
(2026) 03 KL CK 0720
In the High Court Of Kerala
Case No : Criminal Appeal No.1085 Of 2017

Appukuttan

APPELLANT

Vs

State Of Kerala

RESPONDENT

Date of Decision : 03-03-2026

Acts Referred:

Indian Penal Code, 1860 — Section 34, 376
Evidence Act, 1872 — Section 118
Bharatiya Sakshya Adhiniyam, 2023 — Section 124

Citation : (2026) 03 KL CK 0720

Hon'ble Judges : A.Badharudeen, J

Bench : Single Bench

Advocate : V.A.Johnson, Ambika Devi S, Vipin Narayanan

Final Decision : Dismissed

Judgement

A. Badharudeen, J

1. The judgment in S.C.No.667/2012 on the files of the 1st Additional Sessions Court, Palakkad dated 26.05.2017 is under challenge in this appeal, filed by the sole accused. State of Kerala is the respondent.

2. Heard the learned counsel for the appellant/accused and the learned Public Prosecutor appearing for the prosecution. Perused the prosecution records.

3. Precisely, the prosecution allegation is that accused Nos.1 and 2 had committed rape on a partially handicapped girl in her house, at the house of the 1st accused and at the house of the 2nd accused for a period of 3 months prior to 20.08.2011. Thus the prosecution alleges commission of offence punishable under Section 376 of Indian Penal Code ('IPC' for short hereafter), by accused Nos.1 and 2.

4. Before commencement of trial, the 1st accused died and thereafter the learned 1st Additional Sessions Judge proceeded with trial against the 2nd accused after complying the pre-trial formalities. During trial, PW1 to PW13 were

examined and Exts.P1 to P13 as also M.O1 and M.O2 were marked on the side of the prosecution. No defense evidence was adduced despite being given the opportunity to do so. Thereafter the learned Sessions Judge found on appreciation of evidence that the 2nd accused committed the offence punishable under Section 376 of IPC and he was sentenced to undergo rigorous imprisonment for a period of 7 years and to pay fine of Rs.50,000/- and in default of payment of fine, to undergo rigorous imprisonment for a period 3 months.

5. The learned counsel for the appellant/2nd accused argued that even though PW2, the victim is a mentally retarded and partially disabled girl, the Investigating Officer had failed to take note of this aspect at the time of recording her statement during investigation. That apart, no medical consultation also was done to see her mental fitness. It is also pointed out that, otherwise, the evidence available is wholly insufficient to prove the guilt of the accused. Therefore, the entire prosecution is vitiated and in such view of the matter, the appellant/accused is liable to be acquitted after setting aside the verdict impugned.

6. The learned Public Prosecutor vehemently opposed the contention raised by the learned counsel for the appellant/accused in this regard and pointed out that failure to notice the intellectual disability of PW2 by the Investigating Officer is not at all fatal to the prosecution case. According to him, as regards to the evidence of a person with intellectual disability, such person also is a competent witness to testify in a case of sexual assault when the person is capable of giving rational answers to the questions put to him/her during examination. In this regard, he has placed a decision of this Court reported in [2025 KHC 1600 : 2025 KHC OnLine 1600 : 2025 KER 15443], Chakochan v. State of Kerala. He has also placed a decision of the Apex Court reported in [2019 KHC 6676 : 2019 (2) KLD 445 : 2019 (10) SCALE 158 : AIR 2019 SC 3559 : 2019 CriLJ 4635 : 2019 (20) SCC 593 : 2019 SCC OnLine SC 927], Ramesh P. v. State rep. by Inspector of Police, where the Apex Court considered Section 118 of the Evidence Act which would deal with competency of a child witness and in paragraph 15, the Apex Court held as under:

"15. In order to determine the competency of a child witness, the judge has to form her or his opinion. The judge is at the liberty to test the capacity of a child witness and no precise Rule can be laid down regarding the degree of intelligence and knowledge which will render the child a competent witness. The competency of a child witness can be ascertained by questioning her/him to find out the capability to understand the occurrence witnessed and to speak the truth before the court. In criminal proceedings, a person of any age is competent to give evidence if she/he is able to (i) understand questions put as a witness; and (ii) give such answers to the questions that can be understood. A child of tender age can be allowed to testify if she/he has the intellectual capacity to understand questions and give rational answers thereto.(Dalsukhbhai Nayak v satte of

Gujarat, 2003 KHC 1445). A child becomes incompetent only in case the court considers that the child was unable to understand the questions and answer them in a coherent and comprehensible manner. Sarkar, "Law of Evidence" 19th Edition, Volume 2, Lexis Nexis, p. 2678 citing DPP v. M (1977) 2 All ER 749 (QBD). If the child understands the questions put to her/him and gives rational answers to those questions, it can be taken that she/he is a competent witness to be examined."

7. The learned Public Prosecutor pointed out that, in this case PW2 was subjected to voir dire examination by the court and found that she was capable to give evidence and thereafter her evidence as to the occurrence was recorded. During examination, she had given consistent evidence as to the commission of the offence by the appellant/accused. She had given rational answers during cross examination as well, also justifying her competence to give evidence before the court. In such a case, there is no necessity to disbelieve PW2 in any manner, and merely because the Investigating Officer had not given much emphasis to take note of the intellectual disability, if any, of the victim, that by itself would not take away the entire prosecution case. Therefore, the verdict is liable to be confirmed.

8. Having addressed the rival contentions, the points arise for consideration are:

(i) Whether failure on the part of the Investigating Officer during investigation to find the status of the victim as a mentally disabled person would be fatal to the prosecution?

(ii) What are the essentials under Section 118 of the Indian Evidence Act and under Section 124 of Bharatiya Sakshya Adhiniyam, 2023 ('BSA' for short hereafter) to consider the competence of a witness to testify before a court of law?

(iii) Whether the Special Court went wrong in finding that the appellant/2nd accused committed the offence of rape on PW2?

(iv) Is it necessary to interfere with the judgment in any manner?

(v) The order to be passed?

Points (i) and (ii)

9. Section 118 of the Indian Evidence Act, which is corresponding to Section 124 of BSA deals with 'who are the persons competent to testify before a court? As per Section 118 of the Indian Evidence Act, all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. Explanation to Section 118 of the Indian Evidence Act provides that, a lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational

answers to them. Coming to Section 124 of BSA, instead of the word 'lunatic' used in the explanation, 'a person of unsound mind' has been used. In all other respects, Section 118 of the Indian Evidence Act and Section 124 of the BSA are similarly worded.

10. As held by the Apex Court in *Ramesh P. v. State rep. by Inspector of Police's case* (supra) and in the other decision, in order to determine the competency of a child witness, the Judge has to form her or his opinion and for which voir dire (to speak the truth) examination can be opted to find out the competency of the child witness with a view to find out the capability of a child witness to understand the occurrence witnessed and to speak the truth before the Court and in criminal proceedings, a person of any age is competent to give evidence if the person is able to understand the questions put to the person and can give such answers to the questions by understanding the questions. Similarly, a lunatic or a person of unsound mind also is not incompetent to testify unless, due to lunacy or because of unsound mind, he is prevented by lunacy or unsound mind to understand the questions put to him or of giving rational answers to the questions. Here PW2 is a victim partially handicapped and little bit mentally challenged. But she could not be classified as a lunatic. On going through the evidence given by PW2, it could be seen that, on finding the witness as a physically and mentally challenged person, the court opted to proceed with a voir dire examination and put pertinent questions to form an opinion that she was competent to testify before the court. Thereafter, she was examined in chief and cross examined, and she had given rational answers after understanding the questions put to her and nothing extracted even during cross examination to show that her partial mental infirmity in any way prevented her from understanding the questions put to her for which she had given rational answers. It is true that during the cross examination of PW13, the Investigating Officer, he was asked whether he had noticed the mentally retarded status of PW2 at the time when her statement was recorded. He stated that he could not identify the said status. This answer would show that the Investigating Officer when recorded the statement of PW2, she had given rational answers like a person of no mental infirmity. PW13 had given candid evidence during chief examination that he had taken charge of the investigation in this case on 22.08.2011 and recorded the statement of the victim on 30.08.2011 through a woman police constable in the presence of the brother of the victim. In all other aspects, PW13 had given evidence supporting the investigation. In fact, in view of the discussions, the challenge raised by the learned counsel for the appellant/2nd accused that failure on the part of the Investigating Officer to notice the fact that PW2 is a mentally challenged girl would go to the root of the matter, would not have force to be acted upon. Therefore, this contention is rejected.

Points (iii) to (v)

11. In this case, the learned Additional Sessions Judge relied on the evidence of PW2 regarding commission of rape by the 2nd accused against her. PW2 deposed

that she was familiar with Raman and Appukuttan, who were nearby residents. Of them, Raman had died, while Appukuttan was present in court and was identified by the accused at the dock. She deposed further that Appukuttan used to call her to his house stating that he would give her sweets, anklets etc. and she also used to go to his house. While she was at the house of Appukuttan, he pressed on her 'paappa' and she showed her breast as the 'paappa'. Her version further is that, thereafter he had committed the overt act on her 'kunjamani'. She deposed further that Appukuttan removed her dress and laid her on the cot at his house. She deposed further that the term 'kunjamani' referred was pertaining to her urinal organ, i.e, vagina. She stated further that the accused inserted his penis into her kunjamani (vagina) and repeatedly done this and she didn't know exactly to say how many times he had done so. She also deposed that she had given statement in this regard before the police and she identified M.O1 as the churidar top and M.O2 as the pants she wore. She deposed further that she had been studying in 9th standard and she had informed this case to her teachers. She didn't disclose the same earlier because she was afraid of her mother. She was subjected to cross examination as to who were present at the time of recording her statement and she had positively answered that it was in the presence of her brother Krishnadas, the police recorded her statement. She had also given evidence that Krishnadas was studying in 10th standard and there were houses nearby her house. She also answered the query regarding her knowledge of the houses of Jyothy, Ammukutty, Velayudhan, Manikyan, Sarasu, Rajan, Vasu as her nearby residents and stated that none of the neighbours had ever heard the accused calling her. Thus she had given rational answers and she specifically denied the suggestion that the accused had never committed any act of sexual assault. Then the evidence of PW2 is trustworthy to be relied on safely.

12. PW7, the Doctor who medically examined the victim (PW2) was examined before the court to prove Ext.P4 certificate issued by her after examination of the victim and during examination PW7 supported Ext.P4, which would suggest that 'on examination it was found that 'hymen torn, admits two fingers. My opinion is that there is evidence of part of vaginal penetration'. Similarly, the potency test of the appellant/2nd accused was at the helm of PW6. During examination PW6 deposed that he had examined the appellant/2nd accused and had issued Ext.P13 certificate which would show that "there is nothing to suggest that the above person (accused) is incapable of performing the sexual act'.

13. The mother of PW2, the first informant, was examined as PW1. According to her, while PW2 was studying in Elappully Higher Secondary School she was called to Kasaba police station with PW2 from where she had given the F.I Statement, which got marked as Ext.P1. She had also caused production of MO1 and MO2 to the police during investigation.

14. PW4 is the Class Teacher of PW2. She testified that she was told by PW3, the facts disclosed by PW2 during the counselling regarding the sexual assault committed by two elder persons on PW2.

15. PW5 is the Headmaster of Govt. A.P.H.S.S Elappully. Ext.P2 is the certificate issued by this witness to the effect that the date of birth of PW2 as per the admission register maintained at the School is 16.05.1996. Thus the stature of PW2 as a minor also is proved.

16. The F.I Statement was recorded by PW12, the Sub Inspector of Police, Kasaba police station. He had registered Ext.P1(a) as crime No.407/2011 of that police station for offence punishable under section 376 read with Sec. 34 of I.P.C. The initial part of investigation was also conducted by PW12 who had inspected the scene of occurrence and prepared a scene mahazar which got attested by PW9 and marked as Ext.P5. He had arrested both the accused. Exts. P7 and P8 are the arrest memos and inspection memos prepared by PW12. Ext. P9 is the plan prepared by the Village officer, Elappully No. II village pertaining to the scene of occurrence. PW12 had filed Ext.P10 to include the name and address of the accused in the F.I.R..

17. On reading the evidence as a whole, the commission of rape by the appellant/2nd accused against PW2 is proved beyond reasonable doubt and in such view of the matter, the 1st Additional Sessions Judge is right in holding that the accused committed the offence punishable under Section 376 of IPC and as such conviction doesn't require any interference.

18. Coming to the sentence, sentence also found reasonable in the back ground facts of this cse. Hence no interference with the sentence is also necessary.

19. Therefore, the appeal fails and is accordingly dismissed.

Registry is directed to forward a copy of this order to the jurisdictional court for compliance and further steps.