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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MR. JUSTICE JOHNSON JOHN

TUESDAY, THE 9TH DAY OF JANUARY 2024 / 19TH POUSHA, 1945

CRL.A NO. 71 OF 2019

AGAINST THE JUDGMENT SC 301/2016 OF ADDITIONAL DISTRICT COURT & SESSIONS COURT (ATROCITIES & SEXUAL VIOLENCE AGAINST WOMEN & CHILDREN),THIRUVANANTHAPURAM

APPELLANT:

SASI @ KAKKAKOTHI, S/O.SANKARAN,
AGED 68 YEARS, C NO.2881,
CENTRAL PRISON AND CORRECTIONAL HOME,
POOJAPPURA, THIRUVANANTHAPURAM, AND RESIDED AT
PUTHEN VEEDU, MANNARATHALIKKAL, KUVALASHERI,
MARANALLOR DESOM, MARANALLOOR VILLAGE.

ADV.BHARATHAN K.S. (STATE BRIEF)

RESPONDENTS:

1 STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM- 682 031

2 THE CIRCLE INSPECTOR OF POLICE,
KATTAKADA POLICE STATION.

BY PUBLIC PROSECUTOR SMT.BINDU O.V.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 03.01.2024, THE COURT ON 09.01.2024 DELIVERED THE FOLLOWING:

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P.B.SURESH KUMAR & JOHNSON JOHN, JJ.

Criminal Appeal No.71 of 2019

Dated this the 9th day of January, 2024

JUDGMENT

The appellant is the sole accused in S.C.No.301 of 2016 on the files of the Additional Sessions Court for the trial of cases relating to atrocities and sexual violence against women and children, Thiruvananthapuram. The accused stands convicted for the offences punishable under Sections 450 and 376 of the Indian Penal Code (the IPC) and Section 3(a) read with Section 4 of the Protection of Children from Sexual Offences Act, 2012 (the POCSO Act).

2. The victim in the case is a minor girl aged 14 years. The occurrence, which is the subject matter of the case, took place on 12.02.2016. At the relevant time, the father of the victim was working abroad and the only sibling of the victim was not residing with the family of the victim. On 12.02.2016, the victim who had gone to school as usual, came

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back home, as there were no classes on the said day. The mother of the victim had to go to the office of the panchayat on that day for presenting the bill in connection with the work carried on by her in her capacity as the Convenor of a work group, leaving the victim alone at the house. The accused is a neighbour of the victim. He was aged 65 years at the relevant time. The accusation against the accused as stated in the final report is that at about 1.45 p.m. on 12.02.2016, the accused trespassed into the bedroom of the house of the victim, dragged the victim, who was watching television then lying on the bed in the room, after closing her mouth, to the adjoining room and raped her.

3. On the accused pleading not guilty of the charges framed against him for the offences referred to above, the prosecution examined 19 witnesses as PW1 to PW19 and proved through them 20 documents as Exts.P1 to P20. The prosecution has also caused the witnesses examined on its side to identify the material objects in the case namely MO1 to MO4, of which MOs 1 to 3 were the clothes worn by the victim and MO4 was the dhoti worn by the accused at the time of the alleged occurrence. The accused was, thereupon, questioned

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under Section 313 of the Code of Criminal Procedure (the Code) as regards the incriminating circumstances brought out by the prosecution and he denied the same. Since the trial 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 adduce any evidence. Thereupon, on an appraisal of the materials on record, the Court of Session found the accused guilty of the offences, convicted him and sentenced him to undergo imprisonment for life and to pay fine for the offence punishable under Section 376(2)(i) of the IPC and rigorous imprisonment for five years and to pay fine for the offence punishable under Section 450 IPC. In the light of the provision contained in Section 42 of the POCSO Act, no separate sentence was imposed on the accused for the offence punishable under Section 3 read with Section 4 of the said Act. The accused is aggrieved by his conviction and sentence in the case, and hence this appeal.

4. Heard the learned counsel for the accused as also the learned Public Prosecutor.

5. The occurrence was attempted to be proved by the prosecution through the evidence of PW1, the victim.

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The learned counsel for the accused did not contend that the evidence tendered by PW1 does not disclose the commission of offences alleged against the accused. The contention raised by the learned counsel for the accused, on the other hand, was that the evidence tendered by the victim cannot be said to be of a sterling character, so as to convict the accused solely on the basis of the said evidence. According to the learned counsel, a close reading of the evidence tendered by the victim as PW1 and her mother as PW2 would indicate that the evidence tendered by the victim was not real and that she was a tutored witness. In order to substantiate the said argument, the learned counsel has brought to our notice the statement made by PW2 in her deposition that she had locked the main door of the house leaving the victim inside, when she went to the office of the panchayat. According to the learned counsel, if the said statement is accepted as correct, it is not possible for anyone to trespass into the bedroom of the house and the narration of the occurrence by the victim can only be utter falsehood. It was also argued by the learned counsel that Ext.P9 School Certificate produced by the prosecution to prove the age of the victim is not sufficient to establish that the

victim was under sixteen years of age at the time of the alleged occurrence to justify the conviction of the accused under Section 376(2)(i) IPC.

6. *Per contra*, the learned Public Prosecutor supported the impugned decision of the Court of Session pointing out that the evidence tendered by PW1 was natural and nothing was brought out during cross-examination to doubt the veracity of the evidence tendered by her. In order to meet the argument put forward by the learned counsel for the accused that since the main door of the house of the victim was locked from outside, it was not possible for anyone to get inside the house of the victim, the learned Public Prosecutor has taken us through the relevant portion of the evidence tendered by PW2 that even if the main door of the house is locked from outside, it can be opened from inside, and contended that inasmuch as PW1 has stated in her deposition that she went to the courtyard of the house to chat with PW3, a common neighbour of the victim and the accused, when he came there for drawing water from the well, the argument is baseless. As regards the contention raised by the learned counsel for the accused that Ext.P9 School Certificate is not

sufficient to establish that at the relevant time, the victim was under sixteen years of age, it was argued by the learned Public Prosecutor that the prosecution has also produced the birth certificate of the victim from the local authority for the said purpose which proves the age of the victim in terms of the provisions contained in Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015.

7. We have examined the arguments advanced by the learned counsel for the parties on either side. The point that arises for consideration is whether the prosecution has proved beyond reasonable doubt, the guilt of the accused for the offences punishable under Sections 450 and 376(2)(i) IPC and Section 3(a) read with Section 4 of the the POCSO Act.

8. As noted, the victim has deposed that the accused was a person residing in the neighbourhood of her house; that on the relevant day, when her mother left home to the office of the panchayat, she was alone in the house; that while she was watching television, PW3 came to her house for drawing water from the well and that she then went to the courtyard of the house to chat with PW3. It was also deposed by the victim that when PW3 left, she again went inside the

house and was watching television leaving the main door of the house ajar and while so, the accused came there, closed her mouth and then dragged her to the adjoining room, made her stand close to a wall, removed her clothes and penetrated his penis into her vagina. It was also deposed by the victim that she could not make any noise then, as the accused kept her mouth closed. The victim also deposed that when the accused did so, a fluid came out of his penis. It was the version of the victim that her mother then called for her from outside the house and on hearing the sound of her mother, the accused attempted to escape through the front door of the house first, and as her mother was coming inside through the front door, the accused suddenly ran outside the house through the back door. It was also deposed by PW1 that even though her mother caught hold of the accused, the accused escaped from her hold. PW1 deposed that even though she told her mother that the accused assaulted her, she did not narrate the entire occurrence to her mother and the occurrence was narrated by her later to her tuition teacher. PW1 also deposed that she was taken to the hospital on the evening of the same day itself as she felt immense abdominal

pain and that she gave Ext.P1 statement to the police at the hospital. The victim identified Ext.P1 statement given by her, on the basis of which the crime was registered as also Ext.P2 statement given by her to the Magistrate on the same day at the hospital.

9. PW2 deposed that on the relevant day, she went to the office of the panchayat along with her neighbour, PW4 and that they returned by about 2 p.m. PW2 deposed that on returning home, she heard the sound of somebody closing the front door of her house and when she opened the door, she saw the accused inside the house and he was found running towards the backside of the house. PW2 also deposed that she then noticed that the victim was wearing her churidar pants and the accused was attempting then to open the back door. It was also deposed by PW2 that even though she attempted to catch the accused and cried aloud, the accused dragged PW2 out of the house and then managed to escape from her hold and ran away. PW2 also deposed that by the time, PW4 and others came to her house. PW2 also deposed that she took PW1 to the hospital on the night of the same day and thereafter reported the matter to the police. PW2 identified

MO4 as the dhoti worn by the accused at the relevant time.

10. PW3 gave evidence on similar lines of the evidence tendered by PW1. In addition, PW3 also deposed that while he was having lunch thereafter, he heard a noise from the house of PW1 and when he went to the said house, he found a crowd there and he came to know later that the accused had assaulted the victim sexually. PW4, the person who accompanied PW2 to the office of the panchayat on the relevant day gave evidence on similar lines of the evidence tendered by PW2. PW4 also deposed that when she was about to enter her house, she heard a noise from the backyard of the house of PW1 and when she turned towards that side, she saw PW2 holding the accused. PW4 also deposed that she then rushed to the house of PW2 and by the time she reached there, the accused ran away from there. PW4 also deposed that she came to know later that the accused had sexually assaulted PW1. PW9 is another neighbour of the victim. PW9 deposed that on the relevant day, while she was coming back to her house by about 2 p.m. from Kattakada, she found a crowd at the house of PW1 and she came to know that a person named

Sasi sexually assaulted PW1.

11. PW5 is the doctor who examined the victim at 8.52 p.m. on 12.02.2016 at the General Hospital, Thiruvananthapuram and issued Ext.P3 certificate. PW5 deposed that the victim was brought to the hospital with the alleged history of sexual assault at her house at around 2 p.m. on 12.02.2016. The history of the case was recorded in Ext.P3 as "വീട്ടിനടുത്തുള്ള ഒരാൾ (Sasi) ഈ കുട്ടിയെ ഉപദ്രവിച്ചു. നെഞ്ചിൽ പിടിച്ചു വയറിൽ പിടിച്ചു private parts ൽ പിടിച്ചു. " PW5 deposed that as it was a case of sexual assault, she referred the victim to the Gynaecologist. PW19 is the doctor attached to the General Hospital, Neyyattinkara who examined the victim on the reference of PW5 and issued Ext.P20 certificate. The history related to the incident as noted in Ext.P20 certificate is that at about 1.45 p.m. on 12.02.2016, a 65 year old male person named Sasi has introduced scrotum into the vagina of the victim. PW19 deposed that on examination, the hymen of the victim as also her labia were intact and no vaginal injuries were noted. PW19 also deposed that on examination, the statement of the victim and the history were found consistent with sexual intercourse. PW19 also clarified that vulva penetration is possible even

without tearing of hymen and the hymen may be intact in such cases. Though PW19 deposed in cross-examination that she did not find seminal fluid at the vagina of the victim, it was clarified by PW19 that the victim had a bath after the incident and before the examination.

12. PW12 was the Headmistress of the school where the victim girl was studying at the time of occurrence. PW12 deposed that Ext.P9 is the certificate issued by her certifying the date of birth of the victim, on the basis of the entries in the School Admission Register. PW13 is an official of Thiruvananthapuram Municipal Corporation. PW13 deposed that on the basis of the request made by the Inspector of Police, Kattakada, she issued Ext.P11 extract of the birth register maintained at the Corporation in relation to the victim. PW17 is the Assistant Director of the Forensic Science Laboratory, Thiruvananthapuram, who gave Ext.P13 report after conducting forensic examination of MOs 1 to 3 clothes worn by the victim and MO4 dhoti worn by the accused at the time of the occurrence. PW18 is the Police Officer who conducted the investigation in the case.

13. It is trite that in order to base a conviction

solely on the evidence of the victim in a case of sexual assault, the evidence of the victim shall be of a sterling quality. In **Rai Sandeep v. State (NCT of Delhi)**, (2012) 8 SCC 21, the Apex Court had occasion to consider the question as to who can be said to be a sterling witness. Paragraph 22 of the judgment of the Apex Court in the said case reads thus:

> "In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it

> should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a "sterling witness" whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

As is explicit from the extracted portion of the judgment referred to above, the evidence of a sterling witness is one that should be natural and consistent with the case of the prosecution qua the accused. Such witnesses, under no circumstances, give room for any doubt as to the factum of the occurrence and the evidence will have co-relation with each and every one of the supporting materials including the opinion of experts. As in the case of circumstantial evidence, the evidence of sterling witnesses should satisfy the test viz that there should not be any missing link in the chain of

circumstances to hold the accused guilty of the offence. To put it differently, the version of such sterling witnesses on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary, and material objects should match the said version in material particulars.

14. We have perused meticulously the evidence tendered by the victim, and the same appears to us to be very much real and natural. Nothing was brought out by the accused in the cross-examination of PW1 to suspect the veracity of the evidence tendered by her. The victim never gave room for any doubt as to the factum of the occurrence and her evidence had co-relation with the remaining materials made available by the prosecution. The evidence tendered by PW1 was also consistent with her previous statements namely Ext.P1, the First Information Statement, and Ext.P2, the statement recorded in terms of Section 164 of the Code. The evidence tendered by PW1 was consistent with the evidence tendered by PW2, the mother of the victim, PW3, the person who came to the house of the victim to draw water from the well, PW4, who accompanied the mother of the victim to the office of the Panchayat and also the evidence tendered by

PW9, another neighbour of the victim. The evidence tendered by the victim was consistent with the evidence tendered by PW5, the doctor who examined the victim at the General Hospital, Thiruvananthapuram at 8.52 p.m. on 12.02.2016 as also the evidence tendered by PW19, the doctor who examined the victim girl at the General Hospital, Neyyattinkara on the following day. The evidence tendered by PW1 was also consistent with Ext.P13 report of the Forensic Science Laboratory which recites that the dhoti worn by the accused at the time of occurrence contained human spermatozoa and semen.

15. True, going by the evidence tendered by PW19, when the victim was medically examined, her hymen and labia were found intact and no vaginal injuries were noted. It was, however, clarified by PW19 in her evidence that vulva penetration is possible even without tearing the hymen. Even though PW19 deposed in cross-examination that she did not find seminal fluid at the vagina of the victim, it was explained by her that the victim had a bath after the occurrence and before the medical examination. Merely on account of the fact that there was no vaginal injuries, and the hymen of the victim

was found intact and merely for the reason that seminal fluid was absent at the vagina of the victim, in the light of the evidence tendered by PW19, it cannot be said that the evidence tendered by PW1 is inconsistent with the case of the prosecution. Similarly, it is stated in Ext.P13 that seminal stains were not detected on the clothes worn by the victim. The same also, according to us, is no reason to doubt the veracity of the evidence tendered by PW1, as she clarified in cross-examination that the seminal fluid of the accused did not fall on her clothes. Similarly, as rightly pointed out by the learned Public Prosecutor, there is absolutely no substance in the argument advanced by the learned counsel for the accused that it was not possible for the accused to enter into the house of the victim in the light of the evidence given by the victim that even though the main door of the house was locked from outside, it can also be opened from inside and that she went to the courtyard of her house to chat with PW3 when he came there for drawing water. In short, we have no doubt in our minds as to the credibility of the evidence tendered by PW1, and according to us, the victim in the case on hand can certainly be regarded as a sterling witness. If that be so, we

find no infirmity in the finding rendered by the Court of Session that the accused is guilty of the offences alleged against him.

16. Let us now consider the argument advanced by the learned counsel for the accused that the prosecution has not established that the victim was under sixteen years of age at the time of the alleged occurrence. According to the learned counsel, Ext.P9 relied on by the prosecution is only a certificate issued by the School based on the entry in the school admission register and the same cannot be accepted as evidence to prove the age of the victim conclusively, in the absence of any evidence of the person who gave the particulars of the date of birth of the victim to the school authorities when the victim was admitted to the School. Although there is force in the said argument, it is unnecessary to examine the said contention as the prosecution relies on Ext.P11 extract of the register of births maintained by the concerned local authority also to prove the age of the victim. According to us, Ext.P11 being a document relevant in terms of the provisions contained in Section 35 of the Indian Evidence Act, the same can be accepted as a valid proof of the age of the victim.

17. Be that as it may, in **Jarnail Singh v. State of Haryana**, (2013) 7 SCC 263, the Apex Court held that even though the rules framed under the Juvenile Justice (Care and Protection of Children) Act, 2000 apply strictly only for determination of the age of a child in conflict with law, the statutory provisions therein can certainly be the basis for determining the age of even a child who is a victim of crime, for there is hardly any difference insofar as the issue of minority is concerned, between a child in conflict with law and a child who is victim of a crime. The Juvenile Justice (Care and Protection of Children) Act, 2000 has been repealed and the Juvenile Justice (Care and Protection of Children) Act, 2015 has been brought into force in its place. Unlike in the 2000 Statute, the 2015 Statute contains a direct provision dealing with presumption and determination of age. Section 94 of the latter Statute dealing with the presumption and determination of age reads thus:

> "94. Presumption and determination of age.
> 1. Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating

> the age of the child as nearly as may be and proceed with the inquiry under Section 14 or Section 36, as the case may be, without waiting for further confirmation of the age.
>
> 2. In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining —
>
> > i. the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;
> >
> > ii. the birth certificate given by a corporation or a municipal authority or a panchayat;
> >
> > iii. and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:
> >
> > Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.
>
> 3. The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person."

As is seen from the extracted provision, in case of doubt as to whether the person brought before the competent authority is a child, the competent authority has to undertake the process of determination of the age by seeking evidence by obtaining the certificates made mention of therein. The first among the

certificates made mention of in the said provision is the date of birth certificate from the school. The statute provides that if the same is not available, the birth certificate given by a corporation or a municipal authority or a panchayat can be relied on to determine the age. Reverting to the case on hand, even assuming that Ext.P9 does not conform to the provisions contained in Section 94 of the 2015 Statute, according to us, Ext.P11 certificate issued by the local authority would certainly conform to the requirements of the said statutory provision and in the light of the decision of the Apex Court in **Jarnail Singh**, in the absence of evidence to the contrary, Ext.P11 can certainly be accepted as a conclusive proof of the age of the victim. The argument advanced by the learned counsel for the accused in this regard is only to be rejected and we do so.

In the facts and circumstances, the appeal is only to be dismissed and we do so.

Sd/-
P.B.SURESH KUMAR, JUDGE.

Sd/-
JOHNSON JOHN, JUDGE.

ds 03.01.2024