPC	Rigorous imprisonment for 10 years and fine of ₹1,00,000/-, in default of payment of fine, to undergo imprisonment for four months.
3(1)(xi) of SC/ST(POA) Act	Rigorous imprisonment for one year and fine of ₹10,000/-, in default of payment of fine, to undergo imprisonment for 15 days.

3(2)(v) of SC/ST(POA) Act	Life imprisonment and fine of ₹1,00,000/-, in default of payment of fine, to undergo imprisonment for six months.
23 of JJ Act	Imprisonment for one month

8. The point for consideration in this appeal is whether the conviction entered and the sentence passed against the accused by the trial court is sustainable or not.

9. Heard the learned counsel for the accused and the learned Public Prosecutor.

10. The learned counsel appearing for the accused, after taking us through the evidence tendered by the prosecution both oral and documentary pointed out that the version of the prosecutrix regarding the incident is not reliable; that the prosecution failed to prove that the accused committed rape on the prosecutrix. Further, it was contended that the trial court has erred in convicting and sentencing the accused for the offences under Section 3(1)(xi) and 3(2)(v) of the SC/ST (POA) Act and Section 23 of JJ Act, 2000. The learned counsel for the accused further contended that the sentence imposed by the trial court is harsh and excessive.

11. Per contra, the learned Public Prosecutor supported the findings of the trial court and contended that the conviction and sentence passed by the trial court do not warrant any interference by this Court.

12. Now let us have a look at the evidence tendered in this case.

13. PW1 is the father of the prosecutrix who laid Ext.P1 FI statement. PW3 is the prosecutrix. PW4 is the doctor, who examined the accused and issued Ext.P2 certificate. PW5 was the Civil Police Officer, Cherthala Police Station who was in the investigation team of the above crime and who had gone to Parassinikkadavu in search of the missing girl viz. the prosecutrix. He is also a witness to Ext.P4 seizure mahazar for MO8 dhoti and MO9 mobile phone of the accused. PW2 is the owner of the rented house at Parassinikkadavu wherein as per the prosecution case accused took the victim girl and committed rape on her. PW6 was the Village Officer who prepared Ext.P5 site plan. PW7 was the Tahsildar of Cherthala Taluk who issued Ext.P6 caste certificate of the victim and Ext.P7 caste certificate of the accused. PW8 was the Registrar of Births and Deaths of Alappuzha Municipality who issued

Ext.P8 certificate of the victim. PW9 was the Gynecologist of Taluk Head Quarters Hospital, Cherthala who examined the victim and issued Ext.P9 certificate. PW10 was the police officer of Cherthala Police Station who recorded Ext.P1 FI statement of PW1. PW11 was the Inspector of Police, Cherthala Police Station who conducted part of the investigation. He recorded the statement of the prosecutrix and produced her before the doctor for medical examination. PW11 took into custody MO2 to MO7 clothes of the prosecutrix as per Ext.P3 seizure mahazar. PW11 filed Ext.P10 report before the court after adding Sections 366 and 376 (1) IPC, Sections 3(1)(xi) and 3(2)(v) of the SC/ST (POA) Act and Section 23 of the JJ Act, 2000. PW12 conducted the later part of the investigation; he arrested the accused; took into custody MO8 dhothi and MO9 mobile phone of the accused as per Ext.P4 seizure mahazar. After completing the investigation he filed final report before the court.

14. PW1, who is the father of the victim girl testified that on 15.10.2012 since his daughter viz. the victim girl who was then studying in 11th standard did not return from the school even after the time at which she usually reaches, he laid Ext.P1 complaint

before the Cherthala Police Station. Subsequently, the police traced out his daughter from Kannur District and brought her to the Cherthala Police Station and she was sent along with him. He has further testified that on 15.10.2012, in his mobile phone having No. 9142846671, a message had been received as "Don't come in school uniform." According to PW1, during the said period it was a mobile phone then being used by all his family members in common.

15. PW3 is the prosecutrix. Her version is that in April, 2012, she was in love with one Vipin. Through Vipin, she acquainted with the accused. When her relationship with Vipin ended, accused established a relationship with her and he often met her on her way to school. Her further version is that on 14.10.2012 and on 15.10.2012 she received calls and messages from the accused whereby accused asked her to meet him without going to school. In the message he had also asked her not to meet him in the school uniform. Accordingly, on 15.10.2012 though she left her home by wearing school uniform, she kept a spare set of clothes with her and thereafter as per the instructions of the accused, instead of going to school, she went to the Private Bus

Stand, Cherthala wherein the accused was waiting for her. Then after changing her uniform from a comfort station at Taluk Hospital, Cherthala they together went to beach and thereafter they went to a movie house for watching cinema. After watching the cinema, they again came to the Cherthala Bus Stand. At about 8 pm, the accused insisted her to board a bus headed to Thrissur. When she refused to board the bus, accused made a promise of marriage to her. Accordingly, she along with the accused boarded the said bus and reached at Thrissur. From Thrissur, they again boarded another bus and in the early morning of 16.10.2012 they reached at the residence of one Pramod who is a friend of the accused. Her further version is that, on 16.10.2012 while staying in the said house, accused sexually assaulted and committed rape on her after disrobing her. Her further version is that, on 18.10.2012 the police party along with her family members reached there and brought her to the Cherthala Police Station and produced her before the court. She has also testified that the accused who belongs to Ezhava caste had knowledge that she belongs to Scheduled Caste. She would also say that she was unaware of the fact that the accused was already a married person.

16. In his examination under Section 313(1)(b) Cr.P.C accused would admit the version given by the prosecutrix that he used to follow her on her way to school by saying that he is in love with her. He would also admit the version of PW3 that on 15.10.2012 she left her home by wearing school uniform by keeping a spare set of clothes with her and instead of going to school, she went to Cherthala Bus Stand wherein the accused was waiting. In his examination under Section 313(1)(b) Cr.P.C accused would also admit the version of PW3 that she changed her uniform from the comfort station at Taluk Hospital, Cherthala and thereafter they together went to beach. Accused has also admitted in his examination under Section 313(1)(b) Cr.P.C that on 15.10.2012 he along with the prosecutrix had gone to a cinema theater for watching a movie. The specific version of the prosecutrix is that after watching the cinema they again reached at the Private Bus Stand, Cherthala at around 8 pm. and the accused insisted her to board a bus headed to Thrissur and when she refused to do so, accused induced her to board the bus by making a promise of marriage to her and accordingly, they boarded the bus headed to Thrissur and reached Thrissur and from there, they again boarded

another bus and reached his friend's house at Parassinikkadavu. There is no reason to disbelieve the version of prosecutrix that on 15.10.2012 at around 8 pm. from Cherthala Bus Stand, accused took her to the house of his friend at Parassinikkadavu. There is also no reason to disbelieve the version of PW1, viz. the father of the victim girl that she was traced out from Kannur District. PW3, the victim girl has also testified that on 18.10.2012, police along with her family members had reached at the house of Pramod wherein she and the accused were staying. Therefore, the defence canvassed by the accused that after returning from the cinema theater, he left the company of the prosecutrix, he returned to his home and he had not gone along with the prosecutrix to Parassinikkavu is found to be palpably false.

17. The categoric version of the prosecutrix is that on 16.10.2012 while staying at the house at Parassinikkadavu to which accused took her, he committed rape on her and sexually harassed her. We find no reason to disbelieve the said version. PW4 doctor who issued Ext.P2 certificate testified that on examination of the accused, there was nothing to suggest that the accused is incapable of performing sexual act. Though the prosecutrix was cross

examined in detail, nothing could be brought to discredit her version regarding the incident. PW9 doctor who examined the prosecutrix on 19.10.2012 and issued Ext.P9 certificate has testified that upon examination of the victim, there was evidence of past vaginal penetration. Thus the medical evidence corroborates the version of the prosecutrix that on 16.10.2012 accused sexually assaulted her. Thus, the medical evidence also lends support to the prosecution case that on 16.10.2012 accused committed rape on the prosecutrix. The version of victim girl is found to be trustworthy. The version of PW1 who is the father of prosecutrix and the version of the prosecutrix are found to be real and natural and it inspires confidence in the mind of the court. Even after through cross examination, defence could not make any dent in the version of the victim girl regarding the incident spoken by her. We see no reason to doubt the credibility of the prosecutrix.

18. It is a well settled principle that once it is found that the prosecutrix is reliable and trustworthy, in that case there can be a conviction for the offence under Section 376 IPC relying upon the testimony of the sole witness viz. the victim (*Ganesan v. State (2020) 10 SCC 573*)

19. To prove the age of the prosecutrix, prosecution produced Ext.P8 birth certificate and examined PW8 viz. the Registrar of Births and Deaths, Alappuzha Municipality. Ext.P8 birth certificate would show that the date of birth of the prosecutrix is 19.11.1996. Thus, it stands proved that as on the date of alleged incident, ie. on 15.10.2012/16.10.2012 the victim girl was a minor and she was below 16 years.

20. The prosecutrix was a minor girl and she was aged below 16 years as on the date of incident. Prosecution has succeeded in establishing beyond any reasonable doubt that on 15.10.2012 accused enticed the minor prosecutrix out of the keeping of her lawful guardian with the intention of seducing her to illicit intercourse and thereafter on 16.10.2012 accused committed rape on her. Hence, we find no reason to interfere with the finding of conviction and order of sentence rendered by the trial court for the offences under Sections 366 and 376(1) IPC.

21. Now the question is whether the conviction and sentence against the accused under Section 3(1)(xi) and 3(2)(v) of SC/ST (POA) Act is sustainable or not.

22. The learned counsel for the accused contended that the

ingredients of the offence under Sections 3(1)(xi) and 3(2)(v) of SC/ST (POA) Act have not been established by the prosecution, so as to convict the accused for the said offences. The learned counsel pointed out that there is nothing to suggest that the offence was committed by the accused only because the prosecutrix belongs to Scheduled Caste so as to attract the offences under Sections 3(1) (xi) and 3(2)(v) of SC/ST (POA) Act.

23. To substantiate the case that prosecutrix belongs to Scheduled Caste, prosecution has produced Ext.P6 caste certificate which would reveal that victim belongs to Scheduled Caste. Ext. P7 caste certificate produced by the prosecution would reveal that accused belongs to Ezhava caste and is not a Scheduled Caste. Thus, it stands proved that prosecutrix is a member of Scheduled Caste whereas accused is not a member of the Scheduled Caste.

24. Sections 3(1)(xi) and 3(2)(v) of SC/ST (POA) Act reads as follows:

> "**3. Punishments for offences of atrocities.**
>
> 3(1) Whoever, not being a member of a Scheduled caste or a Scheduled Tribe-
>
> xxxxx
>
> xxxxx
>
> (xi) assaults or uses force to any woman belonging to a Scheduled Caste or a Scheduled Tribe with intent to dishonour or outrage her modesty.

> XXXXX
> 3(2) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe-
> xxxxxx
> xxxxx
> v) commits any offence under the Indian Penal Code punishable with imprisonment for a term of ten years or more against a person or property [knowing that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member], shall be punishable with imprisonment for life and with fine."

25. A plain reading of the Section 3 of the SC/ST (POA) Act makes it clear that in order to punish a person for the offence under Sections 3(1)(xi) and 3(2)(v) of the SC/ST (POA) Act it has to be established that the offence was committed by the accused only because the victim belongs to a Scheduled Caste or a Scheduled Tribe.

26. In *Dinesh @ Buddha v. State of Rajasthan [2005 (8) SCC 771] and* in *Khuman Singh v. State of Madhya Pradesh (MANU/SC/1161/2019)* the Hon'ble Supreme Court held that the *sine qua non* for application of Section 3(2)(v) of SC/ST (POA) Act is that an offence must have been committed against a person on the ground that the person is a member of Scheduled Caste and Scheduled Tribe.

27. In *Masumsha Hasanasha Musalman v. State of*

Maharastra (2000(3) SCC 557), the Hon'ble Apex Court held as follows:

> "Section 3(2)(v) of the Act provides that whoever, not being a member of a Scheduled Caste or a Scheduled Tribe, commits any offence under the Indian Penal Code punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine. In the present case, there is no evidence at all to the effect that the appellant committed the offence alleged against him on the ground that the deceased is a member of a Scheduled Caste or a Scheduled Tribe. To attract the provisions of Section 3(2)(v) of the Act, the sine qua non is that the victim should be a person who belongs to a Scheduled Caste or a Scheduled Tribe and that the offence under the Indian Penal Code is committed against him on the basis that such a person belongs to a Scheduled Caste or a Scheduled Tribe. In the absence of such ingredients, no offence under Section 3(2)(v) of the Act arises. In that view of the matter, we think, both the trial court and the High Court missed the essence of this aspect. In these circumstances, the conviction under the aforesaid provision by the trial court as well as by the High Court ought to be set aside."

28. Thus, it is a well settled principle that in order to attract the offence under Sections 3(1)(xi) and 3(2)(v) of the SC/ST (POA) Act, the prosecution has to establish that the offence was committed by the accused only because the victim belongs to a Scheduled Caste or a Scheduled Tribe. In the case on hand, there is

nothing to suggest that the offence was committed by the accused only because the prosecutrix belongs to a Scheduled Caste. Therefore, we find that the conviction of the accused/appellant for the offences under Sections 3(1)(xi) and 3(2)(v) of the SC/ST (POA) Act is not sustainable and is liable to be set aside. Accordingly, the accused/appellant is found not guilty for the offences punishable under Sections 3(1)(xi) and 3(2)(v) of the SC/ST (POA) Act and his conviction and sentence for the said offences stand set aside and he is acquitted of the said offences.

29. The remaining aspect which falls for consideration is whether the conviction and sentence passed against the accused for the offence under Section 23 of the JJ Act, is sustainable or not.

30. Section 23 of the JJ Act reads as follows:

> "Whoever, having the actual charge of or control over, a juvenile or the child, assaults, abandons, exposes or wilfully neglects the juvenile or causes or procures him to be assaulted, abandoned, exposed or neglected in a manner likely to cause such juvenile or the child unnecessary mental or physical suffering shall be punishable with imprisonment for a term which may extend to six months, or fine, or with both."

31. On a reading of Section 23 of JJ Act, one can see that in order to attract the offence under Section 23 of JJ Act, accused

must be a person having actual charge or control over a juvenile or a child. The accused herein was not a person having the actual charge or control over the prosecutrix. Therefore, the ingredients of Section 23 of the JJ Act are not attracted in the facts of this case and accordingly we find that the accused is not guilty of the offence under Section 23 of JJ Act and his conviction and sentence for the said offence is liable to be set aside.

32. In view of the findings rendered above, the appeal is allowed in part as follows:

(a) The conviction and sentence against the accused for the offences under Sections 3(1)(xi) and 3(2)(v) of SC/ST (POA) Act and Section 23 of the JJ Act stand set aside and the accused is acquitted of the said offences.

(b) The conviction and sentence against the accused for the offences under Sections 366 and 376(1) IPC stands confirmed.

(c) Accused is entitled to set off for the period undergone by him in judicial custody as provided under Section 428 Cr.P.C.

Sd/-

P.B.SURESH KUMAR, JUDGE

Sd/-

M.B.SNEHALATHA, JUDGE

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