

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

THURSDAY, THE 09TH DAY OF JULY 2020 / 18TH ASHADHA, 1942

CRL.A.No.773 OF 2017

AGAINST THE JUDGMENT IN SC 511/2015 DATED 17-06-2017 OF  
ADDITIONAL SESSIONS COURT - I, KASARAGOD

CRIME NO.104/2015 OF Kumbala Police Station, Kasargod

APPELLANT :

SHAIK SHIYAVULLA @ MUSTHAF,  
C-490/17,  
CENTRAL PRISON & CORRECTIONAL HOME,  
KANNUR.

BY ADVS.  
SRI.P.VIJAYA BHANU (SR.)  
SRI.P.M.RAFIQ  
SRI.V.C.SARATH  
SRI.M.REVIKRISHNAN  
SRI.AJEESH K.SASI  
SRI.VIPIN NARAYAN  
SMT.POOJA PANKAJ  
SRI.THOMAS J.ANAKKALLUNKAL

RESPONDENT :

STATE OF KERALA  
(SHO KUMBLA POLICE STATION,  
CRIME NO.104/2015)

BY SMT.PUSHPALATHA M.K., SR.PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON  
09-07-2020, THE COURT ON 09-07-2020 DELIVERED THE FOLLOWING:

**P.B.SURESH KUMAR, J.**

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**Criminal Appeal No.773 of 2017**  
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**Dated this the 9<sup>th</sup> day of July, 2020**

**J U D G M E N T**

The appellant who is the sole accused in S.C.No.511 of 2015 on the files of the First Additional Sessions Court, Kasaragod has come up in this appeal challenging his conviction and sentence in the said case.

2. The case of the prosecution in essence is that on a Saturday in the year 2012 and on the day next to that Saturday, the accused committed rape on the victim girl, a minor aged 15 years, at her residence and thereby committed the offence punishable under Section 376 of the Indian Penal Code (the IPC) and Section 5(I) read with Section 6 of the Protection of Children from Sexual Offences Act, 2012(the POCSO Act).

3. On the accused pleading not guilty of the charges levelled against him, the prosecution examined 10 witnesses on its side as PWs 1 to 10 and proved 13 documents through them as Exhibits P1 to P13. Thereupon, the accused was questioned under Section 313 of the Code of Criminal Procedure(the Code) as regards the incriminating evidence brought out by the

prosecution. The accused denied the evidence and pleaded innocence. As the court did not find the case to be one fit for acquittal under Section 232 of the Code, the accused was called upon to enter on his defence. The accused did not however adduce any evidence.

4. Among the witnesses examined, PW1 is the doctor who examined the victim girl on 21.02.2015. She proved Ext.P1 report of examination. PW2 is the victim girl herself. She proved Ext.P2 First Information Statement, Ext.P3 statement given by her to the Childline and Ext.P4 statement given by her under Section 164 of the Code. PW3 is the mother of the victim girl. PW6 is the Headmistress of the school where the victim girl was pursuing her studies. She proved Ext.P7 certificate indicating the date of birth of the victim girl.

5. On an examination of the materials on record, the court below found that the prosecution has not made out a case against the accused under Section 5(l) read with Section 6 of the POCSO Act. The court however found that the accused is guilty of the offence punishable under Section 376(2)(f) of the IPC and sentenced the accused to undergo rigorous imprisonment for ten years and to pay a fine of Rs.50,000/- and in default of payment of fine, to undergo rigorous imprisonment for six months. As noted, the accused is aggrieved by his conviction and sentence.

6. Heard the learned counsel for the appellant as also the learned Public Prosecutor.

7. The learned counsel for the appellant contended that there is absolutely no evidence to convict the accused for the offence punishable under Section 376(2)(f) of the IPC. The learned counsel elaborated the said submission referring to facts proved in the case. I am not referring to the materials on which reliance was placed by the learned counsel for the present, as I propose to deal with the same in detail a little later.

8. Per contra, the learned Public Prosecutor contended that materials on record would certainly justify the conviction of the appellant under Section 376(2)(f) of the IPC.

9. Having heard the learned counsel for the parties and having perused the materials on record, it is seen that the point arising for consideration is as to whether the prosecution has established the guilt of the accused under Section 376(2)(f) of the IPC.

10. The overt acts attributed against the accused being overt acts allegedly took place prior to Act 13 of 2013, the point to be considered is as to whether the prosecution has established the guilt of the accused under Section 376(2)(f) of the IPC as it stood prior to Act 13 of 2013.

11. As noted, the charge against the accused is that on a Saturday, in the year 2012 and on the day next to that Saturday, the accused committed rape on the victim girl who was a minor aged 15 years then, at her residential house. In so far as the prosecution has a case that the victim girl was a minor at the time of the alleged occurrences, it is obligatory for the prosecution to prove the age of the victim girl to secure conviction of the accused. The only evidence adduced by the prosecution to prove the age of the victim girl is Ext.P7. Ext.P7 is a certificate issued by the Headmistress of the school where the victim girl was pursuing her studies. It recites thus:

“This is to certified that Kum.REHNAZ.R D/O Abdul Rasak Ambar Shanthi Nagar Mangalpady her admission No.11688 Date of birth is 06/01/2000 (Sixth January two thousand) is found correct in the school Records. She taken transfer certificate from the school on 29.05.2013. T.C.No.11013/282/2013. To GVHS Kunjathur.”

In **Chandran v. State of Kerala** (2013 KHC 469), as regards the proof of age, this court held thus:

“Normally, the law accepts the entries in school records as proof of age, but the extract of the school admission register of the school where the ward was first admitted should be produced and proved. It is very seldom that the Court accepts the extract of the school admission register where the ward had studied subsequently and the entries in that register is based on the entries in the transfer certificate issued from the school. In such circumstances, as could be seen from the decisions cited above, on facts it can be seen that there were other items of evidence to prove the date of birth of the victim. That would

either be the oral evidence furnished by the person who gave information about the date of birth or the parents of the victim or through medical evidence in support of the age of the victim concerned.”

Ext.P7 is not the extract of the school admission register of the victim girl. It is only a certificate issued from the school. It is not even clear from Ext.P7 as to whether the school referred to therein is the school in which the victim was first admitted. In the absence of any other evidence in this regard, I am of the view that the prosecution has not established the age of the victim girl.

12. The question remains to be considered is as to whether a case of rape as defined in Section 375 of the IPC, as it stood prior to Act 13 of 2013 has been made out otherwise by the prosecution. Here again, I must refer to a charge in the case. The charge in the case is that the accused has committed rape on the victim girl on a Saturday in the year 2012 and on the day subsequent to that Saturday. PW1 is the doctor who examined the victim girl on 21.02.2015 and issued Ext.P1 report. The history of the case as recorded by PW1 in Ext.P1 report reads thus:

“ജാസ്റ്റിൻ എന്ന സ്ത്രീ കൂട്ടി കൊണ്ടുപോയി. ബഷീർ എന്ന (page No.2) – യാൾ മംഗലാപുരം plastic tent – നും രമേശ് കാസർഗോഡ് കാട്ടിൽ വെച്ചു ഹസൈനാർ എന്നയാൾ ശാരീരികമായി പീഡിപ്പിച്ചു. 6 -)0 ക്ളാസ്സിൽ പഠിക്കുന്ന സമയത്ത് Musthaf എന്നയാൾ പീഡിപ്പിച്ച എന്ന് പറഞ്ഞു.”

Musthaf referred to in the extracted portion of the statement is accused in the case. Though it was alleged by the victim girl in the

First Information Statement given by her that she was sexually assaulted by three other persons as well, they were not arrayed as accused in the case as they could not be apprehended. Be that as it may. Although the charge in the case is that the accused committed rape on the victim girl on two days during the year 2012, the victim girl has given evidence to the effect that the overt acts attributed against the accused took place in the year 2010. In other words, the medical examination of the victim girl for the purpose of the case was after about five years. If that be so, according to me, the evidence tendered by PW1 and her report are not of any use to the prosecution.

13. What remains with the prosecution to prove the overt acts attributed against the accused are the evidence of the victim girl and her mother. The mother of the victim girl who was examined as PW3 turned hostile. In a case of this nature, the fact that the mother of the victim girl herself has not given evidence against the accused in support of the prosecution case throws serious doubts as regards the genuineness of the case.

14. Coming to the evidence of PW2, the victim girl has deposed that while she was residing along with her mother and younger siblings, in the year 2010, the accused who was a friend of her father was also residing with them. She deposed that while so, one day, the accused committed rape on her. She deposed

that he grabbed her breast stating that he would marry her. She also deposed that the accused has touched her vagina. She deposed that though she informed the matter to her mother, she did not believe. She deposed that she gave Ext.P2 First Information Statement, Ext.P3 Statement to the Childline and Ext.P4 Statement to the Magistrate. It is profitable to refer to the evidence tendered by the victim girl on the core aspect of the case of the prosecution. The said evidence reads thus:

"പ്രതി എന്നെ റൂമിൽ കൊണ്ട് പോയി ബലാത്സംഗം ചെയ്തു..... പ്രതി എന്നെ കല്യാണം കഴിക്കാമെന്നു പറഞ്ഞു എന്റെ മാറിടത്തു പിടിച്ചു. എന്റെ മുത്രമൊഴിക്കുന്ന സ്ഥലത്തു പിടിച്ചു ബലാത്സംഗം ചെയ്തു..... ഞാൻ 5 -ആം ക്ലാസ്സിൽ പഠിക്കുന്ന സമയത്തു പ്രതി എന്നെ 2 തവണ വീട്ടിൽ വന്നു ബലാത്സംഗം ചെയ്തു."

From the aforesaid evidence, it is doubtful as to what the victim girl has meant by referring to the expression 'ബലാത്സംഗം'. She has not stated the particulars of the overt acts committed by the accused. In this regard, I must at once notice that the version of the victim girl as regards the overt acts attributed against the accused while she was taken to the doctor for medical examination was that the said incidents took place while she was studying in the 6<sup>th</sup> standard, whereas, as revealed from the extracted portion of the evidence, what was stated by her before the court is that the said overt acts have been committed by the accused while she was studying in the 5<sup>th</sup> standard. Further, in Ext.P4 statement given by the victim girl to the Magistrate under Section 164 the code, she has stated thus:



"മുസ്സാഖ് എന്നെ മംഗല്യം കഴിക്കുന്ന ചെക്കനാണ്. അയാൾ എന്റെ മേൽ തൊട്ടു. അയാൾ വേറെ ഒന്നും ചെയ്തില്ല."

In cross-examination, PW2 has admitted having made such a statement. In the absence of any specific evidence as regards the overt acts attributed against the accused and in the light of the contradictory statement given by PW2 in Ext.P4 statement before the Magistrate and in the light of the inconsistent versions as regards the time at which the overt acts alleged against the accused have been committed, I am of the view that it is not safe to convict the accused solely based on the evidence tendered by PW2. That apart, since it was found that the prosecution has not proved the age of the victim girl, even if it is admitted that the accused had sexual intercourse with the victim girl, there is absolutely nothing on record to infer that the alleged sexual acts attributed have been committed against the will of the victim girl or without her consent. Above all, as noted, going by the evidence tendered by the victim girl, the overt acts alleged against the accused took place during 2010, whereas the charge in the case is that the accused committed rape on the victim girl during 2012. In the said view of the matter, I am of the view that this is a case where the accused is entitled to the benefit of doubt.

In the result, the Criminal Appeal is allowed. The conviction of the appellant and the sentence imposed on him by the Court of Session are set aside and he is acquitted. He shall be

set at liberty forthwith and released from custody, if his continued detention is not required in connection with any other case. Registry shall communicate this judgment forthwith to the concerned prison, where the appellant is undergoing incarceration.

Sd/-

**P.B.SURESH KUMAR, JUDGE**

PV/RKJ