2024:KER:73510

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

MONDAY, THE 7TH DAY OF OCTOBER 2024 / 15TH ASWINA, 1946

CRL.A NO. 110 OF 2016

AGAINST THE JUDGMENT DATED 23/01/2016 IN SC NO.106 OF 2012 OF SPECIAL COURT UNDER POCSO ACT-I, MANJERI.

APPELLANT/1st ACCUSED:

ILLIYAS
AGED 23 YEARS,
S/O.ABDU, NIRAMPARAMBIL HOUSE,
VALLIKKAPARAMBA, PANDIKKAD.P.O.,
MALAPPURAM DISTRICT.

BY ADVS.
SAMSUDIN PANOLAN .
JASNEED JAMAL(K/1383/2018)
LIRA A.B.(K/001251/2021)
DEVIKA E.D.(K/1132/2024)
ABIN RASHID(K/002131/2024)

RESPONDENT/COMPLAINANT:

STATE OF KERALA
(CRIME NO.71/2011 OF PANDIKKAD POLICE STATION),
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM, KOCHI-31.

SMT.SHEEBA THOMAS, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING COME UP FOR FINAL HEARING ON 25/09/202, THE COURT ON 07.10.2024 DELIVERED THE FOLLOWING:

2024:KER:73510

"C.R."

C.S.SUDHA, J.

Crl.Appeal No.110 of 2016

Dated this the 7th day of October 2024

J U D G M E N T

In this appeal filed under Section 374(2) Cr.P.C. the appellant who is the first accused (A1) in S.C.No.106/2012 on the file of the Court of Session, Manjeri, challenges the conviction entered and sentence passed against him for the offence punishable under Section 376 IPC.

2. The prosecution case is that PW2, a minor girl aged 13 years, a VIIth standard student of the [redacted] was in a relationship with A1. Accused nos.2 to 4 (A2, A3 and A4) are the friends of A1. On 30/03/2011 at 12:30 p.m., while PW2 was on her way back home from school, A1 instigated her to get into an autorikshaw bearing registration no. KL/10-AC-3310 arranged by the second accused. They went

to the place by name Vazhikkadavu and when they reached there, the third and the fourth accused brought the motor cycle of A1 to the said place. A1 took PW2 from the said place to Ooty on his motor cycle. They occupied a room in a building bearing registration No.170/D, in Ward No.10 of Udakamandalam Municipality, in which room, A1 raped PW2. As PW2 was found missing, PW1, her father, complained to the Pandikkad police. The next day, the relatives of PW2 traced out A1 and the victim at Ooty and were brought back to the Pandikkad police station. As per the charge sheet, the accused persons, four in number, were alleged to have committed the offences punishable under Section 366A and 376 read with Section 34 IPC.

3. On the basis of Ext.P1 FIS given by PW1, crime no.71/2011 of Pandikkad police station for 'man missing', that is, Ext.P1(a) FIR was registered by PW11, Grade Sub Inspector of the said police station. Initial investigation was conducted by PW12 and thereafter by PW13, the Sub Inspector and Circle Inspector respectively. PW13 completed the investigation and

submitted the charge sheet against the accused persons alleging the commission of the aforesaid offences.

4. After the final report was filed before the jurisdictional magistrate, the said court after completing all the necessary formalities committed the case to the Court of Session, Manjeri, which court took the case on file as S.C.No.106/2012. Thereafter on 08/01/2013, a charge under Sections 366A and 376 IPC was framed against A1 and a charge for the offence punishable under Section 366A read with Section 34 IPC was framed against A2, A3 and A4, which was read over and explained to the accused persons to which they pleaded not guilty. The case was then transferred to the Special Court for the Trial of Offences against Children (Additional Sessions Court -I, Manjeri) for trial and disposal.

5. On behalf of the prosecution, PW1 to PW13 were examined and Exts.P1 to P21 and MO.1 to MO.7 were got marked in support of the case. After the close of the prosecution evidence, A1 was questioned under Section 313(1)(b) Cr.P.C.

with regard to the incriminating circumstances appearing against him in the evidence of the prosecution. He denied all those circumstances and maintained his innocence. A1 also took up a stand that he and PW2 were in a relationship; that the parents of PW2 did not like the relationship and hence the reason why they foisted a false case against him; that he had not committed any offence and that he is innocent. As no incriminating circumstances were brought out in the evidence against A2 to A4, their questioning under Section 313(1)(b) was dispensed with.

6. As the trial court did not find it a fit case to acquit A1 under Section 232 Cr.P.C., he was asked to enter on his defence and adduce evidence in support thereof. No oral evidence was adduced by the accused. Exts.D1 and D2 have been marked on the side of A1.

7. On a consideration of the oral and documentary evidence and after hearing both sides, the trial court by the impugned judgment convicted and sentenced A1 to simple imprisonment for a period of seven years and to a fine of

₹25,000/- and in default to simple imprisonment for six months for the offence punishable under Section 376 IPC. He has been acquitted under Section 235(1) for the offence punishable under Section 366A IPC. A2 to A4 have been acquitted under Section 235(1) for all the offences charged against them. Aggrieved, A1 has come up in appeal.

8. The only point that arises for consideration in this appeal is whether the conviction entered and sentence passed against A1 by the trial court is sustainable or not.

9. Heard both sides.

10. It was submitted by the learned counsel for A1/appellant that the evidence on record is totally unsatisfactory to prove the case beyond reasonable doubt. Though the vaginal swab of PW2, the victim, was taken, the result has been suppressed and not produced by the prosecution. Hence an adverse inference has to be drawn. Further, merely because the hymen was found torn, is no ground to believe the prosecution

case that A1 raped PW2 as PW6 the doctor, has opined that fresh tear to the hymen was possible by the victim herself inserting her finger into the vagina. The prosecution has also not proved *mens rea* on the part of the accused. Hence, he canvassed for an acquittal of the accused.

11. *Per contra*, it was submitted by the learned public prosecutor that there is ample and satisfactory evidence on record to substantiate the prosecution case. No reasons have been shown to discredit or disbelieve or discard the testimony of PW2, the victim, who was a minor at the time of the incident. As PW2 was a minor, even assuming that there was consent on her part, the same is immaterial and therefore there is no ground for interference, argues the prosecutor.

12. I make a brief reference to the oral and documentary evidence adduced by the prosecution in support of the case. PW1, the father of PW2 deposed that his daughter was studying in the VIIth standard in the Government School, Pandikkad at the time of the incident. She had gone for attending

her examination, but did not return home at the usual time. After making enquiries with his relatives as well as the friends of PW1, he gave Ext.P1 FIS to the police complaining that his daughter was missing. PW1 further deposed that PW2 returned home the next day. She informed him that she had gone to Ooty along with A1. PW1 also deposed that as per his request, two of his relatives had made inquiries and was able to trace out PW2 in the company of A1 at Ooty and thereafter they brought PW2 to the police station. PW1 also deposed that he was under the belief that A1 had kidnapped his daughter with the help of the other accused persons.

12.1. PW2 when examined deposed that during the relevant time she was studying in the VIIth standard at the Government High School, Pandikkad. She normally walks to her school and back. On 30/03/2011 at about 12:30 p.m. while on her way home from school, A1 asked her to accompany him in an autorickshaw that had been hired by him. As A1 was her neighbour, she joined him. When she joined the accused, he

never disclosed the destination to her. When they reached the bus stand at Vazhikkadavu, she changed her school uniform and wore another dress brought by A1. She had changed her dress in the bathroom of the bus stand. Thereafter, two persons, whom she can identify on sight brought the motorbike of A1 to Vazhikkadavu. The first accused took her in the bike to Ooty where they reached by about 05:30 p.m. They checked into a room at a guest house. After having supper, A1 removed her clothes and subjected her to coitus. The next day morning her neighbours, namely, PW4 and two others reached Ooty and brought her back to the Pandikkad police station, where she disclosed the facts to the police. She handed over the dress worn by her at the relevant time to the police. According to PW1, her date of birth is 11/03/1998 and so she was 13 years at the time of the incident. She was medically examined at the Government Hospital, Manjeri. She also gave a statement before the magistrate. PW2 identified the dress worn by her which have been marked as MO.1 to MO.3. In the cross examination, she

admitted that she and A1 were in a relationship and hence the reason why she had accompanied him to Ooty. They had also decided to marry. PW1 admitted that Exts.D1 and D2 are the letters written by her to A1. She also admitted that Ext.D1 letter was written after the trial of the case had started. She admitted that in her 164 statement she had not stated that A1 had subjected her to sexual intercourse.

12.2. PW4, a neighbour of PW1 deposed that on 30/03/2011 the latter informed him that PW2 was missing. They came to know that A1 was also missing. On enquiries with A2, a friend of A1, they came to know that PW2 had gone to Ooty along with A1. Pursuant to the same, he went to Ooty along with the second accused and two others in search of PW2. On 31/03/2011 at 07:00 a.m., they reached Botanical Garden, Ooty. They saw the motorbike of A1 parked in the courtyard of a house situated near the temple road. A lady present in the house informed that PW2 and A1 had occupied one of the rooms in the building saying that they were newly married. PW4 deposed that

he brought back PW2 from Ooty and produced her before the Pandikkad police station.

12.3. PW6, Junior Consultant, General Hospital, Manjeri deposed that on 31/03/2011 she had conducted the medical examination of PW2, aged 13 years and had issued Ext.P3 certificate. She was told by PW2 that " *on 30/03/2011 at noon went to Ooty with her lover, namely, Illiyas and engaged in sexual intercourse with him*". On examination she found a fresh tear in the hymen of PW2. There was evidence of recent sexual acts. There was no evidence of any resistance. In the cross examination, PW6 deposed that a fresh tear could be caused by the victim herself inserting a finger into the vagina.

13. PW2 admitted that she was in a relationship with A1. Though PW2 was extensively cross examined, nothing was brought out to discredit her testimony. Therefore it is clear that PW2, a minor, in a relationship with A1 accompanied him on her own volition to Ooty, spent a night there with him during which time they engaged in coitus. PW2 admitted that she

consented to coitus. There was never any resistance. However, PW2 being a minor, the consent given or lack of resistance is immaterial. Hence going by the definition contained in Section 375 IPC, the offence of rape is made out and therefore the finding of the trial court on this aspect cannot be found fault with.

14. According to the trial court, the offence committed by A1 was quite serious in nature being "*an illicit intercourse between a man and a girl of less than 16 years. The law prevents illicit intercourse under the colour of platonic love*". Hence a lenient approach was likely to send a wrong message to the society. However, the trial court taking into account the fact that A1 was remorseful for what he had done, proceeded to sentence him to simple imprisonment for a period of seven years for the offence punishable under Section 376 IPC as that was the minimum sentence to be awarded.

15. The incident took place in the year 2011 which is apparently before Section 376 IPC was amended with effect from 03/02/2013. The un-amended Section 376 (1) which deals

with punishment for rape reads -

> " *376. Punishment of rape.*
>
> *(1.1.1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less that seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve to ten years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both.*
>
> *Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less that seven years."* (Emphasis supplied)

Therefore, if adequate and special reasons exist, the court can sentence the accused to a period of imprisonment which is less than the minimum of seven years prescribed. Here it would be apposite to refer to the dictum of the Apex court in **Sukhwinder Singh v. State of Punjab, 2000 KHC 1442: 2000 (9) SCC 204.** In the said case, the High Court dismissed the appeal filed by the

appellant against his conviction and sentence for the offences punishable under S.363, 366 and 376 IPC. The High Court did notice that the prosecutrix was a consenting party to the act of sexual intercourse and that she had willingly left her parents' house to be with the appellant/accused. She was, however, found to be "not more than 16 years of age" and on that account, the High Court upheld the conviction of the appellant. During the pendency of the proceedings in the High Court, the prosecutrix and the appellant entered into a compromise and a compromise petition was filed in the Court. In the compromise petition, the prosecutrix stated that she and the appellant belonged to neighbouring villages; that she had since got married and that she did not want that she be put to further ignominy on account of the episode and that she wanted to put an end to the matter and settle happily with her husband. The High Court noticed the compromise as also the attendant facts of the case, that is, that the prosecutrix was a consenting party, but expressed helplessness in the matter of awarding of sentence on the ground that under S.376

IPC, the sentence to be awarded could not be less than seven years. The Apex court noticing that the High Court had overlooked the proviso to S.376 IPC, held that the facts and circumstances of the case made out an adequate and special reason to invoke the proviso. Maintaining the conviction, it was held that the High Court ought to have for the aforesaid reasons, reduced the sentence to the period already undergone by the appellant as such a course was in the interest of the prosecutrix also. In the peculiar facts and circumstances of the case, it was thus held that the matter should be given a quietus particularly, when the alleged offence was stated to have taken place almost a decade ago. Therefore, while maintaining the conviction of the appellant for the offences aforesaid, the Apex court reduced the sentence to the period already undergone by him.

16. Let me now examine whether there are any adequate and special reasons to invoke the proviso to sub-Section (1) of Section 376 IPC in the case on hand. The learned public prosecutor strongly objected to this Court invoking the proviso to

Section 376(1) IPC and it was submitted that if the court takes such a lenient view, it will send a wrong message to the society at large and hence strongly canvassed for a substantive sentence of a reasonable term. I am quite conscious of the fact that sexual offences against women are on the increase. This Court is in no way justifying the act of A1. The legislature itself contemplated such a situation and hence the reason why such a proviso was brought into the statute despite a minimum sentence of seven years being prescribed. In criminal jurisprudence the concept of punishment has evolved from a retributive approach to a reformative approach. The facts and circumstances of the case call for a lenient approach to be taken against A1, who was just 19 years old at the time of the incident. The fact that A1 and PW2 were in a relationship is admitted. PW2 admitted that they had decided to marry and hence the reason why she accompanied A1 to Ooty. She also admitted that her father was against the relationship which substantiates the stand taken by the accused. Though A1 was charged for the offence punishable under Section

366A, the trial court rightly acquitted him because the testimony of PW2 clearly revealed that there was no compulsion or deceit by the accused in taking her to Ooty. There is no case for PW2 that she was forced or seduced into having illicit intercourse with another person. Her testimony shows that she had voluntarily joined A1. This is not a case where A1 by deceit or fraud, enticed PW2 out of her lawful guardianship and had taken her to Ooty. I am quite conscious of the fact that PW2 was a young girl under 16 years and so her consent is not a valid consent. As noticed earlier, after the trial commenced, PW2 admits that she had sent two letters, that is, Exts.D1 and D2 to A1. PW2 admitted that Ext.D1 was written a week before she was examined before the court. PW2 was examined before the trial court on 06/08/2015, at which time she had crossed 17 years and was nearly on the verge of majority. In the letters she reiterates her desire to join A1. In such circumstances I feel the proviso needs to be invoked. Hence relying on the dictum in **Sukhwinder Singh** (*Supra*) and considering the fact that A1 was just 19 years

old at the time of the incident and as noted by the trial court as he has expressed remorse, I find that the proviso to Section 376(1) IPC can be invoked. The substantive sentence imposed by the trial court is modified and reduced to a period of simple imprisonment for one year.

In the result, the appeal is allowed to the above extent.

Interlocutory applications, if any pending, shall stand closed.

Sd/-

C.S.SUDHA
JUDGE

Jms