IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

MONDAY, THE 29TH DAY OF JUNE 2020 / 8TH ASHADHA, 1942

CRL.A.No.564 OF 2018

AGAINST THE ORDER/JUDGMENT IN SC 495/2010 OF SESSIONS COURT, PATHANAMTHITTA

APPELLANT/ACCUSED:

THANKAPPAN P.K.,
AGED 67 YEARS, S/O. KOCHUKUTTAN,
NALUPURAYIL VEEDU, CHUMATHRA LAKSHAM VEEDU COLONY, PUNNAKUNNAM MURI, KUTTAPUZHA VILLAGE, THIRUVALLA.

BY ADVS.
SRI.T.K.BIJU (MANJINIKARA)
SMT.ANNIE M.ABRAHAM

RESPONDENT/COMPLAINANT:

STATE OF KERALA
REP. BY DEPUTY SUPERINTENDENT OF POLICE, THIRUVALLA POLICE STATION, THIRUVALLA [CRIME NO.731/2009] REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA,ERNAKULAM - 682 031.

R1 SMT.AMBIKA DEVI S, SPL.GP ATROCITIES AGAINST WOMEN AND CHILDREN

SMT. PUSHPALATHA M.K SR PP

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 11-06-2020, THE COURT ON 29-06-2020 DELIVERED THE FOLLOWING:

C.R.

P.B.SURESH KUMAR, J.

Criminal Appeal No.564 of 2018

Dated this the 29th day of June, 2020

J U D G M E N T

The conviction of the appellant and the sentence imposed on him in S.C.No.495 of 2010 on the files of the Sessions Court, Pathanamthitta are under challenge in this appeal. The appellant is the sole accused in the case.

2. The accusation in the case is that on a Sunday in the month of February 2009, and on various subsequent days, the accused committed rape on the victim girl, a minor aged 14 years belonging to a Scheduled Caste, and impregnated her. The offences alleged against the accused are the offences punishable under Section 376 of the Indian Penal Code (the IPC) and Sections 3(1)(xii) and 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, as it stood then.

3. On the accused pleading not guilty of the charges, the prosecution examined 15 witnesses as PW1 to PW15 and proved 31 documents as Exts.P1 to P31. The witnesses examined on the side of the prosecution have also identified MO1 to MO4 material objects in the case. The accused was thereupon questioned under Section 313 of the Code of Criminal Procedure (the Code) as regards the incriminating evidence brought out against him 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, PW1 is the victim girl. PW1 proved Ext.P1 First Information Statement and Ext.P2 statement given by her under Section 164 of the Code. PW2 is the mother of the victim girl. PW3 is a person residing in the neighbourhood of the house of the victim girl. PW4 is the witness to Ext.P3 Scene Mahazar. PW5 is the doctor who examined the victim girl and issued Ext.P4 report. PW6 is the doctor who subjected the victim girl to ultrasound scanning and issued Ext.P5 report. PW7 is the doctor who issued Ext.P6

Potency Certificate after examining the accused. PW8 is the Tahsildar who issued Ext.P7 certificate indicating the caste of the victim girl. PW9 is the doctor who attended the victim girl for her delivery. PW9 has also collected the blood samples of the victim girl and the child delivered by her for DNA analysis. PW9 has proved Exts.P9 report and Ext.P10 seal. PW10 is the official of the Forensic Science Laboratory. PW10 proved Ext.P11 seal, Ext.P12 request, Ext.P12(a) report, Ext.P13 report and Ext.P14 photograph. PW11 is the Village official who issued Ext.P15 Scene Plan. PW12 is the witness to Ext.P16 Mahazar. PW13 is the Head master of the school where the victim girl was pursuing her studies. PW13 has proved Ext.P17 letter and P17 extract of the Admission Register of the school containing the age of the victim girl. PW14 is the doctor who proved the signature of Dr.Umesh in Ext.P12(a) report. PW15 is the Investigating Officer. PW15 has proved Ext.P18 First Information Report, Ext.P19 report concerning the handing over of the investigation, Ext.P20 arrest memo, Ext.P21 inspection memo, Ext.P22 custody memo, Ext.P23 remand application, Ext.P24 report concerning the address of the accused, Ext.P25 property list, Ext.P26 forwarding note, Ext.P27 report of the Forensic Science Laboratory, Ext.P28 property list,

Ext.P29 property list, Ext.P30 forwarding note, Ext.P31 consent and Ext.P31(a) report.

5. The court below, on a detailed evaluation of the materials on record, found that the accused had sexual intercourse with the victim girl and it is the accused who has impregnated her. Although the court found that the prosecution has not proved the age of the victim girl and failed to establish that the case is one that falls under the sixth description in the definition of 'rape' in terms of Section 375 of the IPC as it stood then, it held that in the absence of any case for the accused that the sexual intercourse he had with the victim girl was consensual, the accused is guilty of the offence punishable under Section 376 of the IPC. Similarly, although the court found that the prosecution has failed to establish the guilt of the accused under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, it held that the accused is guilty under Section 3(1) (xii) of the said statute. Consequently, the accused was convicted for the aforesaid offences and sentenced to undergo rigorous imprisonment for eight years and to pay a fine of Rs.10,000/- and in default of payment of fine, to undergo simple imprisonment for six months for the offence

punishable under Section 376 of the IPC. Similarly, the accused was sentenced to undergo rigorous imprisonment for four years and to pay a fine of Rs.5000/- and in default of payment of fine, to undergo simple imprisonment for three months for the offence punishable under Section 3(1)(xii) of the Scheduled Castes and Scheduled Tribes(Prevention of Atrocities) Act, 1989. Substantive sentences were ordered to run concurrently. The accused is aggrieved by the conviction and sentence imposed on him.

6. Heard the learned counsel for the appellant as also the learned Public Prosecutor.

7. The learned counsel for the appellant contended that insofar as it was found by the court below that the prosecution has failed to establish that the victim girl was a minor, the accused ought not have been convicted under Section 376 of the IPC, for, the evidence tendered by the victim girl would show beyond doubt that the sexual intercourse was consensual. It was also contended by the learned counsel that if it is found that the accused is not liable to be convicted for the offence punishable under Section 376 of the IPC for the aforesaid reason, the conviction of the accused under the Scheduled Castes and

Scheduled Tribes (Prevention of Atrocities) Act, 1989 is liable to be interfered with.

8. Per contra, the learned Public Prosecutor contended that the accused had no case before the court below that the relationship was consensual and there was not even a suggestion to that effect to the victim girl during her cross- examination. It was pointed out that the suggestion put forward by the accused during cross examination of the victim girl, on the other hand, was that he is falsely implicated. According to the learned Public Prosecutor, in the absence of any suggestion as to the consensual sex put forward during the cross examination of the victim girl, the accused cannot be heard to contend that the sexual relationship was consensual. Alternatively, it was contended by the learned Public Prosecutor that the evidence tendered by the victim girl do not indicate in any manner that the sexual relationship between the parties was consensual. In essence, the submission made by the learned Public Prosecutor is that the impugned judgment does not call for any interference.

9. No doubt, if it is found that the sexual relationship between the parties was consensual, the conviction of the accused for the offence punishable under Section 3(1)(xii)

of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, is also liable to be interfered with. Similarly, if it is found that the sexual relationship between the parties was not consensual, there would be no infirmity in the conviction of the accused for said offence. As such, the only point arising for consideration is as to whether the prosecution has established that the sexual intercourse the accused had with the victim girl was without her consent.

10. The case on hand being one arose prior to the introduction of Section 114A of the Indian Evidence Act, the point needs to be decided without the aid of the said provision.

11. Before proceeding to consider the point formulated for decision, it is necessary to refer to a few facts which are not in dispute. The victim girl belongs to a Scheduled Caste. She was studying in 8th Standard during the period when the accused allegedly had sexual intercourse with her. The father of the victim girl had abandoned his wife and children including the victim girl and they were residing in a colony. The mother of the victim girl is a house maid. The accused is a person who was residing in the immediate neighbourhood of the victim girl with his wife and granddaughter. He was aged about 59 then. The wife

of the accused is also a house maid. The victim girl used to visit the house of the accused for watching television and she used to call the accused as 'Thankappanachan'.

12. I shall now refer to the evidence tendered by the victim girl. She deposed that when she went to the house of the accused one day during 2009 for watching television, the accused and his granddaughter alone were there in the house. She deposed that while she was watching television, the accused sent his granddaughter away to a shop, closed the door of the house, pulled her to the adjacent room, made her lie down in a cot, removed her clothes and inserted his genital organ into her vagina after removing his clothes. She deposed that though she attempted to make a noise, the accused prevented her from doing so by closing her mouth using his hand. She deposed that she did not disclose this to her mother due to fear. She deposed that the accused called her to his house one day thereafter also when he was alone in the house and when she went there, the accused pulled her inside the house and repeated the same thing. She deposed that the accused has repeated the same on several occasions thereafter. She deposed that the accused used to tell her that it will be shameful to her, if she discloses the

incidents to anyone. She deposed that she did not disclose the incidents to anyone as she was afraid that the accused would do something to her mother and sister.

13. As rightly pointed out by the learned Public Prosecutor, the case of consensual sex is not one suggested to the victim girl during her cross examination. Be that as it may. The relevant portion of the evidence tendered by PW1 which is relied on by the counsel for the appellant to contend that the relationship was consensual reads thus:

> "ഈ സ!ഭവത്ിന ശ)ഷ! പ%ന-ട ഒര ദ്വസ! തങ്കപനചൻ എനന വള%ച. ടയ<ന വ-ട"ക വള%ച. അന അവ്നട തങ്കപനചൻ മ<തമ ഉണ<യ്രനള. ഞ<ൻ അവ്നട ന,ന ത്%ന. ശപ<ര<ൻ തടങ്ങ. അപ<ൾ എന ക-ക പ%ടച പത മറ്ക ഉള%ൽ ന.<ണപ<യ. ശനരനത ന,യ മ<ത്% ഒന: എനന വ-ണ! തങ്കപനചൻ ന,യ. അത്ിന ശ)ഷ! പ%ന-ട! ഒത്% പ<വ)>! അപ.<ര! തങ്കപനചൻ എനന ന,യ്ടണ'."

The argument of the learned counsel is that when it is admitted by the victim girl herself that she used to go to the house of the accused as and when desired or required by the accused and had sex with him, the relationship can only be consensual. In order to adjudicate the aforesaid contention, it is necessary to understand the concept of consent in the context of rape.

14. It is now settled that mere act of helpless resignation in the face of inevitable compulsion, quiescence, non- resistance, or passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be 'consent' as understood in law and the consent, on the part of a woman as a defence to an allegation of rape, requires voluntary participation, not only after the exercise of intelligence, based on the knowledge, of the significance and moral quality of the act, but after having freely exercised a choice between resistance and assent. In other words, the consent in order to relieve an act of a criminal character, like rape, must be an act of reason, accompanied with deliberation, after the mind has weighed as in a balance, the good and evil on each side, with the existing capacity and power to withdraw the assent according to one's will or pleasure [See **Rao Harnarain Singh Sheoji Singh v. State,** 1958 Crl. Law Journal 563 and **Uday v. State of Karnataka,** (2003) 4 SCC 46].

15. That apart, as stated in the Declaration on the Elimination of Violence against Women made by the United Nations, violence against women, including sexual assaults, are manifestations of historically unequal power relations between

men and women, which has led to domination of men over women. Sexual assaults including rape are therefore crimes of gender inequality. In social reality, sex that is actually desired by a woman is never termed consensual, for when a sexual interaction is equal, consent is not needed and when it is unequal, the consent cannot make it equal. In **Meritor Savings Bank, FSB v. Mechelle Vinson** et al. [477 US. 57 (1986)], the United States Supreme Court held that welcomeness and not consent, shall be the standard for sex that does not violate the rights of women consistent with gender equality. The relevant passage reads thus:

> “The fact that sex-related conduct was "voluntary," in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII.... The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.”

In other words, in a country like ours committed to gender equality, only sexual intercourse which are welcomed could be construed as not violative of the rights of the victim, and accepted as consensual.

16. Reverting to the facts, in the poor social background in which the victim girl was brought up, as suggestive from the name 'Thankappanachan' used by the victim girl to call the accused, the accused was a fatherly figure for the victim girl. Leaving apart the doubt created as to the age of the victim girl, there is no dispute to the fact that the victim girl was studying in 8th Standard during the relevant period. The accused was aged about 59 years and a grandfather. It has come out that the victim girl used to visit the house of the accused for watching television. It is taking advantage of the said situation that the accused had made sexual advances to her. The victim girl has given categoric evidence that while she was watching television one day, the accused closed the door of the house, pulled her to the adjacent room and had sex with her. She was also categoric in her evidence that though she attempted to make a noise, the accused prevented her from doing so by closing her mouth using his hand. The accused has no case that the first instance of sexual intercourse was consensual. The case put forward by the accused is only that the admitted conduct of the victim girl in going to the house of the accused as and when desired by him subsequently would indicate that the latter instances of sexual

intercourse were consensual. Insofar as it is established that the first instance of sexual intercourse spoken to by the victim girl was not consensual, it is immaterial as to whether the subsequent instances of sexual intercourse was consensual. Be that as it may. The victim girl deposed that she did not disclose the incidents to her mother due to fear. Similarly, she deposed that she did not disclose the incidents to anyone as she was afraid that the accused would do something to her mother and sister. In other words, it is clear from the materials on record that the victim girl was under a social and psychological hierarchical threat. In a situation of this nature, according to me, the conduct on the part of the victim girl in surrendering before the accused as and when desired by him cannot be said to be unusual or abnormal and such surrender can never be construed as consensual acts of sexual intercourse. I am fortified in this view by the observation made on rape survivors by Judith Lewis Herman, an American Psychiatrist and Researcher on Traumatic Stress in her book, Trauma and Recovery. The relevant observation reads thus:

> “When a person is completely powerless, and any form of resistance is futile, she may go into a state of surrender. The system of self-defense shuts down entirely. The helpless person

> escapes from her situation not by action in the real world but rather by altering her state of consciousness ....."

Needless to say, there is no merit in the contention advanced by the learned counsel for the appellant.

In the result, the appeal is dismissed.

Sd/-

P.B.SURESH KUMAR, JUDGE

PV/YKB