

RobIn Vs. State of Kerala

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Court : Kerala

Decided On : Dec-19-2013

Judge : Honourable Mr.Justice P.Bhavadasan

Appellant : Robin

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE P.BHAVADASAN THURSDAY, THE19H DAY OF DECEMBER201328TH AGRAHAYANA, 1935 CRL.A.No. 79 of 2009 ()
----- AGAINST THE

JUDGMENT

IN SC5212007 of COURT OF THE ADDITIONAL SESSIONS JUDGE, (NDPS ACT CASES), THODUPUZHA, DATED0201.2009 CP572007 of JUDICIAL FIRST CLASS MAGISTRATE COURT-II, ADIMALI APPELLANT(S)/ACCUSED:
----- ROBIN, S/O.THOMAS, KARIYILAKATTIL HOUSE, ADIKKANATTI BHAGOM PERIINCHAMKUTTY KARA, KONNATHADI VILLAGE. BY ADVS.SRI.P.VIJAYA BHANU SRI.THOMAS J.ANAKKALLUNKAL RESPONDENT(S)/COMPLAINANT: -----
STATE OF KERALA, REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM. BY PUBLIC PROSECUTOR SRI. DHANESH MATHEW MANJOORAN THIS CRIMINAL APPEAL HAVING BEEN

FINALLY HEARD ON 19.12.2013, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: ds P.BHAVADASAN, J.

----- Crl.A. No. 79 of 2009 -----
--- Dated this the 19th day of December, 2013

JUDGMENT

The accused was prosecuted for the offences punishable under Sections 451 and 511 of 376 of IPC. After trial, he was found guilty of the offences punishable under Sections 451 and 354 of IPC. He was convicted and sentenced to undergo rigorous imprisonment for one year and to pay a fine of 5,000/- for the offence punishable under Section 354 of IPC and he was also sentenced to undergo rigorous imprisonment for one year and to pay a fine of 1,000/- for the offence punishable under Section 451 of IPC with a default clause. Set off as per law was allowed.

2. The incident which gave rise to the case occurred on 16.12.2006 at about 3.00 p.m. The victim is PW1 and she is the daughter of PW2. On the day of incident, PW2, the mother of the victim had gone to attend a meeting of the Crl.A. No. 79 of 2009 -2- Kudumbasree Unit and her husband had gone to purchase Pooja articles to go to Sabarimala. PW1 was alone at home. In the evening, by about 6.00 O'Clock, when PW2 returned home, she found PW1 sitting in the kitchen in a pensive mood and asked her for the reason. PW1 narrated the incident to her. On 18.12.2006, it is claimed that as a result of the agony undergone by PW1 as a result of the act committed by the accused, she consumed poison and was hospitalized. Ext.P1, First Information Statement was furnished by PW2. On the basis of Ext.P1, PW12 registered crime as per Ext.P11 for the offences punishable under Sections 451 and 511 of 376 of IPC. He started the investigation. He had the accused arrested and conducted potency test of the accused. The victim was got medically examined and certificate was obtained. PW12 recorded statements of witnesses and the investigation was completed by PW13 who laid charge before court. Crl.A. No. 79 of 2009 -3- 3. The court before which the final report was laid took cognizance of the offences. Finding that the offences are exclusively triable by a Court of Sessions, committed the case to Sessions Court,

Thodupuzha. The said court made over the case to Additional Sessions Court Special Judge for NDPS Act for trial and disposal.

4. On receipt of records and on appearance of the accused, the said court framed charges for the offences punishable under Sections 451 and 511 of 376.

5. To the charge, the accused pleaded not guilty and claimed to be tried. The prosecution therefore had PWs 1 to 13 examined and Exts. P1 to P15 marked. Exts. D1 and D1 (a) was got marked by the defence through prosecution witnesses.

6. 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. Crl.A. No. 79 of 2009 -4- Apart from claiming to be innocent, it was pointed out that he was aged only 20 years at the relevant time. He claimed that he and PW1 were in love from childhood onwards and they belong to two different communities. PW2 who was deadly against the relationship caused problems and that resulted in PW1 attempting to commit suicide. In order to escape from the humiliation caused thereby, the story has been fabricated and the accused has been falsely implicated.

7. Finding that the accused could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence. He chose to adduce no evidence.

8. On an appreciation of the evidence in the case and mainly relying on the evidence of PWs 1 and 3, the court below came to the conclusion that the offences have been established and conviction and sentence followed. The said conviction and sentence are assailed in this appeal. Crl.A. No. 79 of 2009 -5- 9. The learned counsel appearing for the appellant contended that the court below has not properly appreciated the evidence in the case and that has resulted in a wrong finding being entered into. Referring to the evidence of PW2 it was contended that according to her, a suicide note was left behind by PW1 in which she implicated the parents of the accused also. No such note has spoken about to by PW1 nor is it recovered by the Investigating Officer. The evidence of PW1 is

assailed on the ground that her evidence is inconsistent and she had been actually in love with the accused for a long time. It is contended that there is no independent evidence regarding the incident and this is not a case where implicit faith could be placed on the testimony of PW1. The possibility of the accused being falsely implicated in order to escape from the humiliation caused as a result of the attempted suicide by PW1 cannot be ruled out. It is also pointed out that the evidence would disclose that there was almost a marriage arranged for PW1 which Crl.A. No. 79 of 2009 -6- she did not like. These aspect would throw considerable suspicion on the prosecution version of the incident and the court below has not taken note of these aspects. Accordingly, it is contended that conviction and sentence cannot stand.

10. The learned Public Prosecutor on the other hand pointed out that there was no justification for PW1 to falsely implicate the accused. It is too unwise to say that in order to escape from the humiliation for having consumed poison, she falsely implicated the accused. The learned Public Prosecutor reminded this Court that the very case of the defence is that PW1 and the accused were in thick love. If that be so, false implication is certainly ruled out. Even assuming that the evidence of PW1 has to be carefully scrutinized, according to the learned Public Prosecutor, it receives ample corroboration at the hands of PW3. It was the evidence of PWs 1 and 3 read together, that persuaded the court below to come to the conclusion that the offences Crl.A. No. 79 of 2009 -7- have been made out. There is nothing to show that the findings are either perverse or are contrary to the evidence on record. Under these circumstances, the learned Public Prosecutor pointed out that there are no grounds made out to interfere with the findings of the court below.

11. The evidence regarding the actual incident remains confined to PW1, the victim. That the victim was all alone at home at the relevant time cannot be disputed. According to PW1, there was an attempt from the side of the accused to commit rape on her when her parents were absent and that caused considerable mental agony to her. She feared that her marriage might not take place. She says that because of that feeling she had consumed poison. She would say that on the date of incident, when her parents were not at home and she after completing the household work, had gone for bath and returned to her house. While she was

dressing her hair, the accused is alleged to have come to the place. He asked whether the father of PW1 was CrI.A. No. 79 of 2009 -8- at home to which she replied that her father had gone out. PW1 would say that the accused advanced towards her and she ran into the bathroom and the accused followed her. She managed to put on the top of the Churidar and ran into the kitchen of her house and she was followed by the accused. Even though PW1 say that she tried to prevent the accused from entering the house, she was not successful. He forced open the door and in that process she fell down. It is stated by her that the accused got in and bolted the door from inside. PW1 says that he caught hold of her and told her that he likes her and he kissed on her right cheeks and there after she would say that he fondled her breasts. With great effort, she was able to extricate herself from the clutches of the accused and she ran outside. She conveyed the information to her neighbour, PW3. They returned to the house of the victim. The accused was not in her house at the relevant time. A short while thereafter, PW1 would say that the accused came from his house and told them that he CrI.A. No. 79 of 2009 -9- had come down to apologize for what he had done. PW3 told him to go back to his house and thereafter, PW1 would say that she was taken by PW3 to the house of PW3. At 4.00 p.m., when her father returned, PW3 took her back to her house. When her mother arrived and the information was conveyed to PW2, it is stated by PW1 that since her father was going to Sabarimala, they thought that they would wait until he returns. The main attack against the evidence of this witness is certain omissions in her statement to the Police. Her attention was drawn to the omission in her Section 161 statement that she had not told to the Police that when the accused pushed open the door, she had fallen down. It is also pointed out that there was no mention of the accused having attempted to drag her inside the room in the statement given to the Police. Her attention was also drawn to the fact that she had not mentioned to the Police that the door was bolted from inside.

12. Emphasize was laid on the answer to the question CrI.A. No. 79 of 2009 -10- in cross examination that had there been no attempt on her side to commit suicide, the case would not have originated. She replied in the affirmative.

13. The above items are taken as weapons to attack the testimony of PW1. It is significant to notice that there is no serious cross examination regarding the actual incident. It is not suggested to PW1 that the accused had never been to the house of PW1 on the relevant day.

14. The next crucial witness is PW3 who is the neighbour of PW1. When one re recalls the evidence of PW1, it is to the effect that after the incident, when she managed to escape from the clutches of the accused, she took shelter in the house of PW3. PW3 had returned along with PW1. The evidence of PW3 is also to the same effect. PW3 also would say that a short while after they reached the house of PW1, the accused came there and told them that he wanted to apologize for what he had done to PW1. It must at once be noticed that in this regard, PW1 gets sufficient CrI.A. No. 79 of 2009 -11- corroboration at the hands of PW3. It is important and significant to notice that there is no cross examination on this aspect spoken to by PW3. The version given by PW3 that after she and PW1 had returned to the house of PW1, the accused came near to apologize remains unchallenged.

15. It is these items of evidence which had persuaded the court below to come to the conclusion that the offence had been committed.

16. The evidence of PW2 is only of academic interest. Her knowledge about the incident is what is told to her by PW1 and does not have much relevance in the context except that she had laid Ext.P1, First Information Statement.

17. Infirmities pointed out in the evidence of PW1 are insufficient to totally disregard her evidence or to create suspicion which make her evidence unacceptable. On the core matter of the issue, there is no effective cross examination. There are no suggestions as to why she should falsely implicate the accused and no reason is also CrI.A. No. 79 of 2009 -12- established. Formidable is the evidence of PW3 whose version as already noticed remains unchallenged. If that be so, the presence of the accused in the house of the victim, his act, his conduct are all established through the evidence of PW1 receiving corroboration at the hands of PW3.

18. True, the medical evidence is of little relevance in this case for it does not make mention of any external injuries. But it also should be noticed that PW1 had no case that she suffered visible external injuries at the hands of the accused.

19. In the above circumstances, if the court below chose to accept the version given by PWs 1 and 3, it could not be said that the court below has erred in any manner. It could not also be said that findings of the court below are unjustified or are contrary to the evidence on record. Finding seems to be fully justified. Conviction for both the offences will therefore have to stand. CrI.A. No. 79 of 2009 -13- 20. The court below was of the view that the age for considering the application of Probation of Offenders Act is the date of conviction and going by the said standard, the accused was passed the age of 21 and therefore, the court below declined to exercise its jurisdiction under the Probation of Offenders Act.

21. The court below obviously acted on the basis of various decisions of this Court and of the Apex Court in some cases. There is another view expressed by the Apex Court that the relevant date reckoned is the date of commission of offence. True, in the decision reported in [1963 SC1088 a decision rendered by four Honourable Judges of the Apex Court, it was held that it is the date of conviction that is relevant. However, the subsequent decision of the Apex Court has also indicated that the relevant date may be the date of commission of the offence.

22. One cannot omit to note the purpose and object of the Probation of Offenders Act. It is intended as a corrective CrI.A. No. 79 of 2009 -14- measure. While as going by the provision of the Act, a person under the age of 21 is as a matter of course entitled to the benefit of Probation of Offenders Act in the light of the controversy that exist even now regarding the reckoning of the relevant date it may have to be considered whether it will be appropriate to apply the Probation of Offenders Act in the case on hand.

23. Here one needs to recall the evidence in the case. After the act was committed and later when PWs 1 and 3 returned to their house, the accused came to the house of the victim and wanted to apologize for what he had done. That shows that he was the repentant about his act. It also indicated that it was that he had acted on the spur of the moment and was not a pre-meditated calculated act.

24. Probation of Offenders Act is a social legislation which is intended to prevent young offenders from becoming hardened criminals by providing them an opportunity to reform and correct themselves. There is nothing to indicate CrI.A. No. 79 of 2009 -15- in the case on hand that the accused has criminal antecedents or is a menace to the society. His act of seeking apology for what he had done has necessarily to be taken note of. It is not a case where though the offence cannot be treated as light, it cannot also be said that it is a heinous crime. This does not mean that the act committed by the accused is being justified, it is certainly objectionable. But at the same time, to send him for incarceration, for an imprudent act committed by him on the spur of the moment, and for which he was repentant would not be in the interest of justice.

25. The sentence provided for under the Code the offence under Section 354 of IPC is two years or fine or both and for the offence under Section 451 of IPC, the sentence prescribed is imprisonment for a term of two years and also liable to fine.

26. Though the accused in this case has not been able to substantiate his statement given at the time of CrI.A. No. 79 of 2009 -16- questioning under Section 313 Statement, it is felt that in the interest of justice, the issue needs to be looked up from a practical angle. From the records, it could be seen that as on the date of commission of offence, the accused was aged only 20 years. If one is to go by some of the decisions rendered by the Apex Court, then it follows that he is entitled to the benefit of Probation of Offenders Act. If on the other hand, some other decisions are to be followed, the position would be otherwise. Even assuming that he had crossed the age limit prescribed under Section 6, the court will not be precluded from exercising the powers under the Probation of Offenders Act if the circumstances so warranted.

27. After having given anxious consideration to various aspects, it is felt that the accused should be provided with an opportunity to reform himself and becoming a useful member of a society. It is felt that sentencing him for a term of imprisonment could only be CrI.A. No. 79 of 2009 -17- counter productive and will not be in the interest of justice. Therefore, it is felt that it is an appropriate case where the Probation of Offenders Act should be extended to the accused.

28. Thus, while confirming the conviction, the sentence passed by the court below for the offences under Sections 354 and 451 of IPC are set aside and the appellant is released on probation under Section 4 of the Probation of Offenders Act, 1958. He is directed to execute a bond for a sum of 25,000/- (Rupees Twenty five thousand only) with two solvent sureties for the like sum each to the satisfaction of the trial court and undertake to appear and receive sentence when called upon to do so for a period of 2 years from the date of execution of the bond and during the period of probation to keep peace and be of good behaviour. He is also directed to pay a compensation of 15,000/- as provided for under Section 5 of Probation of Offenders Act to the victim. In default of payment of which, he shall suffer Crl.A. No. 79 of 2009 -18- imprisonment for a period of three months.

29. During the period under probation, he shall bound to report to the Probationary Officer once in three months and the Probationary officer shall file necessary report before the trial court as it is required under law. The appeal is disposed of as above. P.BHAVADASAN JUDGE ds

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