

Benny Vs. State of Kerala

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Court : Kerala

Decided On : Jul-31-2013

Judge : Honourable Mr.Justice P.Bhavadasan

Appellant : Benny

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE P.BHAVADASAN WEDNESDAY, THE 31ST DAY OF JULY 2013 9TH SRAVANA, 1935 CRL.A.No.133 of 2008 ----- AGAINST THE JUDGMENT IN SC 281/2006 of 3rd ADDITIONAL SESSIONS COURT (ADHOC-1), THODUPUZHA DATED 16 01-2008 APPELLANT/ACCUSED: ----- BENNY, S/O. SEBASTIAN, CHARATTUVELIL HOUSE, ANAKKARAMETTU BHAGOM, PUSHPAKKANDOM KARA, PARATHODE VILLAGE. BY ADVS.SRI.P.VIJAYA BHANU (SR.) SRI.P.M.RAFIQ RESPONDENT/COMPLAINANT: ----- STATE OF KERALA, REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM. BY PUBLIC PROSECUTOR SRI. ROY THOMAS. THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 31-07-2013, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: P.BHAVADASAN, J.

JUDGMENT

In respect of an incident which took place in the year 1999, a private complaint was laid in the year 2005 alleging forced sexual assault which was forwarded for investigation under Section 156(3) of the Code of Criminal Procedure. The victim, PW1 had filed the complaint. After investigation, final report was laid before the court concerned which took cognizance of the offence and on finding that the offence is exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Thodupuzha under Section 209 Cr.P.C. The said court made over the case to 3rd Additional Sessions Court (Adhoc - I), Thodupuzha 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 450 and 376 of Indian Penal Code. To the charge, the accused pleaded not guilty and claimed to be tried. The prosecution therefore had PWs 1 to 10 examined and Crl. Appeal No.133/2008 2 Exts.P1 to P8 marked.

2. 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. 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 chose to adduce no evidence.

3. Mainly relying on the evidence of PW1, the victim, the court below came to the conclusion that the offences under Sections 450 and 376 IPC had been made out and accordingly convicted the accused for the said offences and sentenced to suffer rigorous imprisonment for a period of seven years and to pay a fine of Rs.10,000/- with default clause of rigorous imprisonment for 1 = years under Section 376 IPC and also sentenced to suffer rigorous imprisonment for five years and to pay a fine of Rs.5,000/- with default clause of rigorous imprisonment for one year under Section 450 IPC. It was also directed that out of the fine amount, Rs.10,000/- shall be paid to PW1 as compensation. The substantive sentences were directed Crl. Appeal No.133/2008 3 to run concurrently and set off as per law

was allowed. The said conviction and sentence are assailed in this appeal.

4. Learned counsel appearing for the appellant referred to the evidence of PW1 and contended that there can be no doubt regarding the fact that if at all there was any relationship between the victim and the accused, it was one with consent. Drawing attention of this Court to the fact that the incident had occurred on 17.11.1999 and that even going by the evidence adduced prosecution, the victim had conveyed the information to her mother on the next day, it was contended that the evidence of PW1 cannot be accepted since she has taken six years after the incident to file a complaint. In the meanwhile, a child was also born.

5. According to the learned counsel for the appellant, a reading of the evidence of PW1 would show that they had frequent sex in her own house and that too would show that the physical contacts were with her consent. This is not a case where, according to the learned counsel, implicit faith would be placed on the evidence of PW1 to come to the conclusion that CrI. Appeal No.133/2008 4 offence of rape had been made out. The antecedent of the lady was referred to and it is seen that she had conceived from another person also. Learned counsel went on to point out that the court below has not appreciated the evidence in the proper perspective and has mechanically accepted the evidence of PW1 to come to the conclusion that the offences had been made out. It is therefore contended that the conviction and sentence cannot stand.

6. Learned Public Prosecutor, on the other hand, supported the findings of the court below and contended that the evidence of PW1 suffers from no infirmity and there is no reason as to why she should be disbelieved. The mere delay by itself is not a ground to doubt the prosecution version since it has been properly explained. Learned Public Prosecutor went on to point out that there are no grounds made out to interfere with the findings of the court below.

7. One would wish that the submissions of the learned Public Prosecutor could be accepted. But a reading of the evidence of PW1 along with the complaint is sufficient to show CrI. Appeal No.133/2008 5 that the allegations are unfounded and it is most likely that a consensual act has been converted into one of rape for the convenience of the victim. PW1, the victim says that on a particular day, i.e. on

17.11.1999, the accused came to her house and asked for a glass water from her. She was all alone at home at the relevant time. When she gave water, it is claimed that he caught hold of her hand and had taken her to a room and ravished. Then she says that when her mother arrived, she conveyed the information to her mother and since the accused had told her that he would marry her, she did not want to file a complaint about the incident. Her mother, PW2 also would say something with regard to the incident. However, the information of PW2 regarding the incident is only what is told to her by PW1.

8. As initially noticed, the complaint was given only on 26.05.2005 i.e. six years after the incident which PW1 alleges that it was an act of rape. The reason given for the delay by PW1 is that the accused kept on promising her that he would marry her and she did not make out an issue out of the incident. What is significant is that PW1 admits that subsequently there has Crl. Appeal No.133/2008 6 been physical contacts between the two and she had no objection for those intercourses. Here the antecedent of the lady cannot be simply ignored. She had conceived from another person also and she remains unmarried even as on date. The reason given for the delay cannot be accepted at all and it could not be said that the consent given is one under misconception of fact. It was not a case where there was a promise by the accused to marry the victim and she was persuaded to believe so and was subjected to sexual intercourse with him even though it was against her will. Here, the promise of marriage comes after the incident and that cannot certainly constitute misconception of fact especially there were subsequent frequent physical contacts between the two.

9. As rightly pointed out by the learned counsel for the appellant, this is not a case where the evidence of PW1 can be simply accepted to hold that the accused is guilty. The long delay, the improbability of the complaint made by the victim and also the subsequent conduct make extremely unsafe to place complete reliance on her evidence and to venture a finding of Crl. Appeal No.133/2008 7 guilt against the accused. PW2, however, says that the incident was not initially revealed as the accused had threatened them with dire consequences. It may be remembered that PW1 herself has no such case. According to PW1, she did not reveal the incident as the accused had promised to marry her which, as already

noticed, comes after the incident.

10. On a reading of the evidence of PW1, one gets the impression that the claim of rape made by her is to suit her convenience and that it was most probably an act of consent. At any rate, a reasonable doubt is created in the mind of court as to the version given by PW1. If that be so, the benefit of doubt will have to be extended to the accused. In the result, this Court is unable to accept the finding of the court below that the accused has committed the offences punishable under Sections 450 and 376 IPC. He is given a benefit of doubt and it is held that the prosecution has failed to establish that the offence is proved beyond reasonable doubt. The accused is therefore found not guilty of the offences under Sections 450 and 376 IPC and he is acquitted of the said CrI. Appeal No.133/2008 8 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. This Criminal Appeal is allowed. Sd/- P.BHAVADASAN JUDGE smp // True Copy // P.A.to Judge.

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