

**Surendran Vs. the State of Kerala**

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**SooperKanoon Citation :** [sooperkanoon.com/1014539](http://sooperkanoon.com/1014539)

**Court :** Kerala

**Decided On :** Jan-31-2013

**Judge :** Honourable Mr.Justice. P.S.Gopinathan

**Appellant :** Surendran

**Respondent :** The State of Kerala

**Judgement :**

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE. P.S.GOPINATHAN THURSDAY, THE 31ST DAY OF JANUARY 2013 11TH MAGHA 193 CRL.A.No. 317 of 2004 (B) ----- (AGAINST THE ORDER/JUDGMENT IN SC.NO.320/2000 of ADDL.SESIONS COURT (ADHOC -2), THRISSUR DATED 17 02-2004) -----

APPELLANT(S)/ACCUSED:-

----- SURENDRAN, S/O. PENGAN, AGED 4 YEARS, THEKKUT HOUSE, CHENGALUR VILLAGE, SNEHAPURAM DESOM, LAKSHAM VEEDU COLONY, MUKUNDAPURAM TALUK. BY ADVS.SRI.C.A.CHACKO SMT.C.M.CHARISMA SMT.SONIYA.M

RESPONDENT(S)/COMPLAINANT:- -----

THE STATE OF KERALA, REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM. BY PUBLIC PROSECUTOR SRI.N.SURESH THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 31-01-2013, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: sts P.S.GOPINATHAN, J.



offences u/s 451 & 376 of I.P.C. It was read over and explained to the appellant to which he pleaded not guilty. Therefore, the appellant was sent for trial. On the side of the prosecution, PWs.1 to 13 were examined. Exts.P1 to P17 were marked. PW1 being mentally retarded, she was examined with the assistance of a clinical Psychologist, who was shown as CW1. During the course of examination of PW2, Ext.D1, a portion of the C.D.statement was marked. Exhibit C1, the report submitted by CW1 was marked. Five material objects were marked as M.Os.1 to 5. After closing the evidence for the prosecution, the appellant was questioned u/s 313(1)(b) of CrI.A.No.317 OF 200.4 the Code of Criminal Procedure. He took a plea of total denial and further stated that his twin brother, Sukumaran used to go to the house of Pws. 1 and 2. Sukumaran was addicted to toddy and ganja and was not aware whether he, who looks alike, might have done it. While the appellant was under detention, Sukumaran committed suicide. PW2 and her husband were on enimical terms with the appellant and that they had been allowing consumption of toddy and playing cards in their house. Since the appellant blocked the visit of Sukumaran to the house of PW2, PW2 and her husband were on bitter terms. However, no defence of evidence was let in. The learned Additional Sessions Judge on appraisal of the evidence arrived at a finding that there was no rape, but attempt to commit rape and criminal house trespass were established. Accordingly, the appellant was found guilty for offence u/s 451 and 511 of 376 of I.P.C. and convicted thereunder. After hearing the appellant, he was sentenced to rigorous imprisonment for 5 years and a fine of Rs.25,000/-, with a CrI.A.No.317 OF 200.5 default sentence of rigorous imprisonment for one year for offence u/s 376 read with 511 of I.P.C. No separate sentence was awarded for offence u/s 451 I.P.C. Aggrieved by the above conviction and sentence, this appeal was preferred.

4. I have heard Advocate Sri. C.A.Chacko, the learned counsel appearing for the appellant and N.Suresh, the learned Government Pleader. Perused the judgment impugned as well as the evidence.

5. Pws.1 and 2 had given evidence supporting the prosecution case. Pws.3 and 4 were cited as attestors to seizure mahasars. But they didn't support the prosecution case. They were declared hostile. PW5 is an attestor to Exts. P4 to

P6, the scene mahasar and two seizure mahazars. PW6 is the Village Officer who prepared Ext.P7 sketch. PW7 is the Assistant Surgeon attached to Government hospital, Puthukad. Ext.P8 is the wound certificate issued by him. Ext.P9 is the intimation given by him to the Police. PW8 is the Assistant Professor in CrI.A.No.317 OF 200.6 Obstetrics and Gynaecology working at Medical College Hospital, Thrissur. Ext.P10 is the wound certificate issued by PW8. PW9 is the Medical Officer who examined the appellant and issued Ext.P11 potency certificate. PW10, the Head Constable proved Ext.P1 and P12. PW11 is the Assistant Commissioner of Police who conducted the investigation. PW12 is the Circle Inspector of Police who was examined to prove Ext.P16, the report of the Chemical Examiner. PW13 is the Medical Officer who examined PW1 and issued Ext.P17 certificate, certifying the age of PW1.

6. Carefully going through the evidence of Pws.7 and 8 and through Exts.P8 and P10, I find that there is no supporting medical evidence of rape. Both of them are consistent that there was no sign of any rape or even an attempt of rape as there was no injury noticed. PW7 examined PW1 on 16/10/1996, that is, on the 5th day of the alleged incident. PW8 examined PW1 two days thereafter. PW8 didn't notice any injury. Because of the passage of CrI.A.No.317 OF 200.7 time, injuries especially minor injuries would have been healed without any mark. However, their evidence would no way support the prosecution case. The question then remains is whether the evidence of Pws.1 and 2, the victim and her mother is believable to come to a conclusion regarding the criminal house trespass and attempt to commit rape.

7. Admittedly, PW1 is a mentally retarded girl. She was 16 years old at the time of the occurrence. PW2 was not in the house at the time of occurrence. She has only hearsay information. PW1 didn't report the alleged incident and the matter came to light on enquiry when PW2 noticed some difficulty while PW1 walking, probably because of some infection that she had suffered. Though PW1 was taken to PW7, PW1 didn't allow PW7 to examine her. Therefore, PW7 could not examine her and to give any evidence, either supporting or not supporting the prosecution case. It is two days later PW2 was taken to PW8. Then it was a week after the incident. According to CrI.A.No.317 OF 200.8 PW8, small injuries would disappear by the

lapse of time. Therefore, her evidence as mentioned earlier is not helpful. Though PW1 was subjected to a searching cross examination, no material was disclosed to disbelieve her. Her evidence would show that while she was alone at the side of the baby in the cradle, the appellant entered the house, PW1 was taken to the bed room and her dresses were removed. The appellant then lay over her. Appellant thrust something into her. There is nothing on record to show that PW1 resisted the appellant. She was not able to resist as she couldn't understand. So, there is little chance for PW1 or the appellant sustaining any injury during the course of resistance. However, the evidence of PW8 would show that the appellant could not successfully penetrate PW1. The evidence of PW2 would show that when she enquired PW1 regarding her difficulty in walking PW1 narrated the incident. It is on that basis PW1 was taken to the Police station and gave Ext.P1 first information statement. PW2 was subjected to an CrI.A.No.317 OF 200.9 aggressive cross examination even alleging that she was a lady of loose morals and people around the locality didn't like her. The statement of the appellant when questioned u/s 313 Cr.P.C. would show that in fact the appellant had no such case of any loose morality against PW2. What was stated by the appellant is that at the house of PW2, her husband or some people were taking toddy regularly and playing cards. Whatever it be, what is crucial to note is that nothing is revealed at to show that PW2 or her husband had got any axe to grind against the appellant to cook up a case, that too at the cost of the modesty of PW1, a mentally retarded girl. Of course, some wild allegations were made with no merit. Critically going through the evidence and the impugned judgment, I find little reason to reject the evidence of PWs.1 and 2. There is also no reason to come to a conclusion that the appellant was falsely implicated.

8. The learned counsel for the appellant would vehemently argue that the twin brother of the appellant CrI.A.No.317 OF 200.10 might have been the assailant and that at one stretch of cross examination, PW1 had stated that the appellant had never gone to the house of PW1. Admittedly, the victim and the appellant are rural folk and they are residing in a one lakh housing colony. The evidence of PW1 that the appellant had never gone to her house appears to be either a slip of tongue or without understanding the question put to her. There is nothing revealed out to show that either PW1 or PW2 had got any mistaken identity between the

brothers. Critically going through the evidence of PWs.1 and 2, I find that there are some minor discrepancies, which in my opinion are discrepancies of truth. Reading the evidence of PWs.1 and 2 as a whole, I concur with the trial court to believe PWs.1 and 2. Criminal trespass and attempt to rape by the appellant was deposed in unambiguous terms. Therefore, the argument of the learned counsel for the appellant regarding the mistaken identity is without any merit. I find that the conviction under challenge is unassailable. Crl.A.No.317 OF 200.11 9. Regarding the sentence, having due regard to fact that both the victim and the appellant were belonging to lower strata of the society and that the appellant is the sole bread winner of the family and that PW2 is now admitted in an orphanage, I find that the sentence awarded by the lower court is a little bit excessive and that a sentence of rigorous imprisonment for three years would meet the ends of justice. In the result the appeal is allowed in part. While confirming the conviction the sentence is reduced to rigorous imprisonment for three years. The trial court shall see the execution of the sentence and report compliance. P.S.GOPINATHAN, JUDGE. stu

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