

Babu Vs State Of Kerala

Court: High Court Of Kerala

Date of Decision: Feb. 4, 2025

Acts Referred: Indian Penal Code, 1860 " Section 376(2)(f), 376(2)(j), 376(2)(k), 376(2)(l), 376(2)(n)
Protection of Children from Sexual Offences Act, 2012 " Section 5(j)(ii), 5(k), 5(l), 5(n), 6

Hon'ble Judges: P.B.Suresh Kumar, J; Jobin Sebastian, J

Bench: Division Bench

Advocate: Mathew Kuriakose, J.Krishnakumar, Bindu O.V.

Final Decision: Partly Allowed

Judgement

P.B.Suresh Kumar, J.

1. The sole accused in S.C.No.268 of 2019 on the files of the Court of Session, Kottayam Division, is the appellant in the appeal. He stands convicted

and sentenced for having committed rape and penetrative sexual assault on his mentally retarded minor child.

2. The accused in the case is the biological father of the victim. The mother of the victim passed away during the early childhood of the victim.

Thereafter, the victim was residing with the accused. Although the victim has an elder brother, he was not staying with them. During October 2018,

when the victim was taken to the hospital due to a fever, the doctor after examining her found that she was pregnant. Accordingly, the matter was

informed to the police. The statement of the victim was recorded thereupon on 03.10.2018 by a Women Police Officer attached to Velloor Police

Station, Kottayam and a case was registered based on the said statement. In the statement, even though it is alleged by the victim that one Anil had

sexual intercourse with her forcibly at a place near a stream where she had gone to wash clothes, the investigation conducted in the case revealed

that two persons had committed rape on her including the accused. Though a single final report was initially filed in the case against the accused and

one Gireesh, later, the charges were split and two separate final reports were filed, one against the accused and the other against Gireesh. The

accusation in the final report against the accused is that he had committed rape and penetrative sexual assault on the victim one day in July 2018, at

their house.

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3. The Court of Session framed charges against the accused under Sections 376(2)(f), 376(2)(j), 376(2)(k), 376(2)(l) and 376(2)(n) of the Indian Penal

Code (IPC) and Sections 5(j)(ii), 5(k), 5(n) and 5(l) read with Section 6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act).

The accused pleaded not guilty. The evidence let in by the prosecution thereupon consists of the oral evidence of 18 witnesses examined as PWs 1 to

18 and Exts.P1 to P19 documents proved through them. Exts.D1 and D2 are the previous statements of the witnesses proved at the instance of the

accused. MO1 series are the material objects identified by the witnesses. Thereupon, after complying with the procedure prescribed, the Court of

Session found the accused guilty of the charges under Sections 376(2)(f), 376(2)(j), 376(2)(k) and 376(2)(l) IPC and Sections 5(j)(ii), 5(k) and 5(n)

read with Section 6 of the POCSO Act, convicted him and sentenced him among others, to undergo, imprisonment for life which shall mean

imprisonment for the remainder of the natural life of the accused. The accused was acquitted of the remaining charges. The accused is deeply

aggrieved by his conviction and sentence in the case, hence this appeal.

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

5. The point that falls for consideration is whether the conviction of the appellant and the sentence passed against him, are sustainable in law.

6. Point. The victim gave evidence in the proceedings as PW1. It was deposed by PW1 that sometime during 2018, while she was studying for the

Plus One course, the accused committed rape on her. It was also deposed by PW1 that later, the accused took her to the residence of his friend,

Gireesh and that they stayed in his house for about 15 days and during the said period, Gireesh also committed rape on her. It was deposed by PW1

that due to a fever, she was taken to a hospital in Piravom by her father, where the doctors informed her that she was pregnant and that subsequently,

she was taken to Vaikom hospital, where the doctors confirmed the pregnancy. According to PW1, the accused directed her to tell the police that it

was one Anil who committed rape on her and it is on that basis that she informed the police that it was Anil who committed rape on her. It was also

deposed by PW1 that the statements made by her to the police and to the Magistrate to that effect, are incorrect and that there is no person named

Anil. It was also deposed by PW1 that she first disclosed the true facts to one Sruthy, attached to Nirbhaya Shelter Home and it was thereafter that

PW1 disclosed the true facts to the police and to the Magistrate. PW1 identified Ext.P1 as the statement given by her to the Magistrate. In cross-

examination, even though PW1 stated that it was for the purpose of changing her residence from Nirbhaya that she stated to Sruthy that it was her

father who committed rape on her, when it was suggested to PW1 later that the accused had not committed rape on her, she asserted that her

statement that her father committed rape on her, is true.

7. PW2 is the husband of the maternal aunt of the victim. PW2 deposed that the victim never used to go alone near the stream to wash her clothes

and that she would always be accompanied by either his wife or one Janamma, if his wife was not available. It was affirmed by PW2 that the

accused and the brother of the victim were not on good terms and that the brother of the victim was, therefore, not staying with the accused and the

victim. It was stated by PW2 in his evidence that he is residing in another house in the same compound of the house of the victim and that the victim

used to sleep in the same room along with the accused. PW4 is the wife of PW2. PW4 gave evidence more or less on similar lines as the evidence

tendered by PW2.

8. PW5 is Sruthy referred to by the victim in her evidence. PW5 was the Manager of Nirbhaya Shelter Home, Kakkanad. Her evidence was that the

victim was residing in the said shelter home during December, 2018 and that it was PW5 who counselled the victim.

9. PW8 was the Junior Consultant at Taluk Hospital, Vaikom who examined the victim on 04.10.2018 and issued Ext.P5 certificate. It was deposed by

PW8 that what was stated to her by the victim at the time of examination was that one Hindi speaking person caught hold of her when she had gone

to the nearby stream to wash clothes; that she somehow managed to escape from his hold and that she does not know anything else. It was deposed

by PW8 that on examination, her hymen was found torn and on ultra sound scanning, 12.3 weeks intra uterine pregnancy was detected. PW9 was the

doctor attached to the Medical College Hospital, Kottayam during October, 2018. It was deposed by PW9 that on 09.10.2018, she collected blood as

well as the stillborn foetus of the victim and handed over the same in two separate plastic jars to a police officer, one containing the foetus and

placenta and the other containing the blood sample. It was also deposed by PW9 that before handing over the foetus, the jar containing the same was

filled with crystal salt for preservation. PW10 was the doctor who conducted the potency examination of the accused on 07.12.2018. PW10 collected

his blood sample and handed over the same to the police. It was clarified by PW10 in his evidence that the blood sample was collected in EDTA bottle

and the same was sealed.

10. PW12 was the Woman Police Officer attached to Velloor Police Station, Kottayam who recorded the first statement of the victim, on the basis of

the information received from the Taluk Hospital, Vaikom. PW12 deposed the said fact in her evidence. PW13 was the Woman Police Officer

attached to Velloor police station who recorded the additional statement of the victim. PW13 admitted in cross-examination that the stand of the victim

in the additional statement recorded by her was that it was Gireesh who impregnated her. PW14 was the police officer who collected the stillborn

foetus as also the blood sample of the victim from PW9 and handed over the same to the investigating officer. PW15 was the police officer who

collected the blood sample of the accused from PW10 and handed over the same to the investigating officer. PWs 14 and 15 deposed the said facts in

their evidence.

11. PW16 was the police officer who conducted the initial investigation in the case. It was PW16 who registered the First Information Report based

on the statement furnished by the victim. It was in terms of Ext.P10 seizure mahazar that PW16 collected the stillborn foetus and the blood sample of

the victim from PW14, to whom the same was entrusted by PW9. Similarly, it was in terms of Ext.P14 seizure mahazar that PW16 seized the blood

sample of the accused from PW15 with whom the same was entrusted by PW10. PW16 deposed the said facts in his evidence. In cross-examination,

PW16 denied the suggestion put to him that it was not the foetus of the victim that was sent for DNA analysis. Similarly, PW16 denied the suggestion

put to him that it was not the blood sample of the accused that was sent for DNA analysis. It was clarified by PW16 in cross-examination that the

blood sample of the accused was collected on 07.12.2018 and that the same was produced before the Jurisdictional Magistrate on the same day itself.

In cross-examination, when it was suggested to PW16 that the pregnancy of the victim was not medically terminated, he denied the same, although he

admitted that the documents evidencing the same were not made available.

12. PW18 was the Assistant Director attached to the DNA Division of the Forensic Science Laboratory, Thiruvananthapuram. PW18 deposed that on

13.11.2018 and 11.01.2019, he received two sealed packets from the jurisdictional court and the first packet contained five items consisting of foetus,

liquid blood kept in two plastic vials and two forwarding letters of PW9 and the second packet contained two items of which, one was the sample

blood of the accused and the other was the blood sample of Gireesh. It was deposed by PW18 that DNA was extracted from the foetus of the victim,

the blood sample of the victim as also the blood samples of the accused and Gireesh, and on analysis, it was found that in the absence of identical

twins, the accused is the biological father of the foetus of the victim. It was also found that Gireesh is excluded from the paternity of the foetus of the

victim. Ext.P17 is the report issued by PW18 in this regard. In cross-examination, it was clarified by PW18 that the preservation of foetus in a sterile

plastic container containing crystal salt will prevent further damage to the foetus.

13. The learned counsel for the accused contended that the evidence tendered by PW1 is totally unreliable and there cannot be any conviction based

on such evidence. It was pointed out that the initial version of the victim was that she was raped by one Anil and her later version was that she was

raped by the friend of the accused namely, Gireesh. It was pointed out that although the victim stated in her evidence that she disclosed the true facts

to PW5 namely Sruthy, she did not endorse the same. The version of PW5 in her evidence was only that she counselled PW1 while she was staying

in the shelter home where PW5 was the Manager. According to the learned counsel, even though it is established that the victim is a person suffering

from mental retardation, it is not safe to place reliance on the evidence of the victim to convict a person. It was also contended by the learned counsel

that there is no satisfactory evidence in the case to establish that the foetus of the victim was collected for DNA analysis. Such an argument was

raised by the learned counsel since documents relating to the medical termination of pregnancy undergone by the victim, were not made available. It

was also contended by the learned counsel that the collection of the blood of the accused, and the foetus of the victim as also their transportation were

not in accordance with the guidelines prescribed. According to the learned counsel, foetus tissue sample should be stored at 20 degree celsius and

should be transported in a refrigerated condition. The argument is that inasmuch as the collection and transportation of the foetus tissue sample was

not in accordance with the guidelines prescribed, no reliance could be placed on the result of the DNA analysis. It was also contended by the learned

counsel that at any rate, the sentence passed against the accused namely, imprisonment till the remainder of the natural life is too harsh and

disproportionate a punishment for the offences alleged to have been committed by the accused.

14. There cannot be any doubt that it is after medically terminating the pregnancy of the victim, her stillborn foetus was collected for DNA analysis.

True, the documents relating to the medical termination of pregnancy of the victim were not produced before the jurisdictional court. As noted, it was

categorically stated by PW9 that she collected the foetus of the victim, and the evidence in that regard given by PW9 remains unchallenged. As such,

merely for the reason that the documents relating to the medical termination of pregnancy of the victim were not produced before the jurisdictional

court, it cannot be said that the foetus, which was subjected to DNA analysis, was not the foetus of the victim.

15. There is nothing on record to indicate as to the guidelines in vogue as regards collection and transportation of foetus tissue samples and blood

samples for DNA analysis. As noted, it was PW9 who collected the foetus tissue sample of the victim and it was PW10 who collected the blood

sample of the accused. There was no attempt to discredit the evidence given by PW9 and PW10 as regards the collection of the foetus and blood

samples from the victim and the accused respectively.

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PW18 was the Assistant Director who issued Ext.P17 report of the Forensic Science Laboratory after conducting the analysis of the DNA extracted

from the foetus and blood sample of the victim as also from the blood sample of the accused. As noted, in cross-examination, it was clarified by PW18

that the preservation of foetus in a sterile plastic container containing crystal salt will prevent further damage to the foetus. No questions were put to

PW18 by the counsel for the accused as regards the factors which would affect the integrity of the samples. There was not even a suggestion to

PW18 that the integrity of any of the samples was lost on account of improper preservation or transportation. Needless to say, the argument advanced

by the learned counsel in this regard is only to be rejected.

16. True, the evidence tendered by the victim as regards the person who raped her is not consistent. But in a case of this nature, where it is

established that the victim is a person suffering from mental retardation, the evidence will have to be appreciated in that background. As noted, it has

been established in the case that on an analysis of the DNA extracted from the foetus and the blood sample of the victim as also the blood samples of

the accused and Gireesh, it was found that the accused is the biological father of the foetus of the victim and that Gireesh is excluded from the

paternity of the foetus of the victim. In this context, it is relevant to point out that in *Mukesh v. State (NCT of Delhi)*, (2017) 6 SCC 1, the Apex Court

held that DNA report deserves to be accepted unless it is absolutely dented and 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 the tampering of the samples, the DNA test

report is to be accepted. Paragraph 228 of the said judgment reads thus:

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Ã“228. From the aforesaid authorities, it is quite clear that DNA report deserves to be accepted unless it is absolutely dented and 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.Ã”

In Mukesh, the Apex Court has also quoted with approval a passage from the judgment in Pantangi Balarama Venkata Ganesh v. State of A.P.,

(2009) 14 SCC 607, wherein the Apex Court has referred to the evidence tendered by an expert on the subject that the probability of two persons

except identical twins having the same DNA fingerprint is around 1 in 30 billion world population. In the above circumstances, we are of the view that

in the absence of any material to show that Ext.P17 report is vitiated for want of quality control or quality assurance, the same can be safely

accepted. If Ext.P17 report is accepted, it renders sufficient corroboration to the oral evidence tendered by PW1.

17. What remains to be considered is the argument that the sentence passed against the accused is disproportionate to the gravity of the offences

found to have been committed by him. As pointed out by the learned Public Prosecutor, the offences committed by the accused are grave in nature

especially since it is found that the accused has committed rape and penetrative sexual assault on his mentally retarded minor biological daughter. But

it is seen that the appellant was aged around 50 years at the time of commission of the crime. Having regard to the age of the appellant, we are of the

view that imprisonment for a period of 25 years without remission would be the appropriate sentence to be passed against him.

In the result, the appeal is allowed in part confirming the conviction of the appellant and modifying the sentence passed against him to imprisonment

for a period of 25 years without remission.