

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE R. NARAYANA PISHARADI

MONDAY, THE 11TH DAY OF OCTOBER 2021 / 19TH ASWINA, 1943

CRL.A NO. 242 OF 2019

AGAINST THE JUDGMENT OF CONVICTION AND SENTENCE IN
SC 129/2013 DATED 11.02.2014 OF THE COURT OF THE SESSIONS

JUDGE, KALPETTA, WAYANAD

APPELLAN/ACCUSED

UNNIKRISHNAN

C.NO.2552, S/O.KORU, CENTRAL PRISON AND
CORRECTIONAL HOME, KANNUR

BY ADV ADV.SUJITHKUMAR T.U (STATE BRIEF)

RESPONDENT/COMPLAINANT:

STATE OF KERALA

ADV.SUJITHKUMAR.T.U, STATE BRIEF

BY ADV SMT.AMBIKA DEVI S, SPL.GP ATROCITIES
AGAINST WOMEN & CHILDREN & WELFARE OF W & C
SMT BINDU O V - PP

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON
06.10.2021, THE COURT ON 11.10.2021 DELIVERED THE
FOLLOWING:

R.NARAYANA PISHARADI, J

Crl.A.No.242 of 2019

Dated this the 11th day of October, 2021

J U D G M E N T

There can never be more graver and heinous crime than the father committing rape on his own daughter. The protector then becomes the predator. The father is the fortress and refuge of his daughter. Charged of raping his own daughter under his refuge and fortress is worst than the gamekeeper becoming a poacher and treasury guard becoming a robber (**State of Himachal Pradesh v. Asha Ram : AIR 2006 SC 381**).

2. The prosecution case is that, the accused, the father of the victim girl, repeatedly committed sexual assault and rape on her, on many days during the period from June, 2012 to January, 2013. The girl got pregnant. She delivered a male child on 04.05.2013.

3. The victim girl was aged 16 years when she became a prey to her father. She was then studying in Standard IX.

4. On 20.03.2013, the victim girl went to the police station, along with her mother and reported the matter. PW13 Sub Inspector recorded Ext.P1 statement given by the victim girl. On the basis of that statement, he registered Ext.P17 F.I.R. PW15 Circle Inspector conducted the investigation of the case. He filed final report against the accused for the offences punishable under Sections 376 and 506 of the I.P.C and also under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short 'the Act').

5. The trial court framed charge against the accused for the offences punishable under Sections 376 and 506(ii) of the I.P.C and also under Section 6 of the Act. The accused pleaded not guilty and he claimed to be tried.

6. The prosecution examined the witnesses PW1 to PW15 and marked Exts.P1 to P21 documents and MO1 to MO5 series material objects. No evidence was adduced by the accused.

7. The trial court found the accused guilty of the offences punishable under Sections 376 and 506(ii) of the I.P.C and also under Section 6 of the Act. The trial court sentenced the accused to undergo rigorous imprisonment for a period of two years and to pay a fine of Rs.1,000/- and in default of payment of fine, to undergo rigorous imprisonment for a period of one month for the offence punishable under Section 506(ii) of the I.P.C. The trial court sentenced him to undergo rigorous imprisonment for a period of fourteen years and to pay a fine of Rs.1,00,000/- and in default of payment of fine, to undergo rigorous imprisonment for a period of one year for the offence punishable under Section 6 of the Act. The trial court also directed that the substantive sentences of imprisonment shall run concurrently. No separate sentence was awarded for the offence punishable under Section 376 of the I.P.C.

8. Conviction entered against and the sentence imposed on him by the trial court are challenged in this appeal preferred by the accused from the jail.

9. Heard Adv.Sri.Sujith Kumar, who was appointed as State Brief and the learned Public Prosecutor and also perused the records.

10. Out of the 15 witnesses examined by the prosecution, the material witnesses are PW1, PW5, PW7 and PW9. PW1 is the victim girl. PW5 is the doctor who attended the delivery of PW1 and issued Ext.P5 certificate. PW5 had also collected the blood samples of PW1 and her child for DNA analysis. PW7 is the doctor who collected blood samples of the accused for DNA analysis. PW9 is the Headmaster of the school in which PW1 was studying.

Testimony of the Victim

11. PW1, the victim girl, gave evidence in examination-in-chief as follows: She was residing along with her parents and two younger sisters. She was studying in Standard IX. She had given Ext.P1 first information statement to the police. Her date of birth is 19.01.1997. Her father used to commit sexual assault on her, by taking her to the coffee plantation in the neighbourhood,

on threatening her that he would kill her. He used to commit such act till January, 2013, two or three times. He used to put his penis in her mouth. She got pregnant and then she told the matter to her mother. Her mother took her to a doctor. The doctor informed them that she was pregnant. She delivered a male child in the hospital on 04.05.2013.

12. On cross-examination, PW1 has stated as follows :
When the police recorded her statement, she was alone and her mother was waiting outside. It was Kalyani, her aunt, who first gave the complaint to the police. The facts stated in Ext.P1 statement are true. When she gave the complaint, Kalyani was not in the police station. One week before giving the complaint, she was got examined by the doctor and then she knew that she was pregnant. She had sexual relationship with a person by name Binu. It is true that her father committed rape on her.

13. PW1 denied the suggestion made to her that her father was falsely implicated in the case at the instance of Kalyani. In answer to a specific question in the cross examination, she stated

that her father had not threatened her. However, subsequently, she stated that, the truth is what she has stated in examination-in-chief that her father threatened her.

14. No contradiction or omission has been brought out in the evidence of PW1 with reference to Ext.P1 first information statement given by her to the police.

Delay in Lodging FIR

15. The evidence of PW1 is that her father used to commit sexual assault on her till January, 2013. Ext.P1 first information statement was given to the police only on 20.03.2013, when she came to know that she was pregnant.

16. However, the delay in making the complaint to the police was quite natural. The circumstances of the case themselves justify the delay. No girl would have wanted the world to know that she was a person subjected to sexual assault by her own father. Further, in Ext.P1 statement itself, she had given explanation for the delay. She had stated to the police that her father used to threaten her that he would kill her and it was the

reason for the delay in reporting the matter to the police.

17. Delay, per se, is not a mitigating circumstance for the accused in a case of sexual assault. Delay in lodging the F.I.R cannot be used as a ritualistic formula for discarding the prosecution case and doubting its authenticity. It only puts the court on guard to search for and consider if any explanation has been offered for the delay. Once there is explanation for the delay in lodging the F.I.R, the court is only to see whether such explanation is satisfactory or not. Mere delay in lodging the F.I.R does not in any way render the prosecution version brittle.

18. Merely because the complaint was lodged less than promptly does not raise the inference that the complaint was false. The reluctance to go to the police is on account of the attitude of the society which casts doubt and shame upon the victim rather than comfort and sympathy. The courts cannot overlook the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the

police and complain about the incident which concerns the reputation of the victim and the honour of her family.

19. Moreover, when PW1 was in the witness box, no question was put to her in the cross-examination by the defence, with regard to the delay in reporting the matter to the police. When the defence did not put any question to the witness in the cross-examination on a material point, it cannot subsequently raise any grievance on such point. It is a settled legal proposition that in case question is not put to the witness in cross-examination who could furnish explanation on a particular point, the correctness or legality of the said fact/issue could not be raised (See **Paulmeli v. State of Tamil Nadu : (2014) 13 SCC 90**).

Credibility of the Testimony of PW1

20. It cannot be even imagined that it is a false case registered against the accused at the instance of Kalyani, the aunt (sister of the mother's father) of PW1. No girl would have preferred to put her honour and dignity at stake and make a false

complaint against her own father at the instance of some other person who had enmity towards the father.

21. True, PW1 admitted in cross-examination that she had sexual relationship with another person. It does not in any way affect the credibility of the testimony of PW1. As noticed earlier, no girl would falsely accuse of her own father of committing rape on her. Even in a case where it is shown that the victim is a girl of easy virtue or a girl habituated to sexual intercourse, it may not be a ground to absolve the accused from the charge of rape. Even assuming that the victim is previously accustomed to sexual intercourse, that is not a decisive question. On the contrary, the question which is required to be adjudicated is, did the accused commit rape on the victim on the occasion complained of. It is the accused who is on trial and not the victim (See **State of U.P v. Pappu : AIR 2005 SC 1248**).

22. A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. Her evidence need not be tested with the same amount of suspicion as that of

an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. Only if the court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony.

23. In the instant case, the testimony of PW1 that she was subjected to sexual assault can be accepted on its face value. If at all any corroboration is required, the result of DNA analysis of the blood samples of the child born to PW1 and the accused, lends such corroboration or assurance. The result of the DNA analysis reveals that the accused is the biological father of the child born to PW1.

Result of DNA Analysis

24. The evidence of PW5 doctor, who attended the delivery of PW1, shows that PW1 delivered a male child on 04.05.2013.

25. PW5 doctor has given evidence that she collected the blood samples of PW1 and the newly born child and entrusted the

samples with the investigating officer. She has stated in detail the procedure adopted by her for collecting the blood samples and packing and sealing the same. Nothing has been brought out in her cross-examination to show that the blood samples were not properly collected or packed and sealed.

26. PW7 is the doctor who conducted the potency test of the accused and issued Ext.P8 certificate. He had also collected samples of blood for DNA analysis from the accused. Nothing was brought out in the cross-examination of PW7 also to show that the procedure adopted by him for collecting samples of blood was improper.

27. Ext.P20 is the copy of the forwarding note prepared by the investigating officer for sending the blood samples to the Forensic Science Laboratory, Thiruvananthapuram for conducting DNA analysis. The forwarding note bears the specimen impression of the seals affixed on the packets of blood samples which were sent for analysis.

28. Ext.P21 is the report received from the Forensic

Science Laboratory with regard to the DNA analysis of the blood samples. The result shown in Ext.P21 is that the accused is the biological father of the male child delivered by PW1.

29. The report of DNA analysis shows that the seals on the sample packets were intact. Therefore, there was no question of manipulation of the samples. Further, when PW15 Circle Inspector was examined, no question was put to him in the cross-examination with regard to any irregularity or impropriety in sending the blood samples for analysis.

30. Learned counsel for the appellant contended that there was undue delay in sending the blood samples for DNA analysis. There is no merit in this contention. The child was born to PW1 on 04.05.2013. Only thereafter the blood samples of the child were taken. Ext.P20 forwarding note shows that the samples were sent for analysis through the court on 17.05.2013.

31. DNA report deserves to be accepted unless it is absolutely dented. For non-acceptance of the same, it is to be established that there had been no quality control or quality

assurance. If the sampling is proper and if there is no evidence as to tampering of samples, the DNA test report is to be accepted (See **Mukesh v. State (AIR 2017 SC 2161)**).

32. The result of DNA analysis mentioned in Ext.P21 report corroborates the testimony of PW1 that her father had sexual intercourse with her and the male child was born in that relationship. Nothing more is required to accept the testimony of PW1 that her father committed sexual assault and rape on her.

Proof of Age of the Victim

33. PW1 has stated in examination-in-chief that her date of birth is 19.01.1997. Her evidence in that regard was not challenged in the cross-examination.

34. PW9 is the Headmaster of the school in which PW1 was studying. Ext.P12 extract of the admission register kept in the school, which was produced by PW9, shows that the date of birth of PW1 is 19.01.1997.

35. PW9 has stated on cross-examination that he could not state on what basis the date of birth of the victim was incorporated in Ext.P12 document. He has also stated that it was

in Standard V that PW1 was admitted in that school and she was earlier studying in another school.

36. The evidence of PW9 reveals that Ext.P12 extract of the admission register is not from the school in which PW1 was first admitted and the school in which she first attended.

37. In **Jarnail Singh v. State of Haryana: AIR 2013 SC 3467**, the Supreme Court has held that, sufficient proof for determining the age of a child, who is a victim of a crime, is the extract of the admission register from the school which was first attended by the victim. Following this decision, in **Alex v. State of Kerala: 2021 (2) KLD 434**, a Division Bench of this Court has held that, the document produced to prove the date of birth or the age of the child victim, shall be the certificate from the school which the child first attended.

38. Ext.P12 certificate produced by the prosecution in this case does not satisfy the above requirement. The fact that, when PW1 was cross-examined, the evidence regarding date of birth mentioned by her in examination-in-chief was not challenged,

does not come to the rescue of the prosecution to prove her age. The accused has no obligation to invite the prosecution to establish the date of birth of the victim. It is the bounden duty of the prosecution to establish every material fact and circumstance before the trial court (See **Alex v. State of Kerala: 2021 (2) KLD 434**).

39. In the above circumstances, it has to be found that the prosecution has not proved the date of birth or the age of the victim girl at the time of the alleged incidents. It follows that, the prosecution has not proved that the victim girl was aged below 18 years or 16 years at the relevant time.

40. The consequence of not proving the age of the victim girl is that the accused cannot be found guilty of any offence under the Act.

Consent of the Victim

41. Learned counsel for the appellant would contend that once the prosecution failed to prove that the victim girl was aged below 18 years, the prosecution has to prove that the sexual

assault was made on her without her consent.

42. Even if it is assumed that the victim was more than 16 or 18 years of age, it cannot be a ground to hold that she was a consenting party (**State of U.P v. Manoj Kumar Pandey : AIR 2009 SC 711**).

43. It is not for the victim to show that there was no consent. The question of consent is really a matter of defence by the accused and it is for him to place materials to show that there was consent. Plea of consent shall be taken or made during cross examination and the statement recorded under Section 313 CrI.P.C (See **State of U.P v. Sree Kant Shekari : AIR 2004 SC 4404**).

44. In the present case, the plea of consent is too shallow to even need detailed analysis or consideration. One cannot even imagine that the victim girl consented to have sexual intercourse with her father. There is gulf of difference between consent and submission. Every consent involves a submission but the converse does not follow. Helplessness in the face of inevitable

compulsion clouded by fear cannot be considered to be consent as understood in law. Exercise of intelligence based on the knowledge of the significance and the moral effect of the act is required to constitute consent.

45. In the present case, not even a suggestion was made to PW1 in the cross examination that she was a consenting party.

Criminal Intimidation

46. The prosecution has not been able to establish beyond reasonable doubt that the accused had criminally intimidated PW1. Of course, he would have compelled her to submit to his lust. He would have also threatened her with dire consequences if she told about his act to any other person. PW1 stated in examination-in-chief that her father had threatened that he would kill her. However, on cross-examination, in answer to a specific question, she stated that her father did not threaten her. Again, she would say that what she stated in examination-in-chief was correct. Though the statement of PW1 that her father used to threaten her can be considered as a reason for the delay

in reporting the matter to the police, in view of the varying statements given by PW1 before the court, conviction against the accused for an offence under Section 506(ii) of the IPC cannot be based on such statement.

Offences Proved

47. The discussion above leads to the conclusion that the prosecution could establish beyond reasonable doubt that the accused committed rape on the victim girl, which is an offence punishable under Section 376(1) of the I.P.C. But, the prosecution could not establish beyond reasonable doubt that the accused committed any offence under the Act. The prosecution could not also prove beyond reasonable doubt that the accused committed an offence punishable under Section 506(ii) of the I.P.C.

Sentence to be Imposed

48. Now, the question arises what is the sentence to be imposed on the accused for committing the offence punishable under Section 376(1) of the I.P.C.

49. In **Asha Ram** (supra), the Apex Court has observed as follows:

"Here is the case where the crime committed by the respondent not only delicts the law but it has a deleterious effect on the civilized society. Gravity of the crime has to be necessarily assessed from the nature of the crime. A crime may be grave but the nature of the crime may not be so grave. Similarly, a crime may not be so grave but the nature of the crime may be very grave. Ordinarily, the offence of rape is grave by its nature. More so, when the perpetrator of the crime is the father against his own daughter it is more graver and the rarest of rare, which warrants a strong deterrent judicial hand. Even in ordinary criminal terminology a rape is a crime more heinous than murder as it destroys the very soul of hapless woman. This is more so when the perpetrator of the grave crime is the father of the victim girl. Father is a fortress, refuge and the trustee of his daughter. By betraying the trust and taking undue advantage of trust reposed in him by the daughter, he ravished the chastity of his daughter, jeopardized her future prospect of getting married, enjoying marital and

conjugal life, has been totally devastated. Not only that, she carries an indelible social stigma on her head and deathless shame as long as she lives”.

50. In **Madan Gopal Kakkad v. Naval Dubey : (1992) 3 SCC 204**, the Apex Court has observed as follows:

“Before parting with the judgment, with deep concern, we may point out that though all sexual assaults on female children are not reported and do not come to light yet there is an alarming and shocking increase of sexual offences committed on children. This is due to the reasons that children are ignorant of the act of rape and are not able to offer resistance and become easy prey for lusty brutes who display the unscrupulous, deceitful and insidious art of luring female children and young girls. Therefore, such offenders who are menace to the civilised society should be mercilessly and inexorably punished in the severest terms. We feel that Judges who bear the Sword of Justice should not hesitate to use that sword with the utmost severity, to the full and to the end if the gravity of the offences so demand”.

(emphasis supplied)

51. The accused was a person who was duty bound to provide the victim girl protection and support. But, he perpetrated sexual assault and rape on her. One cannot even imagine the trauma the victim would have suffered. The indelible imprint which the incestuous act has left in her mind cannot be ignored. She may feel the mental agony and pain for years to come. It is a case in which on account of rape committed on her by her own father, she has delivered a male child. The sufferings endured by the victim girl would be beyond imagination. In such circumstances, the accused is not entitled to any leniency in the matter of punishment.

52. Even before the amendment of Sections 375 and 376 of the I.P.C in the year 2013, imprisonment for life was the maximum punishment and imprisonment for a period of seven years was the minimum punishment provided under Section 376(1) of the I.P.C. Considering the facts and circumstances of the case, a sentence of rigorous imprisonment for a period of twelve years and fine of Rs.50,000/- shall be sufficient.

53. Consequently, the appeal is allowed in part and it is ordered as follows:

(i). Conviction as well as sentence against the appellant/accused by the trial court under Section 506(ii) of the IPC and also under Section 6 of the Protection of Children from Sexual Offences Act, 2012 are set aside.

(ii) Conviction of the appellant/accused by the trial court under Section 376 of the IPC is confirmed.

(iii) The appellant/accused is sentenced to undergo rigorous imprisonment for a period of twelve 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 period of one year for the offence punishable under Section 376(1) of the I.P.C.

(iv) The appellant/accused is entitled to get set off under Section 428 Cr.P.C.

(v) If the fine amount is realized, it shall be paid as compensation to PW1 under Section 357(1) Cr.P.C.

54. The Registry shall send a copy of this judgment to the Superintendent of the jail in which the appellant/accused is detained.

(sd/-) **R.NARAYANA PISHARADI, JUDGE**

jsr/ltn