

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

TUESDAY, THE 08TH DAY OF SEPTEMBER 2020 / 17TH BHADRA,  
1942

CRL.A.No.509 OF 2020

AGAINST THE JUDGMENT IN SC 503/2017 OF ADDITIONAL  
SESSIONS COURT, ERNAKULAM

CRIME NO.2346/2016 OF PALLURUTHY POLICE STATION

APPELLANT/ACCUSED:

SHIJU,  
AGED 34 YEARS, S/O GOPALAN, KANNIPURATH HOUSE,  
EAST SIDE OF VAYANASALA, MARUVUKKADU,  
CHELLANAM VILLAGE.

BY ADVS.  
SRI.B.DEEPAK  
SRI.KARTHIK BHAVADASAN

RESPONDENT/COMPLAINANT:

STATE OF KERALA  
REP BY C.I.OF POLICE, PALLURUTHY POLICE  
STATION, REP BY PUBLIC PROSECUTOR, HIGH COURT  
OF KERALA, ERNAKULAM-682031.

SMT. PUSHPA VIJAYAN PP  
SRI.RAMESH CHAND PP

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 18-  
08-2020, THE COURT ON 08-09-2020 DELIVERED THE FOLLOWING:

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

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**Criminal Appeal No.509 of 2020**  
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**Dated this the 8<sup>th</sup> day of September, 2020**

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

The sole accused in S.C. No.503 of 2017 on the files of the Additional Sessions Court, Ernakulam has come up in this appeal challenging his conviction and sentence in the said case.

2. The accusation in the case is that on 02.11.2016, at about 8 am, the accused, who is the cousin brother of the victim minor girl aged 15 years, sexually assaulted the victim girl by penetrating his penis and inserting his finger into her vagina and also by sucking her breast. The offences alleged against the accused are the offences punishable under Sections 376(2)(f) and 376(2)(i) of the Indian Indian Penal Code (the IPC) and Section 5(n) read with Section 6 and Section 9(n) read with Section 10 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 17 witnesses as PW1 to PW17 and proved through them 15 documents as Exts.P1 to P15. Among the witnesses examined on the side of the prosecution, PW1

is the victim girl herself, PW2 is the doctor who examined the victim girl after the occurrence on the same day, PW4 is one of the teachers in the school where the victim girl was pursuing her studies, PW5 is the headmistress of the school, PW6 is the mother of the victim girl, PW7 is the village officer who prepared the site plan, PW9 is the attester to Exts.P6 and P7 seizure mahazars, PW10 is the Child line Member who reported the incident to the police on receiving information from the school. PW11 is a sister of the father of the victim girl, PW12 is another sister of the father of the victim girl and PW13 is the investigating officer in the case. Among the documents proved, Ext.P1 is the statement given by the victim girl under Section 154 of the Code of Criminal Procedure (the Code), Ext.P2 is the report of the medical examination issued by PW2, Ext.P5 is the site plan prepared by PW7, Ext.P13 is the statement given by the victim girl under Section 164 of the Code, Ext.P14 is the report of the forensic science laboratory concerning the dress allegedly worn by the accused and the victim girl at the time of occurrence.

4. On an appraisal of the materials on record, the court below found the accused guilty of the offences punishable under Sections 376 (2)(f) and 376(2)(i) of the IPC, Section 5(n) read with Section 6 as also Section 9(n) read with Section 10 of the POCSO Act. The accused was consequently convicted for the said offences

and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.10,000/- and in default of payment of fine, to undergo rigorous imprisonment for six months each for the offences punishable under Sections 376(2)(f) and 376(2)(i) of the IPC. Separate sentence was not awarded for the offences punishable under the POCSO Act. As noted, the accused is aggrieved by his conviction and sentence.

5. Heard the learned counsel for the appellant and the learned Public Prosecutor.

6. The learned counsel for the appellant submitted that as regards the core aspect of the crime, viz, the sexual assault, the only evidence available in the case is the evidence of the victim girl. It was pointed out that the evidence given by the victim girl is not consistent with her two previous statements namely Ext.P1 and Ext.P13. It was argued by the learned counsel that the inconsistencies in the evidence given by the victim girl are not trivial in nature, but significant and therefore, the victim girl cannot be considered as a sterling witness to rest the conviction of the accused solely based on her evidence. The learned counsel has relied on the decisions of the Apex Court in **Kaini Rajan v. State of Kerala**, (2013)9 SCC 113 and **Munna v. State of M.P.**, (2014) 10 SCC 254, in support of the said contention. The learned counsel has also argued placing reliance on the evidence of by PW2, the doctor who

examined the victim girl and Ext.P2 report issued by her, that the medical evidence also does not support the case of the prosecution that the accused has committed vaginal penetration. The learned counsel has pointed out that the court below has relied on Ext.P14 report of the forensic science laboratory to the effect that the undergarment seized from the accused contained seminal fluids to justify the conviction of the accused. According to the counsel, the undergarment of the accused referred to in Ext.P14 is one seized from him in terms of Ext.P7 mahazar when he was arrested on the subsequent day of the alleged occurrence and the court below, in the circumstances, ought not to have placed any reliance on the said evidence.

7. Per contra, the learned Public Prosecutor supported the decision of the court below pointing out that the inconsistencies in the statements of the victim girl are trivial in nature and the same, at any rate, are not sufficient to ignore the evidence tendered by the victim girl. It was also pointed out by the learned Public Prosecutor that the evidence tendered by PW2 cannot be said to be one not supporting the evidence tendered by the victim girl.

8. Having heard the learned counsel for the parties on either side and having perused the materials on record, the point arising to be adjudicated is as to whether the prosecution has established the guilt of the accused under Sections 376(2)(f) and

376(2)(i) of the IPC and Section 5(n) read with Section 6 as also Section 9(n) read with Section 10 of the POCSO Act.

9. Before proceeding to consider the contentions advanced by the learned counsel for the appellant, it is necessary to refer to the evidence tendered by the prosecution in the case. As noted, the victim girl is none other than the daughter of the brother of the mother of the accused. She was residing in the family house of her father where two of the sisters of her father were also residing, while she was studying in the high school classes. PW12, another sister of her father was residing in a house adjacent to the family house. The victim girl as PW1 deposed that on 02.11.2016, while she was about to leave the family house to the school, the accused came there to invite the inmates therein, and also PW12, for his engagement and after inviting PW12, the accused came to the room of the victim girl through the back door of the house, closed her mouth, grabbed her breast and inserted his finger into her vagina. PW1 also deposed that thereafter, the accused made her lie down in the bed and penetrated his penis into her vagina and also kissed at her lips. PW1 also deposed that the accused did the aforesaid acts after removing her dress. She deposed that the accused thereupon applied his mouth also into her vagina. PW1 also deposed that after the accused left the scene, while she was proceeding to the house of PW12, the accused came there and

inserted his finger and penetrated his penis into her vagina again. PW1 deposed that thereafter, she went to the school, and when she reached the school, she could not control her emotions and consequently, she cried. She deposed that her friends then questioned her as to the reason and she divulged the occurrence to her friends and they, in turn, informed the matter to their class teacher. She deposed that the class teacher, in turn, informed the matter to the police. Though the victim girl was cross examined by the accused, nothing was brought out in cross-examination to discredit her version. The suggestion put to PW1 in cross examination was that her parents did not like the marriage proposal of the accused with the daughter of one of their relatives and the victim girl was consequently made to raise a false allegation against the accused. The victim girl has not only denied the said suggestion, but also clarified that her parents had no issues with regard to the marriage of the accused and it was the mother of the accused and his sister who have opposed the marriage proposal of the accused.

10. PW2, the doctor who examined the victim girl on the date of occurrence at 9.45 p.m. deposed that at the time of examination, it was alleged that PW1 was sexually assaulted by the son of her father's sister. PW2 deposed that the victim girl was complaining about pain at her breast and pain while urinating. She deposed that on examination, the hymen of the victim girl was found

congested and there was redness in the hymen at 6 o'clock position. In cross-examination, to a specific question put to PW2, she answered that from the injuries noted on the private part of the victim girl one cannot say positively as to whether there was penetration and that one can only say that some force has been applied in that area. PW2 has also clarified in the cross-examination that the injuries can be caused by applying penis into the vagina. PW2 also clarified that hymen congestion may occur usually on account of fingering. The opinion given by the doctor as regards the congestion in the hymen of the victim girl is supported by the authorities in medical jurisprudence. A passage from the Medical Jurisprudence and Toxicology by Dr.K.S.Narayan Reddy, which is relevant in the context, reads thus :

“Swelling and congestion of the mucosa at the introitus, the clitoris and the labia minora are caused by genital stimulation, but they may also be caused by digital stimulation or masturbation.”

11. PW4, the teacher to whom the victim girl claims to have stated the occurrence, deposed that on the relevant day, the friends of the victim girl came to her and informed her about the occurrence and she, accordingly, questioned the victim girl and then the victim girl told her about the sexual assault committed by the accused. PW5, the Headmistress of the school deposed that on



receiving information from PW4, she informed the matter to the child line as also to the mother of the victim girl. PW6, the mother of the victim girl deposed that on relevant day, she was called to the school by PW4 and when she reached the school, child line officials and teachers were there in the school and they informed her that the accused has committed sexual assault on the victim girl. PW6 deposed she accompanied the victim girl for medical examination on the same day. To a specific question put by the Prosecutor to PW6 as to whether the victim girl has divulged anything about the occurrence to her, the answer was the following: "ഞാൻ ഒരു അമ്മയല്ലെ അത് ഞാൻ എങ്ങനെ പറയും". PW10 is a member of the concerned child line and she deposed that on 02.11.2006, by about 3 o'clock, she received a call from the school of the victim girl and she went to the school. PW10 deposed that when she reached the school, the mother of the victim girl was also present in the school and on interacting with the victim girl, she was found sad and she disclosed to her that the accused has committed sexual assault on her. PW10 deposed that she, accordingly, informed the matter to the police.

12. PW11 is one of the sisters of the father of the victim girl with whom the victim girl was residing at the relevant time. PW11 deposed that on 02.11.2016, she was called to the school by the class teacher of the victim girl and when she reached

there, she found the mother of the victim girl, a member of the child line as also police at the school. PW11 deposed that the class teacher of the victim girl told her that the accused has assaulted the victim girl. PW12 deposed that on the relevant day, the accused came to her house for inviting her for his engagement. PW12 also deposed that thereafter the accused went to their family house. PW12 also deposed that she found later that the victim girl was going to the school crying and when she questioned, she told her that the kohl applied by her on her eyes has smudged. PW12 deposed that she thereafter cleaned her face using a cloth.

13. I shall now consider the contentions advanced by the learned counsel for the appellant. The first and foremost contention taken by the learned counsel for the appellant is that the evidence given by the victim girl is not consistent with her previous statements. True, in Ext.P1 previous statement, what is stated by the victim girl as regards the occurrence is that the accused has pull down her pants and underwear and thereupon inserted his genital organ into her vagina by placing her on the side of the wall. In Ext.P13 statement given by the victim girl before the Magistrate, she has stated, in addition, that the accused has touched her vagina as also her breast. She has also stated in the said statement that the accused had kissed her on her lips before leaving the scene. In Ext.P13, the victim girl has further stated that the accused has

repeated the overt acts spoken to by her. In Ext.P13, the victim girl has however, not stated in what manner the accused has committed the vaginal penetration alleged, whereas, as noted, in the evidence tendered by the victim girl, her version was that the accused has made her lie down on the cot and thereafter, committed vaginal penetration. It is placing reliance on the versions of the victim girl as to the manner in which the accused has committed vaginal penetration, it was argued by the learned counsel that the evidence tendered by the victim girl is not consistent with her previous statements. One should consider the condition of the mind of a girl aged 15 years, who was subjected to an unexpected sexual assault and the deeply distressing and disturbing experience to which she was undergoing on account of the said sexual assault, before examining a contention in the nature of one taken by the learned counsel for the appellant. According to me, in the absence of any reason for the victim girl to falsely implicate the accused, the approach of the court in a case of this nature shall be to see whether the statements are, in essence, one and the same. If the statements are in essence one and the same, such contentions are to be rejected outright. Viewed in the aforesaid perspective, the inconsistency in the manner in which the accused has attempted vaginal penetration is not sufficient for a court to ignore the evidence tendered by her, which is found to be credible and which is

consistent with the other evidence let in by the prosecution, especially the evidence let in by her close relatives, teachers, members of the child line etc. I take this view also for the reason that to a specific question put to the victim girl in cross examination as to the aforesaid inconsistency in her versions, she answered that the accused has attempted for vaginal intercourse with her by placing her on the side of the wall and also by making her lie down on the cot, and that if there are omissions in her statements, the same might have happened on account of her anxiety. Therefore, the contention raised by the learned counsel for the appellant in this regard is only to be rejected.

14. True, PW2, the doctor has not given any final opinion on the basis of the injuries noted by her in the examination of the victim girl. As noted, the doctor has stated that she found hymen congestion and also redness in the hymen at 6 o'clock position. The evidence tendered by PW2 in cross-examination that the congestion of vagina can occur on account of an attempted penetration or on account of fingering is sufficient for me to hold that the medical evidence in the case supports the case spoken to by the victim girl. It is all the more so since PW2 has examined the victim girl on the same day itself.

15. It is seen that in terms of Ext.P14, it is reported that seminal fluids were found in the pants worn by the victim girl as also

in the undergarments worn by the accused at the time of occurrence. Of course, merely for the reason that seminal fluids were found in those clothes, it cannot be said that the occurrence took place as alleged.

16. True, the medical evidence let in by the prosecution does not establish a case of complete vaginal penetration, but since an attempt at penetration is sufficient to make out a case of rape in terms of the Indian Penal Code amended as per Act 13 of 2013 and in terms of the POCSO Act, it cannot be said that the impugned decision is not correct in any manner on account of that reason [See **Ramesh v. State of Kerala**, 2020(4) KLT 11]. Likewise, merely for the reason that there was no rupture of hymen, it cannot be said that there was no rape, for rupture of hymen is by no means necessary to constitute the offence of rape [See **Aman Kumar and another v. State of Haryana**, (2004) 4 SCC 379].

17. In **Kaini Rajan**, the Apex Court held that even while the evidence of the victim in a rape case commands great respect and acceptability, if there are circumstances which cast some doubt in the mind of the court as to the veracity of the same, the court shall not rely on the same without corroboration. Similarly, in **Munna**, the Apex Court has held that if there are major discrepancies in the evidence of the victim girl which create doubt

as to its veracity, the same may not be acted upon. In the case on hand, I do not find any circumstances or any serious discrepancy which would create a doubt as to the veracity of the evidence of the victim girl. As such, the said decisions have no application.

In the aforesaid circumstances, I am of the view that the prosecution has established the guilt of the accused beyond reasonable doubt. The appeal is, therefore, devoid of merits and the same is, accordingly, dismissed.

Sd/-

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

YKB