

Kerala High Court

Sasi vs State Of Kerala on 3 June, 2020

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

WEDNESDAY, THE 03RD DAY OF JUNE 2020 / 13TH JYAISHTA, 1942

CRL.A.No.213 OF 2018

AGAINST THE JUDGMENT IN SC 557/2014 DATED 31-01-2018 OF
SPECIAL COURT UNDER POCSO ACT, IDUKKI

CRIME NO.232/2013 OF Adimaly Police Station , Idukki

APPELLANT/ACCUSED:

SASI,
S/O MAKKOTHA, MANAKKAKUDI(H),
IRUMPUPALAM, THONIPPARABHAGOM, VALARA KARA,
MANNAMKANDOM VILLAGE.

BY ADVS.
SRI.PAUL JACOB (P)
SMT.SUZANNE KURIAN
SHRI.AMAL AMIR ALI
SRI.RONY JOSE
SRI.GEORGE A.CHERIAN
SRI.LEO LUKOSE

RESPONDENT/COMPLAINANT:

STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA.

R1 BY SMT.AMBIKA DEVI S, SPL.GP ATROCITIES
AGAINST WOMEN AND CHILDREN
SRI. RAMESH CHAND PP

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 03-
06-2020, THE COURT ON 03-06-2020 DELIVERED THE FOLLOWING:
Crl.Appeal No.213 of 2018 2

P.B.SURESH KUMAR, J.

Criminal Appeal No.213 of 2018

Dated this the 3rd day of June, 2020

JUDGMENT

This appeal is directed against the conviction of the appellant and the sentence imposed on him in S.C.No.557 of 2014 on the files of the Special Court for trial of offences punishable under the Protection of Children from Sexual Offences Act, 2012 (the POCSO Act), Thodupuzha.

2. The appellant is the sole accused in the case. The victim in the case is a girl aged 13 years. The accusation in the case is that on 03.02.2013, at about 9.30 pm, the accused who is the partner of the younger sister of the mother of the victim girl, has trespassed into the house of the grandmother of the victim girl where the victim girl was residing at the relevant time, committed rape and penetrative sexual assault on her and thereby committed the offences punishable under Sections 450 and 376 of the Indian Penal Code (the IPC) and Section 6 of the POCSO Act. It is also the accusation in the case that later, on 04.02.2013, at about 9 am, the accused dragged the victim girl to the portion of the very same house where he was residing and committed rape and penetrative sexual assault on the victim girl again. The offences alleged were, therefore, the offences punishable under Sections 450 and 376 of the IPC and Section 6 of the POCSO Act.

3. On the accused pleading not guilty of the charges levelled against him, the prosecution examined 14 witnesses as PW1 to PW14 and proved 19 documents as Exts.P1 to P19. The accused was, thereupon, questioned under Section 313 of the Code of Criminal Procedure (the Code) as regards the incriminating evidence brought out by the prosecution. The accused denied the same and maintained that he is innocent. 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.

4. Among the witnesses examined on the side of the prosecution, PW1 is the victim girl. PW1 has proved Ext.P1, first Information Statement. PW2 is the son of the younger sister of the mother of the victim girl. PW3 is the doctor who examined the victim girl and issued Ext.P2 report. PW4 is the Sub Inspector of Police who recorded the statement of the victim girl. PW5 is the Village Official who prepared Exts.P3 and P3(a) scene plans. PW6 is the Police Official who registered Ext.P1(a) First Information Report. PW7 is the witness to Exts.P4 and P5 scene mahazars. PW8 is the mother of PW2. PW9 is the teacher of the school where PW2 was pursuing his studies. PW10 is the Chairman of the Child Welfare Committee, Idukki, before whom Exts.P6 and P7 statements of the victim girl were taken. PW11 is the official of the local authority who issued Ext.P8 ownership certificate in respect of the house of the grandmother of the victim girl. PW12 is the police official who conducted a part of the investigation and submitted the final report in the matter. PW12 has proved Ext.P10 seizure mahazar, Ext.P11 seizure mahazar, Ext.P12 property list, Ext.P13 forwarding note, Ext.P14 arrest memo, Ext.P15 arrest report, Ext.P16 report for adding additional section and Ext.P19 chemical analysis report. PW13 is the doctor who examined the victim girl before registration of the crime and issued Ext.P18 wound certificate. PW13 has also proved Ext.P17 potency certificate. PW14 is the relative of the victim girl with whom the victim girl was residing for some time.

5. On an appraisal of the evidence on record, the court below found that the prosecution has established the guilt of the accused under Section 376 of IPC and Section 6 of the POCSO Act and convicted him and sentenced him to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.10,000/- and in default of payment of fine, to undergo rigorous imprisonment for six months for the offence punishable under Section 6 of the POCSO Act. The court, however, found that the prosecution has not made out the offence punishable under Section 450 of the IPC. The accused is aggrieved by the conviction and sentence imposed on him.

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

7. At the outset, it was contended by the learned counsel for the appellant that this being a case under the POCSO Act, it was obligatory for the prosecution to prove the age of the victim. It was pointed out that the age of the victim girl has not been proved by the prosecution at all in this matter and that the conviction of the accused under the POCSO Act, in the circumstance, is liable to be interfered with on that sole ground. The learned counsel for the appellant has also contended that the evidence tendered by the victim girl has not been corroborated in any manner by the remaining witnesses on the side of the prosecution. It was pointed out by the learned counsel that the court below has taken the view that the evidence tendered by PW3, the doctor who examined the victim girl that the hymen of the victim girl was found torn at the time of her examination, corroborates the evidence tendered by the victim girl. It was pointed out that the evidence of PW3 was to the effect that the tear of hymen of the victim girl found at the time of examination was an old one. According to the learned counsel, it was admitted by the victim girl that she was abused sexually by one Krishnankutty on several occasions earlier. The argument of the learned counsel was that if the tear is an old one, insofar as it is admitted by the victim girl herself that she was subjected to sexual assault by others prior to the occurrence, the tear of hymen cannot be attributed to the alleged occurrence. It was also contended by the learned counsel that the evidence of PW1 is not one that could be accepted without corroboration to form the sole basis of the conviction, for the version spoken to by the victim girl is not only improbable, but also unnatural. The learned counsel has elaborated this submission pointing out that the evidence of the victim is not consistent with the first information statement given by her. It was also contended by the learned counsel that the clothes worn by the victim girl and the accused at the time of the alleged occurrences, as also the seminal constituents such as vaginal swab, vaginal smear etc. taken at the time of examination of the victim girl were sent for chemical analysis and Ext.P19 report of the chemical analysis is to the effect that semen and spermatozoa were not found at all in the samples. According to the learned counsel, Ext.P19 would also cause a serious doubt as to the genuineness of the prosecution case. It was also pointed out by the learned counsel that the defence of the accused in the case is that he is falsely implicated by the grandmother of the victim girl, so as to prevent him from coming to her house. It was argued by the learned counsel that a specific suggestion to that effect put by the counsel for the accused at the time of the cross-examination of the victim girl was not denied by the victim girl. According to the learned counsel, the conduct of the victim girl in not denying the suggestion aforesaid would also affect the reliability of the evidence tendered by the victim girl. It was contended by the learned counsel that the occurrences alleged by the prosecution are those took place at 9.30 pm on 03.02.2013 and at 9 am on 04.02.2013. It was pointed out by the learned counsel that the specific case of the prosecution is that when the accused dragged the victim girl to

the portion of the house where he is residing, for the purpose of committing rape, the grandmother of the victim girl cried aloud and the people in the locality consequently assembled at the scene. According to the learned counsel, if this were to be the situation, the matter would have been reported to the police by somebody forthwith. It was pointed out by the learned counsel that the complaint **was lodged to the police only on the subsequent day by about 3.30 pm**. The argument of the learned counsel is that in a case of this nature, the delay of one day in lodging the complaint is fatal, and the same also would create very serious doubts as regards the **genuineness of the prosecution case**. Lastly, it was also contended by the learned counsel that the evidence of PW1, even if accepted, would not make out a case of rape or penetrative sexual assault.

8. Per contra, the learned Public Prosecutor pointed out that if one reads the evidence of the victim girl having regard to her age and the social surroundings in which she was living, it could be seen that the same is natural, reliable and truthful. It was also pointed out by the learned Public Prosecutor that PW1 is certainly a witness who falls in the category of sterling witnesses and even assuming that her evidence is not corroborated by the other evidence let in by the prosecution, the accused can be **convicted solely on the basis of her evidence**. The learned Public Prosecutor has, however, conceded that the prosecution has not adduced any evidence to prove the age of the victim girl.

9. I have considered the contentions raised by the learned counsel on either side. I have also perused the materials on record. The points arising for consideration are; (i) whether the prosecution has established the guilt of the accused under Section 376 of the IPC and Section 6 of the POCSO Act and (ii) if not, the relief which the appellant is entitled to.

10. One of the defences taken by the appellant in the case is that the victim girl is not a child and that she is aged **more than 18 years**. The accused has cross-examined the investigating officer, PW12 on this point. The stand taken by the investigating officer was that since the victim girl did not go to any school, no evidence could be collected. The investigating officer has also conceded that no steps whatsoever has been taken to determine the age of the victim girl scientifically. As noted, it was conceded by the learned Public Prosecutor that the prosecution has not adduced any evidence to prove the age of the victim girl. This being a prosecution under the POCSO Act, one of the fundamental facts to be proved by the prosecution is that the victim involved in the case is a child in terms of the provisions of the POCSO Act. In the absence of any evidence to prove that the victim in the case is a child in terms of the provisions of the POCSO Act, I am constrained to hold that the prosecution has not established the guilt of the accused under Section 6 of the POCSO Act. The conviction of the accused under Section 6 of the POCSO Act is, therefore, unsustainable and liable to be interfered with.

11. As noted, the charge in the case is not merely for the offence punishable under Section 6 of the POCSO Act, but also for the offences punishable under Sections 450 and 376 of the IPC. The question remains to be considered, therefore, is whether the prosecution has established a case under Sections 450 and 376 of the IPC. The specific case of the prosecution is that the evidence tendered by the victim girl as PW1 is corroborated in material particulars by the medical evidence adduced by the prosecution. As noted, the appellant refutes the aforesaid case of the prosecution. I

shall first resolve this controversy of the parties. It is seen that on the day succeeding the date of registration of the crime, namely, 06.02.2013, the victim girl was examined by PW3. Ext.P2 is the report of the examination. PW3 has given evidence to the effect that the victim girl was brought before her with the history that she was sexually assaulted at her residence. She has stated that no injuries were noted on examination in the body of the victim girl. PW3 has also stated that she did not notice that the victim girl was suffering from gait pain during walking. PW3 has, however, stated that the hymen of the victim girl was found torn and that the tear was old. PW3 has also stated that she found evidence of penetration on examination of the victim girl. The tear of hymen does not by itself indicate a case of rape. The tear of hymen can be caused due to various other reasons as well. As pointed out by the learned counsel for the appellant, it has come out in evidence that the victim girl was one who was subjected to sexual intercourse prior to the alleged occurrence as well. PW1 has admitted the said fact in her cross-examination. The evidence tendered by PW1 in this regard was that she has informed the police that she was sexually assaulted by a person called Krishnan on several occasions near her residence. In the light of the said evidence, in the absence of any general bodily or genital injury noticed at the time of examination, I am constrained to hold that merely for the reason that PW3 has deposed that the hymen of the victim girl was found torn and she has found the evidence of penetration, it cannot be said that the evidence tendered by the victim girl is corroborated by the medical evidence adduced in the matter.

12. In the light of the finding that the **medical evidence in the case does not corroborate the evidence tendered by PW1**, the question to be examined is whether the evidence tendered by PW1 can be the sole basis of the conviction of the accused. No doubt, the evidence of a rape victim can be the sole basis of conviction. But, it is trite that in order to base a conviction solely on the evidence of the victim, 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."

The decision aforesaid has been quoted with approval by the Apex Court in its recent decision in Criminal Appeal No.264 of 2020, decided on 14.2.2020. It is evident from the aforesaid decisions that the evidence of a sterling witness is one that appears natural and consistent with the case of the prosecution qua the accused. It was held that such witnesses shall, under no circumstances, give room for any doubt as to the factum of the occurrence and the evidence shall have co-relation with each and everyone of other supporting materials including expert opinions. It was also held in the said cases that such evidence should also satisfy the test applied in cases involving circumstantial evidence, 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 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.

13. PW1 has stated in her evidence that the occurrence took place when she was residing with her grandmother. PW1 has stated that the accused is a person who was residing with the younger sister of her mother. She has stated that the accused resides in the first floor of the residential house of her grandmother. She has stated that PW2 who was aged about 10 years at the time of occurrence is the son of the younger sister of her mother. She has stated that on 03.02.2013, at about 9.30 p.m., the accused came to the house with a bottle of Brandy and directed her and others in the house to drink the same. PW1 has stated that she did not drink the liquor as directed by the accused. She has stated that her grandmother also did not drink the liquor. She has stated that the accused then made PW2 to drink the liquor. PW1 has stated that on that night, the accused slept in the room where she was sleeping with her cousin brother, PW2. She has stated that PW2 was sleeping in between her and the accused. PW1 has stated that her grandmother was sleeping in the adjoining kitchen. PW1 has stated that after some time, the accused wanted her to remove her clothes. PW1 has stated that when she refused to do so, the accused removed her clothes and slept over her body. She has stated that by the time, hearing the noise made by her, her grandmother lit a kerosene lamp and looked at the room. PW1 has stated that in the morning the accused went to the first floor of the house where he was staying. She has stated that after some time, the accused came back and dragged her to the first floor of the house. She has stated that the accused thereupon, removed her clothes and kept his genital organ at her vagina and slept over her body for some time. She has stated that she ran away from

that place after some time. PW1 has stated that her grandmother, by the time, called the people around their house. PW1 has stated that the accused then left the house. She has stated that after sometime, a few elder girls came to the house. She has stated that thereafter the police also came to the house and took her to the hospital. She has stated that thereafter, the police took her to the police station. It is seen that though PW1 did not say that the accused had penetrated his genital organ into her vagina, while narrating the occurrence, later, it was stated by PW1 that she felt pain when the accused has penetrated his genital organ into her vagina. She has identified the first information statement given by her to the police.

14. It is seen that the prosecution case has two parts. The first part is the occurrence took place on the night of 03.02.2013 and the second part is the occurrence took place in the morning of 04.02.2013. As noted, while narrating the occurrence took place on 03.02.2013 at the first instance, the victim girl has not stated anything about the penetration. At that time, she has only stated that the accused has slept over her body. Later, after narrating the second occurrence, in answer to a question put by the Public Prosecutor, even without stating anything about penetration, she has stated that she felt pain when the accused penetrated his genital organ into her vagina. The evidence tendered by PW1 at the first instance concerning the occurrence took place on the night of 03.02.2013 appears to be true, for her version then was that when she made noise, her grandmother who was sleeping in the adjacent kitchen lit a kerosene lamp and looked at the room. In other words, the subsequent addition made by the victim girl as regards the occurrence took place on 03.02.2013 does not appear to be true. Coming to the second occurrence, the prosecution version is that on 04.02.2013 morning, the accused dragged the victim girl to the first floor of the house and raped her. It is stated by PW1 herself that when the accused dragged her to the first floor of the house, her grandmother called the neighbours. If that be so, the version of the victim girl that the accused raped her before the people in the locality came to the house does not appear to be probable. I take this view for various reasons. First of all, PW1 has stated that immediately after the occurrence, the people assembled at the house informed the matter to the police and she was taken by the police to the hospital. But her version in Ext.P1, however, was different. In Ext.P1, what was stated by her was that on the next day, namely, 05.02.2013, a few ladies came to the house and when the occurrence was narrated to them, they took her to the hospital. The version of PW1 in the First Information Statement is correct since the case was registered only on 05.02.2013. The aforesaid circumstance creates a genuine doubt as to the correctness of the version of PW1 that the accused dragged her to the first floor of the house and raped her. Further, from the evidence of PW13, and Ext.P18 certificate issued by her, it is revealed that the victim girl was taken to the Taluk Head Quarters Hospital, Adimaly at about 2.30 p.m. on 05.02.2013 by a police constable. The case was not registered then. PW13 has recorded in Ext.P18, the history of the alleged cause of injury thus:

" . . 1 "

It is evident from the extracted history and the alleged cause of injury that PW1 did not inform anything to the doctor about the alleged occurrence took place on 04.02.2013 when she was examined. Further, as is seen from the extracted portion above that the only allegation then was that the accused slept over her body. If as a matter of fact, there was an occurrence as alleged on 04.02.2013, I do not find any reason why PW1 did not divulge the same to PW13 at the time of her

examination. Again, if there was an occurrence as alleged, that too, a case of rape, I do not find any reason why the police should take the victim girl to a doctor for examination even before the crime was registered. As noted, it is thereafter, by about 3.30 on that day, the crime was registered. It is after the registration of the crime that PW1 was examined by PW3 doctor. Ext.P2 is the report of examination issued by PW3. The history of the case is recorded in Ext.P2 thus:

"She was sexually assaulted by Sasi at her residence. She was pulled by her hand and she was asked to lie down beside him." If what was narrated by the victim girl to the doctor was the second occurrence took place on 04.02.2013, the allegation then was only that the accused has asked the victim to lie down beside him. I have already found that the evidence tendered by PW3 does not corroborate the case spoken to by PW1. Further, it is seen that the vaginal swab and vaginal smear taken by PW3 at the time of examination of PW1 as also the clothes worn by the accused and the victim girl at the time of the alleged occurrences were sent for chemical analysis. Ext.P19 is the report of the chemical analysis. From Ext.P19, it is clear that semen and spermatozoa were not found in any of the samples. In the aforesaid facts and circumstances, I am unable to believe that the case spoken to by the victim girl that the accused has placed his genital organ into her vagina on 04.02.2013 morning after dragging her to the portion of his house. Similarly, I am unable to believe the subsequent clarification given by the victim girl about the penetration. At the same time, the evidence on record would establish beyond doubt that the accused came to the house of the grandmother of the victim girl on 03.02.2013; that he slept in the same room where the victim girl was sleeping and made an attempt to commit rape on her by removing her clothes and sleeping over her body. The finding of the court below that the prosecution has established that the accused has committed rape on the victim girl on 03.02.2013 and also on 04.02.2013 is incorrect and unsustainable.

15. In the light of the findings aforesaid, the accused is liable to be punished under Section 511 read with Section 376(1) of the IPC. Having regard to the facts and circumstances of the case, I am of the view that a sentence of rigorous imprisonment for a term of 3½ years together with a fine of Rs.10,000/- would be the appropriate punishment to be imposed on the accused having regard to the gravity of the offence established.

In the result, the Criminal Appeal is allowed in part. The conviction of the appellant is altered to one under Section 511 read with Section 376(1) of IPC and he is sentenced to undergo rigorous imprisonment for a term of 3½ years and to pay a fine of Rs.10,000/- and in default of payment of fine, to undergo rigorous imprisonment for a period of three months. The impugned judgment will stand modified accordingly.

Sd/-

P.B.SURESH KUMAR, JUDGE.

YKB