

Bhaskaran Vs. State of Kerala

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Court : Kerala

Decided On : Jan-23-2014

Judge : Honourable Mr.Justice P.Bhavadasan

Appellant : Bhaskaran

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE P.BHAVADASAN THURSDAY, THE 23D DAY OF JANUARY 2014 3RD MAGHA, 1935 CRL.A.No. 1071 of 2011 ()
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JUDGMENT

IN SC1192009 OF ADDITIONAL DISTRICT COURT (ADHOC-III), KASARAGODE DATED 0806-2011) APPELLANT/ACCUSED: ----- BHASKARAN, S/O. KARIYA, KAYYALAMOOLA HOUSE, KUMBDAJE GRAMAM, KASARAGOD. BY ADVS.SRI.A.SUDHI VASUDEVAN SMT.K.PUSHPAVATHI RESPONDENTS/COMPLAINANT: ----- STATE OF KERALA, REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA. BY PUBLIC PROSECUTOR SMT. P. MAYA THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 2301-2014, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: SCL. P. BHAVADASAN, J.

----- Crl. A.No. 1071 of 2011 ----- Dated
this the 23rd day of January, 2014

JUDGMENT

The accused in this case was prosecuted for the offences punishable under Sections 363, 342 and 376 of Indian Penal Code. He was found guilty of all the offences. He was therefore convicted and sentenced to suffer rigorous imprisonment for 4 years for the offence under Section 363 IPC and sentenced to suffer rigorous imprisonment for 3 months under Section 342 IPC. He is also sentenced to suffer rigorous imprisonment for 5 years and also to pay fine of Rs.25,000/-, in default rigorous imprisonment for 6 months for the offence under Section 376 IPC. The substantive sentences were directed to run concurrently and set off as per law was allowed.

2. The victim in this case is PW9. She is the daughter of PWs 8 and 10. On 30.10.2003, indicating that Crl. A.No. 1071 of 2011 2 she was going to the beedi company to procure the raw material for rolling beedi, she went out of the house, but did not return home. Enquires were made with no result. Finally, Ext.P5 complaint was laid. In the meanwhile, the victim was located and she was produced before the learned magistrate and she was allowed to go with her parents.

3. Ext.P5 complaint was forwarded for the investigation under Section 156(3) of Cr.P.C and based on that, a crime was registered as per Ext. P9 FIR. The investigation was taken over by PW18. PW9 was examined by PW11 and obtained Ext.P6 certificate. He recorded the statement of witnesses and obtained a certificate from the school where the victim had studied last, prepared scene mahazar, completed the investigation and laid charge sheet before court.

4. The court before which the final report was laid, Crl. A.No. 1071 of 2011 3 took cognizance of the offences. Finding that the offences are exclusively triable by a court of Sessions. The said court committed the case to the Sessions Court, Kasaragod. The Sessions Court, Kasaragod made over the case to the Additional District and Sessions Court (Adhoc)-III, Kasaragod for trial and disposal. The latter court on receipt of records and appearance of the accused, framed charges for the

offence punishable under Sections 363, 342 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 18 examined and Exts. P1 to P12 were marked. MO1 dress of PW9 was got identified and marked.

5. After the close of the prosecution evidence, the accused was questioned under Section 313 of Code of the Criminal Procedure. He denied all incriminating circumstances brought out in evidence against him and CrI. A.No. 1071 of 2011 4 maintained that he is innocent. He further stated that there was some enmity between the parents of the victim and him and he has been falsely implicated at the instance of the parents of the victim.

6. Finding that the accused could not be acquitted under Section 235(1) of the Code of Criminal Procedure, he was asked to enter on his defence. He chose to adduce no evidence.

7. The court below mainly relying on the evidence of PWs 8, 9, 10, 11 and 16 and also on Exts.P6, P10 and P11, came to the conclusion that the offences have been made out and the conviction and sentence as already mentioned followed. The said conviction and sentence are assailed in this appeal.

8. The learned counsel appearing for the appellant assailed the finding on several grounds. It is pointed out that on reading of the evidence of PW9, it can be easily CrI. A.No. 1071 of 2011 5 seen that she was a voluntary party, who had gone along with the accused and if that be so, the offence of kidnapping cannot lie. She went along with the accused to several places and at no point of time, she raised any objection or resistance, even though, she had ample opportunity to object or attract the attention of others so as to escape from the clutches of the accused. This conduct of the victim, according to the learned counsel, it is sufficient to show that she had voluntarily gone along with the accused.

9. The learned counsel for the appellant then contended that the court below has placed reliance on the evidence of PWs 16 and Exts.11 and 12 to come to the conclusion that the victim is a minor. According to the learned counsel, the age of the victim is not properly proved and for that proposition, the learned counsel for

the appellant relies on the decision reported in Ram Suresh Crl. A.No. 1071 of 2011 6 Singh Vs. Prabhat Singh @ Chotu Singh and another [AIR 2009 SC2805 and Birad Mal Singhu Vs. Anand Purohit [AIR 1988 SC1796. The learned counsel went out to point out that the person who has given the data at the time of admission in the school has not been examined and so also, Ext.P11 is not proved in accordance with law. Attention was also drawn to the fact that when the victim was examined in 2010, her age is shown as 24 in the deposition. If that be so, in 2003, she passed 16 years of age. This vital aspect has also been noticed by the court below. It is therefore contended that the conviction and sentence cannot be stand.

10. It is further contended that there is no evidence of sexual intercourse that the offence of rape has been committed. Accordingly it is contended that the conviction and sentence has to be set aside.

11. Per contra, the learned Public Prosecutor Crl. A.No. 1071 of 2011 7 contended that PW9 was forced to go along with the accused and it was represented to various persons that she was the second wife and she was ravished by threatening her with dire consequences against her resistance and by overpowering her. It cannot be said on a reading of the evidence of PW9, according to the learned Public Prosecutor that she had voluntarily gone along with him. She has in clear term deposed that she was threatened of dire consequences if she did not go along with him. One should remember, according to the learned Public Prosecutor that the girl was aged only 14 or 15 years at the relevant time.

12. As regards the age, learned Public Prosecutor contended that there is no merit in the contention that the age has not been properly proved. Ext. P11 and P12 clearly show the date of birth of the victim as 6.4.1989. Those documents have been proved in accordance with law Crl. A.No. 1071 of 2011 8 by examining PW16, which is the extract of the school admission register and at the time of examination, PW16 had produced the register as such on the basis of which the extract was drawn up by the person concerned. There is nothing to show that the said documents are incorrect or that the date of birth as reflected in those

documents cannot be relied on. If that be so, the offence is clearly made out.

13. The learned Public Prosecutor went out to point out that the court below which had the opportunity towards the similar offences, has chosen to accept the evidence of PWs 8, 9 and 10, there is no reason as to why this court should take a different view unless it is shown that the appreciation of the evidence is perverse. In short, it is contended that there are no grounds made out to interfere with the findings of the court below.

14. As is the usual case, in this case also, as regards CrI. A.No. 1071 of 2011 9 the actual incident that is the rape and kidnapping, there is the evidence of PW9, the victim alone. It is well settled that if the evidence of the prosecutrix is found to be convincing and cogent, then there is no reason for corroboration and the conviction can be solely based on the evidence of prosecutrix. If on the other hand, the evidence of the prosecutrix is inherently defective or as rendered suspicious by other item of evidence produced by the prosecution then that the court may be well advised to corroborate the item of evidence. It is also well settled that the prosecutrix is treated as an injured witness and not as an accomplice and their evidences are entitled to considerable weight. Normally, unless there was convincing reason, the evidence of prosecutrix is usually acceptable.

15. Bearing the above principles in mind, an attempt shall now be made to ascertain whether the evidence of CrI. A.No. 1071 of 2011 10 PW9 is trustworthy. Before going to the evidence of PW9, the evidence of PW8, the father of the victim may be referred. He at the relevant time was staying with his wife, the victim and two of his sons. The victim was engaged in rolling of beedi and she used to purchase the raw material from the Bharath Beedi Company. According to him on 30.5.2003, as usual, PW9 went out from the house, saying that she was going to the company for getting raw materials, but did not return. When he returned after work, he was informed about the missing of his daughter and he searched for her. He claims that he filed a complaint before police and after three days, PW9 was located. PW8 says that he and PW10 went to the police station and they saw their daughter in the police station. He asked her where she had been and she replied

that she had been to Swarga. He would say that she was subjected to medical examination and she was allowed to go with them from the CrI. A.No. 1071 of 2011 11 court where she was produced. Even though enquiry was made by PW8 at that time, PW9 did not reveal the whole incident. However when she reached home, she found that her brother had attempted to commit suicide, only because she had gone along with somebody. Then she revealed the incident to him. Prosecution case is that at the relevant time the victim was only 15 years of age. In cross- examination of PW8, it was brought out that the statement given by him in chief examination that the accused caught hold of the hand of PW9 and she was made to go along with him, was not mentioned to the police when his statement was taken by the police. The evidence of PW10, the mother is also almost identical to PW8. As regards PW8 and 10, the information regarding the actual incident is what they have been told by PW9.

16. Coming back to the evidence of PW9, she would say that she had gained acquittance with the accused as he CrI. A.No. 1071 of 2011 12 had come for work in grandfather's house. She would say that on 30.5.2003 at about 9 a.m., she told her mother that she was going to the company to procure the raw material for rolling beedi and left the place. She reached Bellige, but did not go to the company. Instead she went to Mulleria for buying Mangalam magazine. After purchasing the magazine, she mounted a bus, then the accused followed her. She would say that she got down at Mulleria and went to the fancy stores where also the accused followed her and paid for the articles purchased by PW9. When she returned to the bus stand, she was invited to have a cup of tea with the accused. When she refused to have tea, she was offered cool drinks and she went along with the accused. She would then say that at Mulleria, they had happened to see her brother Gangadharan and the accused talk to him. Her brother asked her why she had come to Mulleria and she replied that she had come to CrI. A.No. 1071 of 2011 13 purchase Mangalam magazine. After her brother left, she mounted a bus and the accused again followed. When she got down at Bellige, the accused also dismounted. She would say that she had gone to a shop and purchased two chocolates and took the way to the company to get raw material. The accused was alleged to have told her that the company was not working for the day, then she decided to return home. She found that the accused was following her. On the

way, she met a friend Jayashi, who also was engaged in rolling of beedies. PW9 happened to see the raw material with her. Then she asked the accused why he told her a lie. After her friend Jayashi passed them, PW9 would say that the accused caught hold of her churidhar and he touched her body, to which she took objection. She would say that then the accused pressed her neck and commanded that she should come along with him. When she refused to do so, she was threatened with dire CrI. A.No. 1071 of 2011 14 consequence. She returned to Bellige along with the accused and when she attempted to cry aloud, her mouth was gagged. She says that she asked the accused where he was taking her. He mounted a bus to Badiadka. The accused asked her to follow him. They then mounted a bus to Perlam. PW9 would say that at that time, she was crying and she was threatened by the accused. They got down at Perlam and then went to Swarga. When they dismounted the bus at Swarga, the accused was alleged to have told her that she was taken to live along with him and also held out a threat to her life. The accused took her to the house of his uncle and they found the house locked. The son of the uncle lived nearby and they went to that house. The wife of the son of the uncle asked who was along with the accused and he replied that PW9 was the second wife. PW9 would say that the accused repeatedly told her that if she uttered about, he will kill her. Balakrishnan, the son of CrI. A.No. 1071 of 2011 15 the uncle came at that time. They shared the same room. When PW9 had fallen asleep, she found that the accused was ravishing her. When she expressed her objection, then by saying that 'I will teach you what the husband and wife do their life' he continued. She would also say that the accused had taken her to the house of one Kusuma and leaving the victim there, he went out. The said Kusuma asked her to return to her house, but she unable to do so. But instead of it she went to the house of the brother of the accused and she stayed there. He informed her that the accused will come soon. The next day, she was informed that the accused has contacted him over phone and told him that he is waiting for her at Badiadka town. She went to Badiadka. Then the police reached there and they took her to the Badiadka Police Station. Her parents came to the police station and they took her home.

17. In the cross examination, she said that she had CrI. A.No. 1071 of 2011 16 gone to Badiadka town on her own volition to buy Mangalam magazine. The

question as to whether she could not have objected to the act of the accused which was against her wishes, she replied that she was being constantly threatened by the accused with dire consequences. She however conceded that the statement made by her regarding the pulling of her shawl and the accused touching of her body was for the first time when she deposed in court.

18. Even though, after locating PW9, her statement was taken by the police and she was produced before the learned magistrate concerned, there was no cross examination with reference to those statements or any attempt to show that what she had deposed in the court is contrary to the statement given earlier. A reading of the evidence of PW9 would show that she was taken by the accused under threat even though she would say that they CrI. A.No. 1071 of 2011 17 had travelled together in the bus where there were other passengers also.

19. The learned counsel for the appellant emphasised that if as a matter of fact the victim was unwillingly to accompany the accused, she could have resisted or objected or attracted attention of other persons and tried to escape, but she did not do it and that will indicate that she had gone voluntarily.

20. The learned counsel forgets the fact that PW9 has categorically stated that the accused was repeatedly threatening her when she tried to escape. If she believed that if she caught attention of other persons, that would result in severe consequences, she cannot be found fault with.

21. It is significant to notice that even though PW9 has stated that she was subjected to forcible sexual assault, there was no cross examination on that point. Of CrI. A.No. 1071 of 2011 18 course, there was only one incident spoken to by PW9. But that is not challenged in cross-examination.

22. Except for stating that the conduct of PW9 would suggest that she had voluntarily gone, there is nothing else pointed out by the learned counsel for the appellant to show that PW9 had any reason to falsely implicated the accused. She has given the reason as to why she did not object to the conduct of the accused. It is also important to notice that PW9 had categorically stated that on two occasions, the accused had represented that she was his second wife. This

statement of PW9 is also not challenged in cross examination. It is true that the accused left her in two places and asked her to go back her home, which she did not do. One must remember at this juncture that she was forcibly taken from her native place and was taken to distance places and if she was unwilling to return on her own home, there is nothing wrong with her conduct and Crl. A.No. 1071 of 2011 19 that cannot suggest that she was a willing partner. On one occasion, it may be noticed that she was left in the house of the brother of the accused.

23. Much was argued regarding the finding of the age of the victim. The lower court has relied on the evidence of PW16 to come to the conclusion that the date of birth of the victim is 6.4.1989. The learned counsel for the appellant contended that, that is not proved in accordance with law. The learned counsel pointed out that there is no evidence to show as to who had furnished the information based on which the entries have been made in the admission register and the admission register as such had not been produced. It is also pointed out that person who had issued Ext.P11 was also not examined. This infirmity was not noticed by the court below and that had resulted in a wrong finding.

24. Though the contention may look attractive at the first instance, on a close scrutiny, it can be found to be Crl. A.No. 1071 of 2011 20 without any basis. PW16 is the Headmaster of the school at the relevant time when the trial was going on. He was examined by the prosecution to prove that Ext.P11 which was produced by the prosecution and which was issued as per the entry in the school admission register. It is also significant to notice that PW16 had at the time of evidence, produced admission register and the same was marked as Ext.P12. As it was regularly kept register, that was returned and the photostat copy was kept in the files. The said register shows that the date of birth of the victim is 6.4.1989.

25. In the decision reported in *Raju Vs. State of Kerala* [2013(1) KLT718, an identical question was considered and it was held that the certificate issued in the school duly proved is sufficient to establish the age of the victim. In the decision reported in *Jarnail Singh Vs. State of Haryana* [2013 (7) SCC263, it was stated as Crl. A.No. 1071 of 2011 21 follows: "The manner of determining age (of a minor) conclusively has been expressed in Rule 12(3) of the Juvenile Justice (Care and

Protection of Children) Rules, 2007. Under the aforesaid provision, the age of a child is ascertained by adopting the first available basis out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available would conclusively determine the age of a minor. In the scheme of Rule 12 (3), matriculation (or equivalent) certificate of the child concerned is the highest rated option. In case the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12 (3) envisages consideration of the date of birth entered in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and Crl. A.No. 1071 of 2011 22 conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the child concerned, on the basis of medical opinion." In the light of the principles laid down in the above decision, the contention that since the person who has given the information based on which the entries in the school admission register was made is not examined, the date of birth cannot be said to have been proved, cannot be countenanced. Going by the above decisions, extract of the school admission register produced and proved through PW16 is sufficient in law. Crl. A.No. 1071 of 2011 23 26. It is contended that going by the deposition of PW9, it is shown that in 2010 when she was examined, the age was shown as 24. If that be so, in 2003, she must have been 17 and that shows that she was above the age of 16. If the defence had such a case it should have been put to the victim and her explanation sought for. No such exercise had undertaken and it could not be said that the age shown in the cause title of the deposition can be preferred to Exts.P11 and P12.

27. What now remains to be considered is the question as to whether there has been sexual assault. The said fact will clear from the evidence of PW11 and

Ext.P6. On 3.6.2003, the victim was examined by PW11, the doctor who deposed that on the basis of the findings entered into by her in Ext.P6, there is clear evidence of penetration. However, she had reserved the final opinion pending in the chemical analysis report. It is true that the CrI. A.No. 1071 of 2011 24 chemical analysis report was not procured and the final opinion obtained from PW11. But the evidence of PW11 sufficient to show that there has been penetration.

28. It could be seen that the evidence of PW9 regarding the sexual assault to some extent gets corroboration at the hands of PW11 and Ext.P6. It is not as if the evidence of PW9 stands in isolation in this regard. It is corroborated by the medical evidence referred to above. PW9 has also stated that she was aged only 14-15 years at the relevant time and it is substantially right from Ext.P11 and P12 and the evidence of PW16.

29. There is no reason to disbelieve PW9 when she say that she has chose to go along with the accused.

30. The court below was therefore perfectly justified in coming to the conclusion that the accused had tried to kidnap the victim and subjected to her a forcible sexual intercourse. The findings regarding the age also seems to CrI. A.No. 1071 of 2011 25 be justified. Resultantly, the court below has rightly come to the conclusion that the offences punishable under Sections 363, 342 and 376 of Indian Penal Code have been made out.

31. One aspect is to be noticed. The sentence that is to be awarded for the offence under Section 363 is the term of imprisonment and also that the accused shall be liable to pay fine. For the reason best known to the court below, no fine was imposed. This is clearly illegal. Since there is no appeal by the State in that regard, need not be considered.

32. Conviction for the offences under Sections 342 and 376 of Indian Penal Code are only to be sustained.

33. What now remains to be considered is the question of sentence. Considering the facts and circumstances of the case, the manner in which the offence is

committed and also the conduct of the accused, the Crl. A.No. 1071 of 2011 26 sentence awarded appears to be reasonable. It is significant to notice that the offence under Section 376, the sentence lesser than the minimum sentence has been awarded, though no specific reason has been given. Anyhow, since there is no appeal by the State for enhancing the sentence, the issue can rest there. In the is result, this appeal is without merits and it is liable to be dismissed. I do so confirming the conviction and the sentence passed by the court below. Sd/- P. BHAVADASAN JUDGE Scl. True Copy PA to Judge

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