

Biju Vs. State of Kerala

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Court : Kerala

Decided On : Feb-04-2013

Judge : Honourable Mr.Justice P.Bhavadasan

Appellant : Biju

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE P.BHAVADASAN MONDAY, THE 4TH DAY OF FEBRUARY 2013 15TH MAGHA 193 CRL.A.No. 850 of 2004 (A) ----- AGAINST THE JUDGMENT & CONVICTION DATED 19 05.04 AND SENTENCE DATED 22 05.2004 OF THE ADDITIONAL SESSIONS JUDGE (ADHOC)-II, KOLLAM IN SC NO.403/2000 APPELLANT(S)/ACCUSED: ----- BIJU, S/O.SAMUAL, OLIPPURATHUPURAYIL, CHARUVILA PUTHENVEETIL, VARINJAM CHERRY KALLUVATHUKKAL VILLAGE, KOLLAM. BY ADVS.SRI.JOHN BRITTO SRI.C.A.RAJEEV RESPONDENT(S)/COMPLAINANT: ----- STATE OF KERALA, REP. BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA ERNAKULAM REP. THE SUPERINTENDENT OF POLICE CRIME DETACHMENT, KOLLAM. BY PUBLIC PROSECUTOR SRI.ROY THOMAS THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 04-02-2013, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: P.BHAVADASAN, J.

----- Dated this the 04th day of February, 2013

JUDGMENT

The accused was prosecuted for the offences punishable under Sections 323 and 376 of IPC. He was found guilty on both counts. Therefore he was convicted and sentenced to undergo rigorous imprisonment for 5 years and to pay a fine of Rs. 15,000/- under Section 376(1) of IPC in default of payment of which he had to suffer simple imprisonment for 6 months. Accused was also directed to pay a compensation of Rs. 50,000/- in default of payment of which had to suffer simple imprisonment for 18 months.

2. The incident which gave rise to the case is said to have occurred on 25.10.1996 at about 11.00 am. PW1, the victim was alone in her house. She was engaged in household work. She is staying with her brothers and mother who had gone out for work. The accused, who is the neighbour of the victim on realizing that the victim was all Crl.A.No.850/2004 -2- alone in her house, trespassed into the house of the victim and after having dragged her into a room of their house violated her body. When she resisted, she was assaulted also. On the same day itself PW1 laid Ext.P1, First Information Statement. PW8 recorded Ext.P1 statement and registered crime as per Ext.P1, FIR. Investigation was taken over by PW9. He had the victim sent for medical examination. PW4 examined the victim and furnished Ext.P2 certificate dated 25.10.1996. Material objects produced was seized by PW10 and he recorded the statement of the few witnesses. Investigation was continued by the successor officer who ultimately laid charge before the court.

3. The JFCM-I, Paravur before whom the final report was laid took cognizance of the offence. Finding that the offence is one exclusively triable by a court of sessions. The said court committed the case to Sessions Court, Kollam under Section 209 of Cr.P.C.

4. The sessions court on receipt of the records and Crl.A.No.850/2004 -3- on appearance of the accused, framed charges for the offences punishable under Sections 323 and 376 of IPC.

5. To the charge, the accused pleaded not guilty and claimed to be tried. The prosecution therefore examined PWs 1 to 11 and had Exts.P1 to P10 marked. Mos 1 to 3 were also got identified and marked. Court exhibits were known as C1 to C1(b). After the close of prosecution evidence, the accused was questioned under Section 313 of Cr.P.C. He denied all the incriminating circumstances brought out in evidence and maintained that he is innocent. He however stated that the victim and he were of the same age and were neighbours. He denied having gone to the house of the victim on 25.10.1996 and committed the objectionable act. He would further say that the victim was in the habit of visiting his house often and they were in love and they used to engage in sex then. On the date of incident at 7.30 in the morning, he claimed that the victim who had gone to fetch water from the Panchanyath well had CrI.A.No.850/2004 -4- come to his house and embraced him. He says about the unnatural act committed by the victim. He would say that one Philip who had ravished the lady and they wanted him to marry her. He goes a step further and says that the victim was in the habit of indulging in sex with several persons.

6. Finding that the accused could not be acquitted under Section 232 of Cr.P.C. he was asked to enter on defence. He examined DW1. On an appreciation of the evidence in the case, the trial court found the evidence of PWs 1 to 3 trustworthy and acceptable and on the basis of their evidence came to the conclusion that the offences have been made out. Accordingly the accused was found guilty and he was therefore convicted and sentenced as already mentioned. The conviction and sentence are assailed in this appeal.

7. The learned counsel appearing for the appellant assailed the finding on several grounds. It was pointed out CrI.A.No.850/2004 -5- by the learned counsel that the FSL report cannot be relied on for the purpose of finding the prosecution for the simple reason that the blood sample of the accused was not taken and examined by the Chemical Analyst. The mere fact that sperms or spermatozoon has been detected in the cloth said to have been worn by the victim at the relevant time does not advance the case of the prosecution unless it is seen that it is actually belonged to the accused. The learned counsel also assailed the findings of the court below accepting the evidence of PWs 1 to 3. At any rate, according to the

learned counsel, the sentence imposed is on the high side. Considering the fact that the accused hails from the lower strata, some leniency may be shown in that regard.

8. The learned Public Prosecutor on the other hand pointed out that the court below had analysed the evidence of PWs 1 to 3 and found those items of evidence to be acceptable. There is no reason as to why PW1 to falsely implicate the accused. The evidence of PW2 would clearly CrI.A.No.850/2004 -6- show, according to the learned counsel, that he had occasion to see the accused going in and coming out from the house of the victim and then hearing the cry of the victim when he reached the place, he saw the victim in a shattered position. PW3's evidence shows that she had occasion to see the accused going in and coming out the house at the same time. The medical evidence would clearly show that the claim of assault and sexual violence is correct.

9. In short, according to the learned Public Prosecutor, there are no grounds made out to interfere with the finding of the lower court and the appeal is only to be dismissed.

10. After having heard the learned counsel for the appellant and learned Public Prosecutor and after having perused the records, this Court finds no justifiable ground to interfere with the findings of the court below. CrI.A.No.850/2004 -7- 11. PW1 is the victim in this case. Her evidence shows that on the date of incident while she was all alone in her house the accused forced himself into her house. At the relevant time, she was engaged in cooking in the kitchen. She was dragged from there. She was gagged and she was taken to the room on the southern side. When she resisted, she was slapped and thereafter she was sexually assaulted. The evidence of PW2 is to the effect that on the date of incident, at about the time when he was coming to his house, he had occasion to see the accused going to the house of the victim. He would say that he then thought that accused had gone to the house of PW1 to meet her brother. A short while thereafter, going by the evidence of PW2, he heard cries from the house of the victim and he and his wife rushed to the place. They saw the victim in a total disarray. She narrated the incident to PW2. PW3, the wife of PW2 says about having seen the accused

running away from the place after the incident. The evidence of PWs 2 and 3 are CrI.A.No.850/2004 -8- assailed on the ground that PW2 is closely related to PW1 and PW3, is none other than the wife of PW2.

12. It is not disputed before this Court that PWs 2 and 3 are neighbors of the victim. The statement given by PW2 that he was going home at the relevant time and had occasion to see the accused going inside the house is not seriously challenged in the cross examination. So in the statement of PW3 that she had occasion to see the accused running away from the spot. Merely because PW2 is related to the victim, is not a ground to believe version given by the PW2 unless it is shown that it is otherwise open to serious doubt. No such infirmity is pointed out in the evidence of either PW2 or PW3.

13. It is significant to notice that Ext.P1 FIS comes into existence almost within a few hours of the incident. It gives the details of incident. That sufficiently corroborates the version given by PW1 and dispels any possibility or embellishment or development for false implication. CrI.A.No.850/2004 -9- 14. Then there is the evidence of PW4, doctor who had examined the victim. Ext.P2 is the certificate furnished by PW4. That shows contusion near hymen and also a torn hymen. His opinion is that there is evidence of sexual assault. It is significant to notice that the examination of the victim was soon after the incident.

15. The criticism leveled that FSL report which shows the presence of sperms and spermatozoon on the cloths said to have been worn by the victim at the relevant time for want of samples of blood taken from the accused without any basis at all. Even assuming that the said item of evidence is not taken into consideration, there is evidence furnished by PWs 1 to 3 and so also corroboration received from the evidence of PW1 with reference to Ext.P1 are sufficient to show that prosecution had succeeded in establishing the case against the accused.

16. Further, it has been noticed that at the time of questioning under Section 313 of Cr.P.C. the accused had CrI.A.No.850/2004 -10- given a totally different story which is not even suggested to PW1 at the time of evidence. He had attempted to give a false explanation. This also has to be taken into consideration while appreciating the prosecution evidence.

17. It was the above items of evidence which had persuaded the court below to come into a conclusion that the prosecution had succeeded in establishing the case against the accused.

18. It is contented on behalf of the appellant that the evidence adduced by the defence shows that PW1 was aged 19 at the relevant time and that would be sufficient to show that if at all any incident has taken place as alleged it was with her consent. The above contention has only to be rejected in the light of the evidence adduced by the prosecution. The evidence of assault and the resistance offered by PW1 would clearly dispel any consent on her part. The evidence of PWs 2 and 3 and the way in which PW1 was found at the time when PWs 2 and 3 reached the house also CrI.A.No.850/2004 -11- would dispel the claim of consent.

19. This Court therefore finds no infirmity in the finding of the court below that the prosecution has succeeded in establishing the case against the accused. The accused was found rightly guilty of the offence attributed to him. He was rightly convicted for the said offences. However, one needs to notice that the court below has imposed a sentence of only 5 years without giving any justifiable reason for doing so. Further after having imposed fine under section 357(1) of Cr.P.C. one fails to understand how separate compensation could have been granted under Section 357 (3) of the Cr.P.C. It is well settled that when fine is imposed under Section 357(1) of Cr.P.C. compensation can be awarded only out of the fine amount (See decision in State of Madhyapradesh v. Ballare (2006 1 SCC (CrI.) 32)). So that portion of the sentence awarding compensation under section 357(3) cannot be sustained. CrI.A.No.850/2004 -12- 20. In the result, while confirming the conviction and sentence of the accused for the offences punishable under sections 323 and 376 of IPC, award of compensation under 357(3) of 50,000/- is set aside. In view of the fact that a fine of 15,000/- has been imposed under Section 376(1) of the Cr.P.C. if the fine amount is realized, the same shall be paid to PW1 as compensation. It is seen that the accused is seen convicted for the offence punishable under Section 323 IPC but no sentence is seen awarded. It seems to be an irregularity. But there is no appeal by state as against the non awarding of sentence for the offence under section 323 of IPC. In the above modification, the appeal stands dismissed. Sd/- P.BHAVADASAN, JUDGE ds //TRUE COPY// P.A.

TO JUDGE

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