

Udayakumar Vs. State of Kerala

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Court : Kerala

Decided On : Jul-30-2013

Judge : Honourable Mr.Justice P.Bhavadasan

Appellant : Udayakumar

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE P.BHAVADASAN TUESDAY, THE 30TH DAY OF JULY 2013 8TH SRAVANA, 1935 CRL.A.No. 836 of 2009 ----- AGAINST THE JUDGMENT IN SC 311/2005 of ADDL.SESIONS COURT (ADHOC -I), KALPETTA DATED 27 04-2009 APPELLANT/ACCUSED: ----- UDAYAKUMAR, AGED 3 YEARS, S/O.KRISHNAN NADAR, VENNIYKJLOOR, NELLIVILA P.O. THIRUVANANTHAPURAM. BY ADV. DR.GEORGE ABRAHAM RESPONDENT/COMPLAINANT: ----- STATE OF KERALA, REP.BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM. BY PUBLIC PROSECUTOR SRI. DHANESH MATHEW MANJOORAN. THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 30-07-2013, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: P.BHAVADASAN, J.

----- Crl. Appeal No.836 OF
200.------ Dated this the 30th day of July, 2013.

JUDGMENT

The accused was prosecuted for the offences punishable under Sections 366A and 376 of Indian Penal Code. He was found guilty of offences under Sections 363 and 376 IPC and was therefore, convicted and sentenced to suffer rigorous imprisonment for a period of three years and to pay a fine of Rs.10,000/- under Section 363 IPC and also sentenced to suffer rigorous imprisonment for a period of five years under Section 376 IPC. It was also directed that if the fine amount is realised, the same shall be paid to PW5 as compensation. Default clause was also added. The substantive sentences were directed to run concurrently. Set off as per law was also allowed.

2. PW5 is the victim in this case. She was studying in the 9th standard at the relevant time. PW2 is her brother. On 27.11.1989, as usual, the victim went to school from her house. Usually she returns home by 4.30 p.m. On the date of the CrI. Appeal No.836/2009 2 incident, she did not do so. PW2 would say that he and others went in search of the victim and they reached the school and asked the teacher and they were told that she had not come to school on the day at all. They also enquired with some of the students who usually go to school along with the victim. They also replied that she had not come to school on that day. Initially PW2 believed that she might have gone to her friend's house. Unable to locate her, on 28.11.1989, Ext.P2 First Information Statement was laid.

3. PW9 recorded the First Information Statement furnished by PW2 and registered a crime as per Ext.P2(a) First Information Report. During investigation, the investigating officer was learnt that the victim had been enticed away by the accused and that she was subjected to sexual intercourse. Accordingly, Ext.P5 report was filed. Later on the victim and the accused were located and when they were brought to the Police Station, PW5, the victim was sent for medical examination. PW7 doctor examined the victim on 10.02.1990 and issued Ext.P4 certificate. PW9 filed a report showing the details of the accused. PW8, after CrI. Appeal No.836/2009 3 verifying the records, laid charge before court.

4. The court before which final report was laid took cognizance of the offence and on finding that the offences are exclusively triable by a Court of Sessions, the case

was committed to Sessions Court, Wayanad. The said court made over the case to Additional Sessions Court (Adhoc -I), Kalpetta for trial and disposal. The latter court, on receipt of records and on appearance of the accused, framed charges for the offences punishable under Sections 366A and 376 IPC. To the charge, the accused pleaded not guilty and claimed to be tried. The prosecution therefore had PWs 1 to 9 examined and Exts.P1 to P8 marked.

5. After the close of the prosecution evidence, the accused was questioned under Section 313 Cr.P.C. He denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent. He also stated that he has been falsely implicated in the matter.

6. On finding that the accused could not be acquitted under Section 232 Cr.P.C, he was asked to enter on his defence. But he Crl. Appeal No.836/2009 4 chose to adduce no evidence.

7. The court below, mainly relying on the evidence of PW5, the victim and also Ext.P8 certificate showing her date of birth, found that even though the victim had voluntarily gone along with the accused, since she was below the age of 16 years at the relevant time, the offence had been committed and accordingly, the accused was convicted and sentenced as already mentioned. The said conviction and sentence are assailed in this appeal.

8. Learned counsel appearing for the appellant contended that a reading of the evidence of PW5 is sufficient to show that story of kidnapping, abduction and enticement are without foundation and that the victim had gone voluntarily along with the accused to various places. It is pointed out that even assuming that there was sexual intercourse, the real issue involved is the age. The court below has chosen to accept Ext.P8 certificate which is said to be an extract of the entries in the Birth and Death Register maintained by the local authority. Learned counsel invited the attention of this Court to the name of the child shown in the said document. The name of the child is Crl. Appeal No.836/2009 5 shown as 'Eliamma'. According to the learned counsel, the prosecution has not adduced any evidence to show that PW5 who is known as Bindu is also known as Eliamma and unless that identity is established, Ext.P8 could not have been

accepted as conclusive evidence of proof.

9. In support of the above contention, learned counsel appearing for the appellant relied on the decisions in Govinda Pillai Sukumara Pillai vs. Lekshmi Amma Kochappi Amma (1957 KLT 804), S.Varadarajan vs. State of Madras (1965 KHC 584) and in Suresh Babu vs. State of Kerala (2001 (1) KLT 80).

10. According to the learned counsel for the appellant, the above decisions clearly show that in such cases unless the identity is established, it could not be said that the certificate relates to the victim concerned. It is significant to notice, according to the learned counsel, that PW9 the investigating officer has not bothered to find out whether Ext.P8 relates to the victim at all. He has not verified the relevant records and also not attempted to fix the identity of the victim as one covered by Crl. Appeal No.836/2009 6 Ext.P8. The court below was not justified in coming to the conclusion that since the statement by PW5 is that the date of birth is as shown in Ext.P8, there is no need for further proof. According to the learned counsel, there was a suggestion to PW5 that she has not stated the correct date of birth. The cross examination of PW9 would reveal that he had not made any attempt to verify the records. Unless the prosecution proves that the name Bindu was Christianed as Eliyamma, it could not be said that Ext.P8 relates to the victim. If Ext.P8 is to be eschewed, there is no other evidence regarding the age of the victim and in that case, the accused is entitled to benefit of doubt.

11. Learned Public Prosecutor, per contra, contended that the evidence of PW5 is clear to the effect that her date of birth is 24.02.1976 and that is not seriously challenged in cross examination. There is no reason to disbelieve PW5 when she says that at the time of Christianing, she was named Eliyamma and she is also known as Eliyamma. According to the learned Public Prosecutor, there is nothing to show that Ext.P8 relates to Crl. Appeal No.836/2009 7 any other child of the parents of PW5. The evidence of PW5, according to the learned Public Prosecutor, is sufficient to show that the accused had taken her to various places and they had sexual intercourse. If further evidence is required in that regard, that is furnished by the medical evidence. The evidence of PW7 doctor taken along with Ext.P4 is sufficient to establish the said fact.

12. According to the learned Public Prosecutor, there is nothing to doubt the version given by PW5 regarding her date of birth and the court below was fully justified in accepting her evidence as conclusive proof of her date of birth. It is contended that no grounds are made out to interfere with the findings of the court below.

13. The evidence regarding the actual incident is given by PW5 who is the victim. Her evidence needs to be referred to. She was studying in the 9th standard at the relevant time. It would appear from her evidence that the accused was a servant in her house and they had developed affinity towards each other and later on they eloped. She, in her evidence, mentions various CrI. Appeal No.836/2009 8 places they had gone and ultimately when they came to the native place, they were taken into custody by the Police. She in no less terms says that there was no kidnapping or abduction on the part of the accused. Therefore, it is clear that the victim had gone voluntarily along with the accused. But, as pointed out by the learned Public Prosecutor, Ext.P4 certificate issued by PW7 shows that PW5 was subjected to sexual intercourse. Even assuming that the evidence of PW5 also can be taken in this regard, the larger question that arises for consideration is whether the age of the victim is proved.

14. In fact, the real issue involved in the case is whether the prosecution has established that the date of birth of the victim is 24.02.1976. The prosecution relies on Ext.P8 for the said purpose and also the testimony of PW5 to the effect that her date of birth is 24.02.1976. It is not correct to say that there is no challenge with regard to the version given by PW5. But, what is more significant is the evidence of PW9, the investigating officer. He was cross examined at length. With regard to this aspect, he in no less terms says that he had not verified the CrI. Appeal No.836/2009 9 records based on which Ext.P8 was issued. He also admitted that he had not verified whether the victim is also known as Eliyamma. He says that he had not bothered to get the extract of the school register. He also says that he does not know in whose favour Ext.P8 has been issued. He also deposes that he does not know who has drawn up the said document. Finally he says that on questioning the victim, she had admitted that she had a sister. In another portion, he would say that he had not questioned the victim at all.

15. It will be only appropriate to refer to the decision in Govinda Pillai Sukumara Pillai vs. Lekshmi Amma Kochappi Amma (1957 KLT

804) wherein it was held as follows: "It is not safe to accept a mere entry in the birth register as proof of the age of the child concerned without some evidence or admission of the parties about the identity of the parents and the child mentioned in the register".

16. In the decision in S.Varadarajan vs. State of Madras (1965 KHC 584), it was held in paragraph 7 as follows: "7. The question whether a minor can abandon the guardianship of his or her own guardian and it so the Crl. Appeal No.836/2009 10 further question whether Savitri could, in acting as she did, be said to have abandoned her father's guardianship may perhaps not be very easy to answer. Fortunately, however, it is not necessary for us to answer either of them upon the view which we take on the other question raised before us and that is that "taking" of Savitri out of the keeping of her father has not been established. 'The offence of "kidnapping from lawful guardianship" is defined this in the first paragraph of S. 361 of the Indian Penal Code: "Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian is said to kidnap such minor or person from lawful guardianship." It will thus be seen that taking or enticing away a minor out of the keeping of a lawful guardian is an essential ingredient of the offence of kidnapping. Here, we are not concerned with enticement but what we have to find out is whether the part played by the appellant amounts to "taking" out of the keeping of the lawful guardian of Savitri. We have no doubt that though Savitri had been left by S. Natarajan at the house of his relative K. Natarajan she still continued to be in the lawful keeping of the former but then the question remains as to what is it which the appellant Crl. Appeal No.836/2009 11 did that constitutes in law "taking". There is not a word in the deposition of Savitri from which an inference could be drawn that she left the house of K. Natarajan at the instance or even a suggestion of the appellant. In fact she candidly admits that on the morning of October 1st, she herself telephoned to the appellant to meet her in his car at a certain place, went up to that place and finding him waiting in the car

got into that car of her own accord. No doubt, she says that she did not tell the appellant where to go and that it was the appellant himself who drove the car to Guindy and then to Mylapore and other places. Further, Savitri has stated that she had decided to marry the appellant. There is no suggestion that the appellant took her to the Sub-Registrar's office and got the agreement of marriage registered there (thinking that this was sufficient in law to make them man and wife) by force or blandishments or anything like that. On the other hand the evidence of the girl leaves no doubt that the insistence of marriage came from her side. The appellant, by complying with her wishes can by no stretch of imagination be said to have taken her out of the keeping of her lawful guardian. After the registration of the agreement both the appellant and Savitri lived as man and wife and visited different places. There is no suggestion in Savitri's evidence, who, it may be mentioned had attained the age of discretion and was on the verge of attaining majority that she was made by the appellant to accompany him by administering any threat to her or by any blandishments. The fact of her accompanying him the appellant all along is quite consistent with Savitri's own desire to be the wife of the appellant in which the desire of accompanying him wherever he went was of course implicit. In these circumstances we find nothing from which an inference could be drawn that the appellant had been guilty of taking away Savitri out of the keeping of her father. She willingly accompanied him and the law did not cast upon him the duty of taking her back to her father's house or even of telling her not to accompany him. She was not a child of tender years who was unable to think for herself but, as already stated, was on the verge of attaining majority and was capable of knowing what was good and what was bad for her. She was no uneducated or unsophisticated village girl but a senior college student who had probably all her life lived in a modern city and was thus far more capable of thinking for herself and acting on her own than perhaps an unlettered girl hailing from a rural area. The learned Judge of the High Court has referred to the decision in *Abdul Sathar v. Emperor*, 54 Mad LJ 456.(AIR 192.Mad

585) in which it was held that where the evidence disclosed that, but for something which the accused consented to do and ultimately Crl. Appeal No.836/2009 13 did, a minor girl would not have left her husband's house, or would not have been able to leave her husband's house, there was sufficient taking in law for the purpose of

S. 363 and expressing agreement with this statement of the law observed: "In this case the minor, P. W. 4, would not have left the house but for the promise of the appellant that he would marry her." Quite apart from the question whether this amounts to blandishment we may point out that this is not based upon any evidence direct or otherwise. In 54 Mad LJ 456.(AIR 192.Mad

585) Srinivasa Aiyangar J., found that the girl whom the accused was charged with having kidnapped was desperately anxious to leave her husband's house and even threatened to commit suicide if she was not taken away from there and observed: "If a girl should have been wound up to such a pitch of hatred of her husband and of his house or household and she is found afterwards to have gone out of the keeping of her husband, her guardian, there must undoubtedly be clear and cogent evidence to show that she did not leave her husband's house herself and that her leaving was in some manner caused or brought about by something that the accused did." In the light of this observation the learned Judge considered the evidence and came to the conclusion that there was some legal evidence upon which a court of fact could find against the accused. This CrI. Appeal No.836/2009 14 decision, therefore, is of little assistance in this case because, as already stated, every essential step was taken by Savitri herself; it was she who telephoned to the appellant and fixed the rendezvous she walked up to that place herself and found the appellant waiting in the car; she got into the car of her own accord without the appellant asking her to step in and permitted the appellant to take her wherever he liked. Apparently, her one and only intention was to become the appellant's wife and thus be in a position to be always with him".

17. In the decision in Suresh Babu vs. State of Kerala (2001 (1) KLT 80), it was held as follows: "The mere entry in the register of births and deaths to the effect that a child was born to a person without any statement as to the identity of the child is not sufficient to prove the birth of a particular person. The identity of that person has to be fully established by other evidence. No doubt, the father of a child is a competent witness to swear about the age of his child. But here is a father (PW1) who cannot give a consistent version regarding the age of his daughter. Though he would say that Ext.P2 entry showing the date of birth as 16.11.1973 relates to PW2, he has no hesitation to swear before the court that he

has given 16.04.1974 as the date of birth of PW2 at the time of admission in the Crl. Appeal No.836/2009 15 school. That apart he had to admit in the cross examination that he does not know the exact date of birth of PW2. Thus the evidence of PW1 is utterly unreliable and hopelessly contradictory. It is also relevant to note that admittedly PW1 was not the person who gave the information relating to the date of birth for entering in the births and deaths register of the Panchayat. Neither the person who gave the information nor the person who made the entry was examined in this case. If we examine the evidence of PW5, it could be seen that he had prepared Ext.P2 on the basis of the births and deaths register maintained in the office of Ranni Pazhavangadi Panchayat. In the absence of reliable evidence connecting PW2 with Ext.P2 entry it is difficult to hold that PW2 was born on 16.11.73. The non production of the copy of the school admission register also casts doubt on the veracity of the prosecution case. It is true that the entries in the birth register has to be preferred to the entries in the admission register maintained in the school. But in the absence of evidence about the identity of the child mentioned in the birth register, the entries in school admission register could be relied upon to prove the age".

18. The evidence adduced by the prosecution in the case regarding the date of birth has to be appreciated in the light of Crl. Appeal No.836/2009 16 the principles laid down in the above decisions. Ext.P8 is the certificate on which reliance is placed by the prosecution. That shows that the child by name Eliyamma was born on 24.02.1976. Even though PW5 says that she is also known as Eliyamma, there is no other evidence to show that what she says is true. It is significant to notice that even PW2 who had laid the First Information Statement has no case that his sister PW5 is also known as Eliyamma. It is here that the evidence of PW9 assumes importance. It is quite difficult to understand the reason as to why he did not bother to find out whether Ext.P8 relates to the victim herself. His version that he did not bother to find out whether Eliyamma and PW5 was one and the same person goes against the prosecution. He also did not bother to get the extract of the school register which would also show the date of birth of the victim. What is more baffling is that he does not know on whose request Ext.P8 was issued and there is no reason as to why the person who issued Ext.P8 was not examined.

19. The court below seems to have been greatly impressed Crl. Appeal No.836/2009 17 by the version given by PW5 that her date of birth is 24.02.1976. PW9, the investigating officer has been cross examined at length and the answers given by him have already been referred to. In short, there is nothing to show that PW5 who is now known as Bindu while at the time of christening was named as Eliyamma. One would expect at least PW2 would speak about that aspect. That was also not done. His testimony also does not disclose that Bindu had another name Eliyamma. It is further significant to notice that the victim has a sister. In such unsatisfactory circumstances, it may not be possible to come to the conclusion that Ext.P8 in fact relates to the victim. The prosecution ought to have adduced evidence to establish the identity of the person made mention of in Ext.P8. That has not been done. Therefore, there is no acceptable and cogent evidence regarding the age of the victim. If that be so, benefit of doubt will have to be given to the accused.

20. In the result, this Court is unable to accept the finding of the court below that the victim was below the age of 16 years at the time of commission of offence. If that be so, the Crl. Appeal No.836/2009 18 conviction and sentence cannot stand. The appeal is allowed and the conviction and sentence are set aside. The accused is held not guilty of the offences under Sections 363 and 376 IPC and he stands acquitted of the said offences. His bail bond shall stand cancelled and he is set at liberty. If the fine amount has already been paid, the same shall be refunded to him. Sd/- P.BHAVADASAN JUDGE smp // True Copy // P.A.to Judge.

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