

Shinoj vs State of Kerala

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Court : Kerala

Decided On : Oct-31-2022

Judge : Honourable Mr.Justice P.G. Ajithkumar

Appeal No. : CRL.A/439/2008

Appellant : Shinoj

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR
MONDAY, THE 31ST DAY OF OCTOBER 2022 / 9TH KARTHIKA, 1944
CRL.A NO. 439 OF 2008 AGAINST THE JUDGMENT DATED
26.02.2008 IN S.C.NO.393 OF 2005 OF IV ADDITIONAL SESSIONS
COURT (ADHOC)-II, THODUPUZHA APPELLANT: SHINOJ S/O
GEORGE, THOTTUMKAL VEEDU, KALLAR KARA, ANAVIRATTY
VILLAGE. BY ADV SRI.M.T.SURESHKUMAR RESPONDENT: STATE
OF KERALA REP.BY THE PUBLIC PROSECUTOR, HIGH COURT OF
KERALA, ERNAKULAM. BY SRI.SANAL P.RAJ, PUBLIC
PROSECUTOR THIS CRIMINAL APPEAL HAVING COME UP FOR
FINAL HEARING ON 07.10.2022, THE COURT ON 31.10.2022

DELIVERED THE FOLLOWING:

JUDGMENT

This is an appeal filed under Section 374(2) of the Code

of Criminal Procedure, 1973. The appellant was convicted for an offence punishable under Section 366 of Indian Penal Code, 1860 and sentenced to undergo simple imprisonment for a period of 5 years and to pay a fine of Rs.5,000/- with a default sentence of six months as per the judgment dated 26.02.2008 by the IVth Additional Sessions Judge (Adhoc-II), Thdupuzha. The appellant challenges the conviction and sentence in this appeal.

2. On 27.02.2018 the appeal was admitted to file. As per the order in Crl.M.A.No.1919 of 2008 the sentence imposed on the appellant was suspended and he was released on bail subject to conditions.

3. Heard the learned counsel appearing for the appellant and the learned Public Prosecutor.

4. The allegations levelled against the appellant are that at 10.30 a.m. on 01.10.2004 he enticed away one Anitha, the minor daughter of PW1 from his house at Kallar with the intention of marrying her. The appellant kept Anitha in the house of PW10 from 01.10.2004 till 07.10.2004.

5. On the basis of the final report filed by the Sub

Inspector of Police, Adimaly, before the Judicial First Class Magistrate Court, Admilaly the case was initiated and it was committed to the Court of Sessions, Thodupuzha. That court made over the case to the Additional Sessions Judge-IV who had tried the appellant. PWs.1 to 15 were examined and Exts.P1 to P15 were marked on the side of the prosecution. During the questioning under Section 313(1)(b) of the Code the appellant denied the incriminating circumstances that appeared against him in the evidence. No evidence was let in by the appellant, except proving Exts.D1 and D1(a).

6. The learned Sessions Judge after considering the

evidence in detail found that the appellant enticed the deceased Anitha and took along with him. He persuaded Anitha to marry him. Accordingly, the appellant was found guilty and convicted.

7. The learned counsel appearing for the appellant

would submit that the trial itself has been vitiated for want of framing a proper charge and that the evidence is totally lacking to enter a conviction. It is submitted that the deceased Anitha went along with the appellant on her own volition, which is evident from the facts that she willingly lived along with him in the house of PW10 for about a week and soon her sending back along with PWs.1 and 2, her parents, she committed suicide. The learned counsel would submit that there is absolutely no evidence to prove that the appellant anyway pursued or enticed Antha to leave the house of PW1. Thus, he would maintain that evidence is totally lacking to prove the offence under Section 366 of the I.P.C. or any lesser offence. As regards the age of deceased Anitha, in view of the learned counsel, there is no reliable evidence, and therefore the finding that she was minor at the time of incident is also incorrect.

8. The learned Public Prosecutor, on the other hand, would submit that in the light of the evidence of PW15 and

Ext.P5, age of the deceased has been duly proved. In this regard, the learned counsel placed reliance in *Murugan @ Settu v. State of Tamil Nadu* [AIR 2011 SC 1691]. It is further submitted that the evidence regarding taking away of deceased Anitha by the appellant is fully reliable and the Sessions Judge rightly had held that the appellant took deceased Anitha from the lawful custody of her parents and against her will she was made to marry the appellant. And, the deceased Anitha was, against her will, subjected to sexual intercourse.

9. PW1 the defacto complainant deposed that he was

residing at Kallar along with his wife, daughters Mini and Anitha and son Bineesh. His daughter Anitha studied up to 9th standard in Govt. High School, Adimaly. On

01.10.06, as usual, PW1 went to work at 7 a.m. His wife, PW2 also left the house for her avocation at 7.30 a.m. Their children alone were there in the house. PW1 returned home at 5.00 p.m., and then he was informed that his daughter Anitha was missing. Four sets of her dress and an amount of Rs.320/- were also

missing from the house. PW1 enquired about Anitha. He went to the appellant's house to inquire about Anitha since he knew that the appellant and Anitha were in love and when a proposal for their marriage came one year before he told the parents of the appellant that Anitha was a minor and that she would not be given in marriage to the appellant. After coming to know of the love affair of Anitha with the appellant, her study in the school was also discontinued.

10. When PW1 went to the house of the appellant to

enquire about Anitha his father said that he was also missing from the house. PW1 learnt that the appellant had taken Anitha in an autorickshaw called Payyappally. Since all efforts to trace Anitha failed, PW1 went to the police station and gave Ext.P1 F.I.Statement. Since Anitha could not be traced even after giving a complaint before the police he filed Ext.P2 complaint before the Magistrate. A complaint was submitted before the High Court also. On 08.10.2004, he got back custody of Anitha from the Court. On 13.10.2004 Anitha consumed poison and she died on 16.10.2004.

11. PWs.2 and 3 mother and sister of Anitha have also

supported the evidence given by PW1. PW2 stated that she had overheard the appellant and Anitha talking over phone and it was after that her studies in school discontinued. The evidence of PWs.1 to 3 would show that Anitha and the appellant were in love with each other and that Anitha eloped with the appellant. The fact that Anitha had gone along with the appellant is not disputed by him. According to the appellant, Anitha had voluntarily gone along with him.

12. PW10 is a person residing at Bhoothathankettu. He

deposed that the appellant is a distant relative of his wife. At about 2 p.m. almost 4 years back, the appellant had come to his house along with a girl. The appellant

told PW10 that they were married. When PW10 further questioned the appellant and the girl he came to know that they were not actually married. PW10 asked the appellant and the girl to go back to their house. The girl told that she would commit suicide if she was sent back to the house. The appellant and the girl resided in the house of PW10 for about one week. Since they did not

return even after one week PW10 informed the matter to the father and mother of the appellant. The father and mother of the appellant came to his house and took both of them. That evidence of PW10 is not challenged and it stands proved that the appellant and Anitha had come and stayed in his house for about one week. PW11 is the father of the appellant. He deposed that a marriage agreement was registered between the appellant and Anitha at the Sub Registrar Office, Devikulam. Ext.P9 is the marriage agreement. He produced the same before the police. The evidence of PW11 also would show that after Anitha left her house she was in the company of the appellant.

13. The fact that Anitha, who is the daughter of PWs.1

and 2 left her house on 01.10.2004 and she stayed in the house of PW10 in the company of the appellant for seven days is sufficiently proved. In fact, the evidence tendered by PWs.1, 2, 3, 10 and 11 in this regard is not challenged. PW11 is none other than the father of the appellant. He deposed that knowing that the appellant along with Anitha was residing

in the house of PW10, who is his relative, he had taken initiative to register their marriage in the Sub Registrars Office, Devikulam. Ext.P9 is the agreement for registering the marriage. PW4 is the driver of the autorickshaw in which the appellant along with Anitha left from near her house. Thus the prosecution has succeeded in proving that the appellant took Anitha to the house of PW10 while she was staying in her house under the guardianship of PW1. It is also proved that the appellant and Anitha entered into a marital tie; whether or not it is a legally valid one.

14. The charge against the appellant is that he, by

taking Anitha, a minor, from the guardianship of her father PW1, with intention to compel her to marry him and seducing to have illicit intercourse with him has committed the offence punishable under Section 366 of the IPC. The question immediately arises for consideration is whether Anitha was a minor at the time of occurrence. Only if the act of the appellant amounted to an offence of kidnapping the minor from the lawful guardianship, the other offence charged will

be attracted in this case. Going by Section 361 of the I.P.C. age of the victim girl shall be below 18 years to attract an offence of kidnapping from lawful guardianship.

15. PW1 as well as PW2 deposed that Anitha, who is

her third child was born in 1988. They could only say that birth was on the 8th of Thulam, Malayalam era. They did not remember the corresponding English calendar date. The calendar for the year 1987 shows that the date corresponding to Thulam 8 is 25.10.1987. Both PWs.1 and 2 deposed that

Anitha was delivered in Kurians Hospital. In order to corroborate that version, the prosecution has brought in Ext.P15, which is a certified copy of the birth register of Anitha. PW15 is the Secretary of Adimaly Grama Panchayat. He proved in court Ext.P15 as the copy of the original register maintained in his office. He produced the original along with its copy and after comparison the copy was admitted in evidence.

16. The learned counsel appearing for the appellant would contend that entry in Ext.P15 cannot be used to relate

to the deceased Anitha in the absence of any other evidence to correlate. He further would contend that the entry in Ext.P15 cannot be given any evidentiary value, since the person who entered the entries therein was not examined. The Apex Court in *Murugan @ Settu* (supra) considered the question as to what is the probative value of a birth certificate. It was held that the documents made ante litem motam can be relied upon safely, when such documents are admissible under Section 35 of the Indian Evidence Act, 1872. The Apex Court, however,

made a note of caution that the authenticity of the entries in the birth register and whose information are such entries in the register may have to be ascertained.

17. Here, both PWs.1 and 2 deposed that the date of

birth of Anitha was Thulam 8, corresponding to 25.10.1987. Of course PW1 stated the English year as 1988. In the light of the other evidence on record that version of PW1 regarding the year can be taken as a mistake only. In Ext.P15, names of PWs.1 and 2 are entered as father and mother. On the basis of the information received from Kurians Hospital, Adimaly,

the birth was registered on the very next day, ie., 26.10.1987. Ext.P15 register having been maintained under the provisions of the Registration of Births and Deaths Act, 1969 by the appropriate authority and the entries regarding the birth of Anitha have been duly proved, the same can certainly be acted upon under Section 35 of the Indian Evidence Act. Section 35 reads, an entry in any public or other official book, register or record or an electronic record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record or an electronic record is kept, is itself a relevant fact. Ext.P15 is such a document and the entries in it sufficiently proved to be related to Anithas birth. The entries in Ext.P15 therefore render sufficient corroboration to the oral testimony of PWs.1 and 2. and the prosecution has succeeded in proving that Anitha was born on 25.10.1987. Therefore, on the date of occurrence. ie., 01.10.2004, she was aged below 18 years.

18. The contention of the appellant is that Anitha went

along with the appellant on her own and there was absolutely no compulsion or any element of enticing from the part of the appellant. The learned counsel pointed out the circumstances that one year before the incident, there was a proposal from the side of the appellant to marry Anitha, but it was turned down by PWs.1 and 2 saying that she was not of marriageable age and that there has been frequent conversions between the appellant and Anitha through phone to substantiate his contention that Anitha went along with the appellant on her own volition. Her

subsequent suicide also relied on by the learned counsel to buttress that contention

19. The learned Public Prosecutor would submit that

since deceased Anitha was below the age of 18 years, her consent does not matter either in the context of the offence of kidnapping from lawful guardianship or enticing away of the minor with the intention of compelling her to marry. The submission of the learned Public Prosecutor is that the question of consent has relevance only if the victim is a major

and consent of the minor does not absolve the offender from charge of kidnapping from lawful guardianship.

20. The Apex Court in *State of Haryana v. Raja Ram* [AIR 1972 SC 819] held that,-

The object of this section seems as much to protect the minor children from being seduced for improper purposes as to protect the rights and privileges of guardians having the lawful charge or custody of their minor wards. The gravamen of this offence lies in the taking or enticing of a minor under the ages specified in this section, out of the keeping of the lawful guardian without the consent of such guardian. The words "takes or entices any minor out of the keeping of the lawful guardian of such minor in Section 361 are significant. The use of the word "keeping" in the context connotes the idea of charge, protection, maintenance and control, further the guardian's charge and control appears to be compatible with the independence of action and movement in the minor, the guardian's protection and control of the minor being available, whenever necessity arises. On plain reading of this section the consent of the minor who is taken or enticed is wholly immaterial : it is only the guardian's consent which takes the case out of its purview. Nor is it necessary that the taking or enticing must be shown to have been by means of force, or fraud. Persuasion by the accused person which

creates

willingness on the part of the minor to be taken out of the keeping of the lawful guardian would be sufficient to attract the section. (underline supplied)

21. This principle was reiterated in Thakorlal D.

Vadgama v. State Of Gujarat [AIR 1973 SC 2313]. In Mafatlal and another v. State of Rajasthan [(2022) 6 SCC 589], the question before the Apex Court was when the minor abductee went along with the offender without any compulsion, but on her own will, can that amount to an offence defined under Section 361 of the IPC. There the accused was charged for the offence under Sections 363 and 366 of the IPC. The matter came up before the Apex Court since the accused along with the abductee approached the court for the quashment of the prosecution proceedings. The abductee had filed an affidavit stating that she left her house and went along with the offender on her own free volition. The Apex Court held that when the minor girl went along with the accused on her own will and volition and there was no element of enticing or persuasion, offence punishable under

Section 363 or for that matter the offence under Section 366 of the IPC would not be attracted. In that view of the matter, it is the burden of the prosecution to establish that the victim went along with the offender as a result of some kind of enticement.

22. Here, the prosecution attempted to prove that on

account of the compulsion, Anitha went along with the appellant through PW4, in whose autorickshaw both the appellant and Anitha left from her house. PW4 did not depose in court supporting that version. Soon on coming back to her

house Anitha consumed poison and committed suicide. Consumption of poison was on 13.10.2004 and the death was on 16.10.2004. Therefore, her evidence is not available before the court. None of the other witnesses has any direct knowledge as to under what circumstances Anitha left her house. From the evidence of PW10 it cannot be said that Anitha stayed along with the appellant, in his house without her full consent. Only after registration of marriage before the

Sub Registrar Office and at the intervention of police, Anitha

was sent back along with PWs.1 and 2. In that context the version of PWs 10 and 11 that Anitha threatened of committing suicide if she was sent back her house assumes relevance.

23. In the said circumstances, it is not able to find that

Anitha went along with the appellant on 01.10.2004 due to any kind of enticement, persuasion or compulsion from the part of the appellant. Viewed the facts proved in the case in the light of the law laid down by the Apex Court in the aforementioned decisions it can only be said that evidence is insufficient to prove the charge levelled against the appellant. The effect of the infractions pointed out in the formal charge framed by the Court against the appellant does not require consideration in the light of the above finding.

24. Therefore, I hold that the Additional Sessions Judge

went wrong in finding that the appellant had committed the offence punishable under Section 366 of the I.P.C. The conviction and sentence of the appellant are liable to be set aside.

25. The appeal is accordingly allowed and on setting

aside the conviction and sentence as per judgment dated 26.02.2008 in S.C.No.393 of 2005 on the file of the IV Additional Sessions Judge (Adhoc)-II, Thodupuzha the appellant is acquitted. He is set at liberty. Sd/- P.G. AJITHKUMAR, JUDGE dkr

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