



Crl.Appeal No.235 of 2019

2025:KER:17514

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

TUESDAY, THE 4TH DAY OF MARCH 2025 / 13TH PHALGUNA, 1946

CRL.A NO. 235 OF 2019

CRIME NO.32/2015 OF THAMARASSERY POLICE STATION, KOZHIKODE

AGAINST THE JUDGMENT DATED 12.07.2018 IN SC NO.319 OF
2015 ON THE FILE OF THE SPECIAL COURT FOR TRIAL OF CASES
RELATING TO ATROCITIES AND SEXUAL VIOLENCE TOWARDS WOMEN AND
CHILDREN, KOZHIKODE

APPELLANT/ACCUSED:

VIJAYAN,
AGED 55 YEARS,
S/O.RAGHAVAN, C.NO.547/18
CENTRA PRISON & CORRECTIONAL HOME,
KANNUR (THROUGH SUPERINTENDENT, CENTRAL PRISON &
CORRECTIONAL HOME, KANNUR)

BY ADV SRI.SIDHARTH A.MENON, STATE BRIEF

RESPONDENT/RESPONDENT:

STATION HOUSE OFFICER,
THAMARASSERY POLICE
REP.BY PUBLIC PROSECUTOR.

BY ADV SMT.AMBIKA DEVI S, SPL.GP ATROCITIES
AGAINST WOMEN & CHILDREN & WELFARE OF W & C

SRI.VIPIN NARAYAN, PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
25.02.2025, THE COURT ON 04.03.2025 DELIVERED THE FOLLOWING:



C.S.SUDHA, J.

Crl.Appeal No.235 of 2019

Dated this the 4th day of March 2025

J U D G M E N T

In this jail appeal filed under Section 383 Cr.P.C., the appellant, the sole accused, in S.C.No.319/2015 on the file of the Special Court for Trial of Cases Relating to Atrocities and Sexual Violence Towards Women and Children, Kozhikode, challenges the conviction entered and sentence passed against him for the offences punishable under Section 9(m) read with Section 10 of the Protection of Children from Sexual Offences Act, 2013 (the PoCSO Act) and Section 3(1)(xi) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (the SC/ST Act).

2. The prosecution case is that on 19/01/2015 at 16:30



hours, while PW2, a minor girl aged 8 years, was on her way to the house of PW3, for giving sweets to the daughter of the latter, the accused lifted her and sexually assaulted her by touching her private parts by inserting his fingers into her inner-wear from either side, that is, from the back as well as front, and thereafter pasted a sticky fluid on her leg. The accused sexually assaulted PW2 knowing fully well that she was a member of the Scheduled Caste community. Thus as per the final report, the accused is alleged to have committed the offences punishable under the aforementioned Sections.

3. Crime no.32/2015, Thamarassery police station, that is Ext.P10 FIR, was registered by PW12, Sub Inspector, on the basis of Ext.P1 FIS of PW1. PW14, Dy.S.P., Thamarassery, conducted the investigation and on completion of investigation, submitted the final report/charge sheet before the court.

4. On appearance of the accused before the trial court, a



charge under Section 9(m) read with Section 10 of the PoCSO Act and Section 3(1)(xi) of the SC/ST Act was framed, read over and explained to the accused to which he pleaded not guilty.

5. On behalf of the prosecution, PWs.1 to 14 were examined and Exts.P1 to P15 were marked in support of the case. After the close of the prosecution evidence, the accused 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. The accused denied those circumstances and maintained his innocence.

6. As the trial court did not find it a fit case to acquit the accused under Section 232 Cr.P.C., he was asked to enter on his defence and adduce evidence in support thereof. No oral or documentary evidence was adduced on behalf of the accused.

7. On a consideration of the oral and documentary evidence and after hearing both sides, the trial court by the impugned



judgment found the accused guilty of the offences punishable under Section 9(m) read with Section 10 of the PoCSO Act and Section 3(1)(xi) of the SC/ST Act. He has been sentenced to simple imprisonment for five years and to a fine of ₹50,000/- and in default to simple imprisonment for two years for the offence punishable under Section 9(m) read with Section 10 of the PoCSO Act, and to simple imprisonment for two years and to a fine of ₹5,000/- and in default to simple imprisonment for three months for the offence punishable under Section 3(1)(xi) of the SC/ST Act. The substantive sentences of imprisonment have been directed to run concurrently. Set off under Section 428 Cr.P.C. has been allowed. Aggrieved, the accused 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 the accused/appellant by the trial court are sustainable or not.

9. Heard both sides.



10. It was submitted by the learned counsel for the accused/appellant relying on the dictum in **Asharfi v. State of Uttar Pradesh, (2018)1 SCC 742 : AIR 2017 SC 5819** that the trial court committed a mistake in convicting and sentencing the accused as the offence under Section 3(2)(v) of the SC/ST Act is not made out. Hence on the said ground alone, the accused is entitled to be acquitted, goes the argument.

11. The incident in this case took place on 19/01/2015. **Asharfi (Supra)** was a case in which the appellant/accused therein was convicted for the offences punishable under Sections 450, 376(2)(g), 323 IPC and under Section 3(2)(v) of the SC/ST Act. Varying terms of imprisonment were given for the aforesaid offences and invoking Section 3(2)(v), the appellant was also sentenced to life imprisonment and fine with a default clause. The Apex court confirmed the sentence awarded for the offence under Section 376(2)(g) IPC. The Apex court held that the gravamen of Section 3(2)(v) is that any offence, envisaged under IPC



punishable with imprisonment for a term of ten years or more, against a person belonging to Scheduled Caste/Scheduled Tribe, should have been committed on the ground that "*such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member*". Prior to the Amendment Act 1 of 2016, the words used in Section 3(2)(v) of the SC/ST Act are "*.....on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe*". By way of the amendment, the words "*.....on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe*" have been substituted with the words "*.....knowing that such person is a member of a Scheduled Caste or Scheduled Tribe*". Therefore, if an offence under IPC punishable with imprisonment for a term of ten years or more, is committed upon a victim who belongs to SC/ST community after 26/01/2016 and the accused person has knowledge that such victim belongs to the said community, then the charge of Section 3(2)(v) of SC/ST Act would be attracted.



But from the unamended provisions of Section 3(2)(v) of the SC/ST Act, it is clear that the statute laid stress on the intention of the accused in committing such an offence in order to belittle the person as he/she belongs to Scheduled Caste or Scheduled Tribe community. It was found that the evidence and materials on record did not show that the appellant therein had committed rape on the victim on the ground that she belonged to Scheduled Caste. Section 3(2)(v) of the SC/ST Act can be pressed into service only if it is proved that the rape had been committed on the ground that the victim belonged to Scheduled Caste community. In the absence of evidence proving intention of the appellant therein in committing the offence on the victim only because she belonged to Scheduled Caste community, the conviction of the appellant under Section 3(2)(v) of the SC/ST Act was held to be not sustainable and hence the conviction under Section 3(2)(v) of the SC/ST Act was set aside. However, the conviction and sentence of the appellant for the offence under Section 376(2)(g) IPC as well as



the other offences were confirmed.

12. As is clear from a reading of Section 3(2)(v) of the SC/ST Act, the same does not deal with any particular offence. It only provides for life imprisonment in case a person is found guilty of an offence under IPC which is punishable with imprisonment for a term of ten years or more against a member of the Scheduled Caste/Scheduled Tribe on the ground that such person belongs to the said caste or community. The accused has not been found guilty of any offence(s) punishable under the IPC. The accused/appellant has been found guilty only of the offences punishable under Section 3(1)(xi) of the SC/ST Act and Section 9(m) read with Section 10 of the PoCSO Act. The term of imprisonment that could be imposed under Section 3(1)(xi) was six months which could extend to five years and for the offence under Section 9(m) of the PoCSO Act, the minimum sentence is five years which may extend to seven years. None of the ingredients under Section 3(2)(v) of the SC/ST Act are attracted. The trial



court has rightly not invoked the said Section. Therefore the dictum in the aforesaid case is not applicable to the facts in the present case.

13. Now coming to the offences under Section 9(m) read with Section 10 and Section 3(1)(xi) of the SC/ST Act. I make a brief reference to the materials on record relied on by the prosecution to prove the offence. PW2, the victim, the daughter of PW1 deposed that in the year 2015, she was studying in the IInd Standard. Her mother was working as a nurse. She was residing along with her mother and brother. On the date of the incident, she reached home by about 4 o' clock in the evening. Her mother gave her some sweets. She then sought her mother's permission to go to her neighbour's house to give sweets to her friend. On her way to the house of her friend, she saw Vijayettan (the accused herein) along with Kuttappi and another person on the road. Kuttappi was repairing a bike. When she reached there, Kuttappi left the place by taking his vehicle. The accused lifted her and made her swing,



during the course of which he touched her private parts by inserting his fingers through the front and back portion of her inner-wear. Thereafter she was placed on the ground and the accused pasted a sticky fluid on her legs. By this time, Kuttappi returned with his vehicle and so the accused released her. She did not proceed to her friend's house due to the incident and so she returned home and informed her mother.

14. PW1, the mother of PW2, supports the prosecution case. She also deposed that on the said day her daughter, who had left for her friend's house to give sweets, returned home crying and revealed the incident to her. She immediately removed her daughter's dress and bathed her. Thereafter she went to the house of the accused to enquire about the incident. However, the brother-in-law of the accused was present there and therefore she did not question the accused and instead she requested the wife of the accused to come to her house in order to speak about an important matter. When the wife of the accused came to her house,



she informed the former of the incident. The wife of the accused cried and requested her not to take any hasty steps and wait till her daughter's marriage was over. PW1 also deposed that she had informed PW3 Alice and one another neighbour, that is, Shantha, about the incident. The next day she again went to the house of the accused to question him. The wife of the accused questioned the accused at which time he apologized to PW1. The accused expressed his regret and informed PW1 that his daughter's wedding is to be solemnised on a near date. The next day she went to the police station and gave Ext.P1 statement to the police.

14.1. PW3, a neighbour of PW1, deposed that PW1 had revealed the incident to her also. PW4, the neighbour of PW1 as well as PW3 deposed that on 20/01/2015 she heard a commotion in front of the house of the accused and accordingly she went there. She heard the wife of the accused talking in a loud voice. However on enquiry she did not respond. On the way back, she met PW3 Alice, who informed her that the accused had sexually



harassed PW2.

14.2. PW5, Civil Surgeon, Taluk Hospital, Thamarassery, examined PW2 on 20/01/2015 at about 04:00 p.m. and issued Ext.P3 certificate.

14.3. PW9, Headmaster, Government UP School, Thamarassery, issued Ext.P6 certificate regarding the date of birth of PW2. Her date of birth as per the said certificate is 06/02/2007.

15. Referring to the testimony of PW1 and PW2, it was submitted that the prosecution witnesses have no consistent case. PW1 has given different versions in Ext.P1 FIS, her 164 statement and in the box. PW1 is a nurse and hence would have been well aware of the procedure to be followed when a sexual abuse takes place. However going by her testimony, she bathed her daughter immediately after the incident resulting in evidence being obliterated. There is inconsistency in the colour of the frock of PW2 referred to in Ext.P11 mahazar and in Ext.P15 chemical



report. There is also delay in reporting the matter to the police. The materials on record are not satisfactory to find the accused guilty of the offences alleged against him beyond reasonable doubt and therefore he canvassed for an order of acquittal.

16. Going by the case of PW2, it is seen that the accused after lifting her touched her private parts by putting his fingers inside her inner-wear and thereafter pasted some sticky liquid on her thighs. PW2 has no case that the sticky liquid was spread on her frock or dress. That being the position, it is immaterial that no sperm or spermatozoa was traced in the frock that was worn by the victim girl at the time of the incident. Hence in such circumstances, the difference in the colour of the frock alleged to have been worn by the victim and described in Exts.P11 and P15, is immaterial.

17. Though it was submitted that the statements of PW1 and PW2 are quite inconsistent, on going through the testimony I



do not find any major contradictions brought out while they were cross examined and proved through the investigating officer. There are no materials to show as to why the accused/appellant should be falsely implicated in this case. Therefore I do not find any reasons to disbelieve PW1 and PW2 or the other prosecution witnesses.

18. As far as the delay is concerned, the same has been explained by PW1. On the date of the incident itself, she had gone to the house of the accused for questioning him. It was only because the brother-in-law of the accused was present there, she did not question him. The next day also she questioned the accused on which day he expressed regret over the incident. It is true that the testimony of PW1 shows that she had consulted her friends and her colleagues at the hospital before she gave her statement to the police. It is quite natural in offences of such nature to consult the family and friends before a decision as to whether or not to set the law in motion is taken by the family of the victim. There is no inordinate delay in giving the complaint to the



Crl.Appeal No.235 of 2019

2025:KER:17514

police and what delay occurred has been explained by the testimony of PW1. I do not find any infirmity in the findings of the trial court calling for an interference by this Court.

In the result, the appeal is dismissed.

Interlocutory applications, if any pending, shall stand closed.

Sd/-

**C.S.SUDHA
JUDGE**

ami/