



IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MR. JUSTICE C.PRATHEEP KUMAR

WEDNESDAY, THE 4TH DAY OF SEPTEMBER 2024 / 13TH BHADRA, 1946

CRL.A NO. 1022 OF 2019

CRIME NO.639/2017 OF ALAKODE POLICE STATION, KANNUR

AGAINST THE JUDGMENT DATED 22.11.2018 IN SC NO.309 OF
2018 OF SPECIAL COURT FOR TRIAL OF OFFENCES UNDER POCSO ACT,
THALASSERY

APPELLANT/ACCUSED:

V.M.ABDULKHADER @ KADER,
AGED 38 YEARS, S/O.MUSTHAFI,
VAZHAVALAPPIL HOUSE, ALAKKODE AMSOM,
NEDUVOD, KUTTAPARAMBA P.O., KANNUR-670571.

BY ADVS.
T.U.SUJITH KUMAR
SRI.K.V.WINSTON

RESPONDENTS/COMPLAINANT:

- 1 STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM- 682031.
- 2 THE SHO,ALAKKODE POLICE STATION, KANNUR- 670571.

SMT.BINDU.O.V, PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON
04.09.2024, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:



C.R.

**P.B.SURESH KUMAR
&
C.PRATHEEP KUMAR, JJ.**

Crl.Appeal No.1022 of 2019

Dated : 4th September, 2024

JUDGMENT

C.Pratheep Kumar, J.

A father, who has been convicted for ravishing his own minor daughter is the appellant before us. He is the accused in Sessions Case No.309/2018 on the file of the Special Judge for the trial of offences under the PoCSO Act, Thalassery. The trial court convicted and sentenced him under various provisions of IPC as well as under the Protection of Children from Sexual Offences Act. The prosecution case is that the accused committed rape/penetrative sexual assault repeatedly on his minor daughter, since she was a student of class VII, at his own residence.

2. The trial court framed charges against the accused under Section 376 (2)(f),(k) and (n) of IPC and Section 5 (l) and (n) r/w Section 6 of the Protection of Children from Sexual Offences Act (PoCSO Act). The evidence in the case consists of the oral testimonies of PWs 1 to 11



and documentary evidence Exts.P1 to P21 on the side of the prosecution. No evidence was adduced by the accused. After appreciating the available evidence, the trial court found the accused guilty of the offences under Section 376 (2)(f)(k) and (n) of IPC and Section 5 (l) and (n) r/w 6 of the PoCSO Act. He was sentenced to undergo imprisonment for life and to pay a fine of Rs.50,000/- under Section 376 (2)(f)(k) and (n) of IPC and in default to undergo rigorous imprisonment for six months. He was further sentenced to undergo imprisonment for life and to pay a fine of Rs.50,000/- under Section 5 (l) and (n) r/w Section 6 of the PoCSO Act. Aggrieved by the above judgment of conviction and sentence, he preferred this appeal raising various contentions.

3. Now the points that arise for consideration are the following :-

(i) Whether the prosecution has succeeded in proving beyond reasonable doubt that the accused being the father of the minor victim has committed rape/aggravated penetrative sexual assault on her?

(ii) Whether the trial court was justified in sentencing the accused both under Section 376 (2)(f)(k) and (n) of IPC as well as under Section 5 (l) and (n) r/w Section 6 of the PoCSO Act?

4. Heard both sides.



5. Points (i) & (ii) : The prosecution has mainly relied upon the oral testimonies of PWs1 and 2 to prove the charge against the accused. PW1 is the victim herself. She would swear that on one Sunday while she was studying in 7th standard, her mother was absent in the house. At that time, her father took her to the bedroom, removed her dress, undressed himself, caused her to lie on the bed and inserted his genital organ into her genitalia. She felt pain and cried. At that time, the accused who is her father pacified her stating that there is nothing to worry. Thereafter he continued to sexually assault her as above, on several occasions. In January, 2017, their old residential building was demolished for constructing a new one. At that time, a temporary shed was constructed. In the said temporary shed also, she was similarly abused by her father, repeatedly. Finally, on one Sunday in November, 2017, while her mother went for the meeting of Kudumbasree, her father sexually abused her. When her mother returned home after the meeting, she happened to witness the incident and on seeing the incident, she became shocked. She informed about the incident to her brother. After one week, her uncle took them to his residence and thereafter they are residing in the family house of her mother. While residing in the residence of her uncle, she joined in a new school. In that school, during counselling, she had informed about the incident to a teacher, who in turn informed the matter to the Child Line. Two women from the Child Line came to her residence on 27.12.2017 and she had given Ext.P1 complaint to them. On the same day, the police also came and obtained her statement. She identified her



signature in Ext.P2 FI statement given on 27.12.2017. She had also identified her signature in Ext.P3 statement given by her to the Magistrate under Section 164 Cr.P.C.

6. PW2, the mother of the victim deposed that on one Sunday in the month of November 2017 at about 5.00 pm, when she returned home after attending the meeting of Kudumbasree, she saw her husband and her daughter, PW1, fully naked, in a compromising position. On seeing the same, she was shocked. After one week, she summoned her brother and went to her parental home along with her husband and children. She informed about the incident to her brother and other family members. Thereafter, she has been residing along with her children, in her parental home. After one week, two women from the Child Line came and obtained the complaint of PW1. Thereafter, the police also recorded her statement. She also signed in Ext.P2 FI statement given by her daughter to the police. She produced the dress of her daughter and husband to the police.

7. PW3 is the Child Line volunteer who had received information from PW1 regarding sexual assault by her father and obtained Ext.P1 complaint from the child. PW6 was the doctor who had conducted the potency test of the accused and issued Ext.P9 certificate. As per the certificate, there is nothing to show that the accused is incapable of performing the sexual act. PW9 was the Sub Inspector, Alakode police station who had registered Ext.P13 FIR on the basis of



Ext.P2 FI statement.

8. PW10 was the Assistant Professor, Pariyaram Medical College, who had examined PW1 and issued Ext.P14 medical examination report. She would swear that the child was brought by a woman Civil Police Officer and accompanied by her mother. The history was vaginal penetration by penis by the victim's father. The history was told by the child. On examination she noticed old tear on the hymen of the child. Her opinion is that findings are consistent with the history of penetrative sexual assault. PW11 is the Circle Inspector, who had conducted the investigation of this case and filed the final report.

9. At the time of evidence, the victim as PW1 deposed that her date of birth is 21.2.2003. Ext.P17 is the copy of the birth certificate produced by PW11, the investigating officer. As per Ext.P17 birth certificate also, the date of birth of PW1 is 21.2.2003. The above date of birth of PW1 as deposed by PW1 and as shown in Ext.P17 was not challenged by the accused. Therefore, from the evidence of PW1 and from Ext.P17, it is proved that the date of birth of PW1 is 21.2.2003 and as such, on the date of the alleged incidents which occurred before 18.11.2017, she was a 'child', as defined under the PoCSO Act.

10. It was argued by the learned counsel for the accused that the original FI statement given by PW1 was suppressed in this case. At the time of evidence, PW1 deposed that on 27.12.2017, she had given Ext.P1



complaint to PW3, the Child Line volunteer. On the same day, Ext.P2 FI statement was given to the police. According to PW3, Ext.P1 complaint received from the victim was handed over to the police on the very same day, ie, on 27.12.2017. However, PW9, the Sub Inspector as well as PW11, the investigating officer denied the same and according to PW11, Ext.P1 was seized only on 16.1.2018. Since both Exts.P1 and P2 are produced in this case from the side of the prosecution, there is no merits in the allegation that the original FI statement given by PW1 was suppressed in this case.

11. The learned counsel would argue that in Ext.P1, the details of the overt acts of sexual assault are not disclosed while in Ext.P2, a detailed description of the entire episode was narrated. It is true that in Ext.P1 the details of the sexual assault made by the accused are not narrated, in clear terms. In Ext.P1 she stated that since she was a student in 7th standard, her father used to lie along with her during night and during day time, in the absence of her mother, that he behaved indecently towards her and told her not to disclose about the same to others. She further stated that, when she resisted such activities of her father, he told her not to worry as there is no problem in doing so. She further stated that, on one day her mother happened to witness the incident and on seeing the same, her mother became unconscious. Thereafter, they were taken to the parental home of her mother. She is aggrieved by the above conduct of her father and therefore, in Ext.P1, she prayed for taking



necessary action against her father.

12. However, in Ext.P2 given on the very same day, she had given a more detailed description of the harassment faced by her, at the hands of her father. In Ext.P2 she stated that on one Sunday while she was studying in 7th standard, her father took her to the bedroom, caused her to lie down, removed her dress, undressed himself, pressed on her breast and genitalia and inserted his genital organ into her genitalia. When she cried because of pain, her father pacified her stating that there is no problem and there is nothing to worry. When she told him that she will complain to her mother, he advised her not to disclose to anybody and also that there is nothing serious in it. Thereafter he continued to sexually assault her repeatedly. Since January, 2017, in the temporary shed constructed in the place of the existing house also, he sexually assaulted her on several days. Finally, on one Sunday in November, 2017, her mother happened to witness one such incident. After one week, her uncle took them to his residence and thereafter they are residing in the family house of her mother. She did not disclose about the same to others due to shame and fearfulness. When two women from the Child line came and asked about the incident, she had given Ext.P1, written complaint to them.

13. On a perusal of Exhibits P1 and P2, it can be seen that there is difference in them especially in the language used as well as in narrating the details of the sexual assault faced by her. In this context it is to be



noted that Ext. P1 was written by a 14 year old girl in her own words and by her own hand. However, Ext. P2 is her statement recorded on the very same day, by a Woman Police Constable. In Ext. P1, she stated that her father used to lie along with her and misbehaved towards her in the absence of her mother as well as during night. In Ext.P2 FI statement, she had disclosed the details of the so called “misbehaviour” mentioned in Ext.P1. In Ext.P2, she makes it more clear that the “misbehaviour” faced by her was sexual assault. Ext. P2 further clarifies, describes, explains, and elaborates the allegations narrated briefly in Ext.P1.

14. There are obvious reasons for the above difference between Exts.P1 and Ext.P2. Ext. P1 was written down by an inexperienced and innocent girl of 14 years, who was unaware of her rights in law, about the horrible experience faced by her, at the hands of her own father, while Ext.P2 was recorded by an experienced Woman Police Constable. When the statement is recorded by an experienced police officer, she would definitely obtain all the required inputs from the victim, which cannot be expected of from a minor child like PW1 when she writes the complaint, herself. The exact difference between Exts.P1 and P2 is that in Ext.P2 the professional touch of a police officer is reflected, while it is absent in Ext.P1. Ext.P2 only explains what is stated in Ext.P1. In short, Ext.P1 and Ext.P2 are not at all contradictory to each other, but they are complementary to each other. Therefore, for the mere reason that in Ext.P1 the detailed description of the sexual acts committed by



the accused are not explicitly narrated, no inference can be drawn that Ext.P2 FI statement given on the same day to the police is not reliable or trustworthy.

15. The learned counsel for the accused would argue that there are inconsistencies in the evidence of PWs 1 and 2. He would also argue that the accused was falsely implicated in the case as PW2 wanted to avoid him. Though PWs 1 and 2 were cross-examined in detail, nothing material could be brought out to discredit their testimonies. There is also no material contradictions or omissions in the evidence of PWs 1 and 2. The one inconsistency in the evidence of PWs 1 and 2 is with regard to the date on which the matter was informed by PW2 to her brother Sathar. While according to PW1, the matter was informed to Sathar on the date PW2 witnessed the incident, according to PW2, she informed him only after a week. Both PWs 1 and 2 are unanimous that Sathar took them to his house only a week after the incident. They are also unanimous that it was on 18.11.2017, Sathar took them to his house. The date on which the matter was informed to Sathar has nothing to do with the fact in issue involved in this case. Therefore, the above discrepancy in the evidence of PWs 1 and 2 is not relevant in the facts of this case.

16. Usually, no child will give a false complaint of sexual abuse against her father, unless there are any special reasons for the same. Similarly, no wife also will raise such a false allegation against her husband, unless there exists some bitter enmity between them. In this



case, there was no such enmity between them. When during the cross-examination PW2 she was asked whether she would like to resume co-habitation with the accused, she replied that she does not want to live along with the accused, together with PW1. The above answer given by PW2 also makes it clear that she has no animosity towards the accused.

17. Moreover, it is to be noted that, the incident was brought to light neither by PW1 nor by PW2, but by the volunteers of child-line, on the basis of the information passed on to them by the teacher of PW2 which she received during the counselling of the child. The fact that neither PW1 nor PW2 reported the matter to the police, before the intervention of the volunteers of the child-line completely rules out the possibility of implication of the accused falsely. It appears that the parties hail from a poor family and PWs 1 and 2 were completely depending on the accused for the means of their livelihood. It can be the reason for PW2 for not reporting the matter to the police, before the intervention by the volunteers of child-line. The picture that unveils is the ground reality; the hapless condition of a wife who is completely depending on her husband for her sustenance and not that of a wife who was waiting for an opportunity to avoid her husband. And finally on 18.11.2017 she started living away from the accused, as she had no other way to stop him from ravishing the girl further. Therefore, there is no merits in the argument that PW2 implicated the accused in a false case in order to avoid him.

18. It was argued that according to PW1, the accused only



'pressed' his genital organ into her genitalia and as such the factum of 'penetration' was not proved. It is true that while describing the first bitter experience from her father, before the court, PW1 stated only to the extent that after undressing her the accused caused her to lie down on the cot and pressed his genital organ into her genitalia. However, she further deposed that at that time she felt pain on her genitalia and she even cried on account of the pain. Similar abuse continued for more than 2 years, till the same was finally witnessed by PW2.

19. More over, in order to constitute the offence of penetrative sexual assault as defined in Section 3 of the PoCSO Act, penetration to 'any extent' is sufficient. Section 3 of the PoCSO Act defines the term "penetrative sexual assault". Clause (a) of Section 3 states that:

"3. Penetrative sexual assault.- A person is said to commit "penetrative sexual assault" if-
(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person."

20. In Ext.P2 FI statement, PW1 had specifically stated that the accused forcefully inserted his genital organ into her genitalia. PW10, the doctor who had examined the victim also found old tear in her hymen. She further opined that, her findings are consistent with the history of penetrative sexual assault. The evidence of PW10 and Ext.P2 FIS coupled with the fact that during the first instance of abuse, the child felt pain on her genitalia and she even cried on account of the pain, proves the prosecution case that the accused committed penetrative



sexual assault on her. In the above circumstance, the version given by PW1 at the time of evidence that the accused 'pressed' his genital organ into her genitalia cannot be taken in isolation to contend that the factum of 'penetration' was not proved.

21. The evidence of PWs 1 and 2 are quite natural, reliable and are of sterling quality. We do not find any grounds to disbelieve the testimonies of PWs 1 and 2. The evidence of PW10 the Doctor, who had examined the victim and PW3, the Child-line volunteer also corroborates the evidence of PWs 1 and 2. Therefore, from the evidence of PWs 1, 2, 3 and 10 and from Ext. P14 medical examination report, the prosecution has succeeded in proving beyond reasonable doubt that the accused being the father of the minor child PW1 has committed rape/ penetrative sexual assault on her repeatedly and as such he has committed the offences punishable under Section 376 (2)(f),(2)(k), and 2(n) of IPC and Section 5(1) and 5(n) read with Section 6 of the PoCSO Act.

22. The trial court has awarded a punishment of imprisonment for life and to pay a fine of Rs.50,000/- with a default sentence, under Sections 376 (2)(f), (2)(k) and (2)(n) of IPC. A similar punishment was imposed by the trial court, under Sections 5(1) and (n) read with Section 6 of the PoCSO Act also. In the above circumstance, now the other question to be considered is whether the trial court was justified in sentencing the accused both under Section 376 (2)(f)(k) and (n) of IPC as well as under Section 5 (1) and (n) r/w Section 6 of the PoCSO Act?



23. Section 42 of the PoCSO Act states that:

“Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376-A, 376-AB, 376-B, 376-C, 376-D, 376-DA, 376-DB, 376-E, section 509 of the Indian Penal Code (45 of 1860), or section 67B of the Information Technology Act, 2000 (21 of 2000)] then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree. “

24. Therefore, in the light of Section 42 of the PoCSO Act, in case it is proved that the accused has committed offences punishable under Sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376-A, 376-AB, 376-B, 376-C, 376-D, 376-DA, 376-DB, 376-E, section 509 of IPC, and also under any of the provisions of the PoCSO Act, he cannot be punished both under IPC and also under the PoCSO Act, but he can be punished only for the offence for which greater degree of punishment is provided. In this case, the prosecution has succeeded in proving that the accused has committed the offences punishable under Section 376 (2)(f)(k) and (n) of IPC as well as under Section 5 (l) and (n) r/w Section 6 of the PoCSO Act. Therefore, he can be punished only for any one of those offences, for which greater degree of punishment is provided. In other words, the trial court was not justified in imposing sentence for both the offences under Section 376 (2)(f)(k) and (n) of IPC as well as under Section 5 (l) and (n) r/w Section 6 of the PoCSO Act.

25. Now the question to be considered is which of the above



offences provides for greater degree of punishment. The punishment provided for the offence under Sections 376 (2)(f), (2)(k) and (2)(n) of IPC during the relevant period (before 21-4-2018) was “ *shall not be less than 7 years, but which may extend to imprisonment for life, and shall also be liable to fine*”. The punishment prescribed for Section 6 of the PoCSO Act is “ *rigorous imprisonment for a term which shall not be less than 20 years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person and shall also be liable to fine, or with death*”. Therefore, the greater degree of punishment involved in this case is for Section 6 of the PoCSO Act. In the above circumstance, the accused can be punished only for the offence under Section 6 of the PoCSO Act and the punishment under Sections 376 (2)(f), (2)(k) and (2)(n) of IPC is liable to be set aside.

26. The learned counsel for the accused submitted for taking a lenient view in favour of the accused, considering his age. Now it is well settled that the Constitutional Courts have power to award fixed term even in cases in which imprisonment for life extending to the remainder of the natural life of the accused is provided. The Hon'ble Supreme Court in **Shiva Kumar @ Shiva @ Shivamurthy v. State of Karnataka, 2023 LiveLaw (SC) 252**, held that Constitutional Courts are empowered to impose fixed term of sentence, even in cases where life sentence is imposed.

27. In the decision in **Raju v. State of Kerala**, (Crl.A.No.233 of



2022 decided on 12.06.2023) a Division Bench of this court (in which one of us was a party) also held that it is now settled that the Constitutional courts are empowered to modify the punishment within the punishment provided for in the IPC, for specified offences. Those decisions were followed by this court in the decision in **xxx V. State of Kerala** in Crl.A. No. 632 of 2021 decided on 6.8.2024 and also in **xxx V. State of Kerala** in Crl.A.No. 184 of 2021 decided on 22.8.2024.

28. The accused is none other than the father of the minor victim, who is supposed to protect her from any such sexual harassment from anybody else. In spite of that, he had committed rape/ penetrative sexual assault on his minor daughter repeatedly, for a period of more than two years. In the above circumstance, he does not deserve any leniency. However, considering the entire facts, we hold that this is not a fit case in which the accused is liable to get the extreme punishment like imprisonment for life, which shall mean imprisonment for the remainder of his natural life or death, as more heinous situations may arise warranting such punishments. In the above circumstance, considering the entire facts, we hold that rigorous imprisonment for a period of 20 years will be sufficient to meet the ends of justice to both the prosecution as well as to the accused. The points are answered accordingly.

29. In the result, the appeal is disposed of as follows:

While sustaining the conviction under Section 6 of the PoCSO Act, the sentence is modified as follows:



The sentence imposed on the appellant under Section 5(l) and (n) read with Section 6 of the PoCSO Act is modified to rigorous imprisonment for a period of 20 years and to pay a fine of Rs.50,000/- (Rupees Fifty Thousand only) and in default of payment of fine, to undergo rigorous imprisonment for a further period of six months.

30. In the result, the sentence imposed on the appellant under Section 376 (2) (f), (2)(k), and (2)(n) of IPC is set aside, in view of Section 42 of the PoCSO Act.

Sd/-

P.B. SURESH KUMAR, JUDGE

Sd/-

C. PRATHEEP KUMAR, JUDGE