

State of Kerala Vs. Ayooob

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Court : Kerala

Decided On : Aug-02-2004

Reported in : 2005(2)KLT441

Judge : K.A. Abdul Gafoor, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 375, 376 and 386; Code of Criminal Procedure (CrPC) - Sections 156(3)

Appeal No. : Cri.A. 186 of 1996

Appellant : State of Kerala

Respondent : Ayooob

Advocate for Def. : P. Ramakrishnan Nair, Adv.

Advocate for Pet/Ap. : T.K. Kunhabdulla, Public Prosecutor

Disposition : Appeal allowed

Judgement :

K.A. Abdul Gafoor, J.

1. The State has come up with this appeal, when the respondent was acquitted of the charges for the offence under Section 376 IPC. PW4, the father of the victim filed a private complaint as CMP No. 678/91 before the then Second Class

Magistrate, Parapanangady. It was on 19.2.1991. The Magistrate forwarded it to the police in terms of Section 156(3) Cr.P.C. There upon the police registered Ext.P9 FIR as Crime No. 33/91 of Tirurangadi police station. PW.14 and PW.15 conducted investigation. Successor to PW.15 laid the charges. The prosecution examined 15 witnesses and marked 11 documents. The defence evidence consists of the oral testimony of DWs.1 to 6 and Exts.D1 to D15.

2. It is contended by the Public Prosecutor that the victim being a minor aged 15 years in March, 1990, below the consenting age provided under clause sixthly of Section 375 IPC and being a student of 7th standard and as there is evidence of she being pregnant and giving birth to a child, the factum of rape has been proved in this case. Of course there was delay in preferring Ext.P1 complaint by about 11 months and 4 days. It has been sufficiently explained through PWs.2, 3 and 4 that the victim did not divulge the information of the sexual intercourse to any one. It was when she complained of stomach pain and taken to a hospital that PW.3, her mother, was told by the doctor that she was pregnant. It was then alone, the victim PW.1 divulged the factum of rape by the accused to PW3 who in turn informed PW.4, the father of the victim. Thereafter PW4 approached the accused and the accused promised to marry the victim after delivery. Later he withdrew from that promise. These facts are proved through the evidence of PWs.2,3 and 4. Therefore, the delay has been sufficiently explained.

3. He further submits that, PW1 the victim had spoken to about the incident in a natural way. Of course Ext.P1 gives the date of occurrence as 15.3.1990. PW.1 had stated that the occurrence was on an examination day. Even though, through DW.1 it is said to be proved that the examination started only on 19.3.1990, no such suggestion was made to PW.1 during cross examination by the defence. So even if there is a slight discrepancy in the date, it cannot materially affect the prosecution, as PW1 had never stated about the date in her examination before the Court below. The date was mentioned by her father in Ext.P1 after about 11 months. In such circumstances the discrepancy in a date cannot be a reason to reject the prosecution case. It is further submitted that, as spoken to by PW.2, the Panchayat President and the mediator, there was a proposal to conduct DNA test of the child and the accused. But it did not materialise obviously because there

was no consent forthcoming from the accused. Therefore, there was no reason for the Court below to acquit the accused in the light of the documentary evidence on record and from PWs.1 to 4 and other witnesses. There is due corroboration of the incident spoken to by PW1 through the evidence of PWs.2 to 4 and also because of the child birth to a minor unmarried girl. So in every aspect the case shall end in conviction. The acquittal has therefore to be reversed. He has relied on the decision reported in *State of Punjab v. Gurmit Singh and Ors.*, AIR 1996 SC 1393, *Smt. Kamti Devi and Anr. v. Poshi Ram*, AIR 2001 SC 2226, *Syed Mohd. Ghouse v. Noorunnisa Begum*, AIR 2001 (Crl.) Law Journal 2028, *State of Rajasthan v. N.K.*, (2000) SCC (Crl.) 898 and *State of Karnataka v. Manjanna*, 2000 SC (Crl.) 1031.

4. At the same time it is submitted by the counsel for the accused that there is no reason for reversal of the acquittal in this case especially when there is no corroboration to the evidence of PW1, the victim. Admittedly by the prosecution the victim had divulged the incident after six months. Even if the victim has to be believed there should be some other contemporaneous evidence of the victim divulging the fact to any of her relatives about the time of occurrence. When the prosecutrix had divulged the alleged factum of rape only after six months; there shall be strong corroboration. The evidence of PWs.2 to 4 is not sufficient enough to corroborate this aspect. Delayed complaint with corroborated evidence of PW 1 cannot be the basis of conviction. So the trial Court was justified in acquitting the accused. It is further submitted that the prosecution is vitiated due to exorbitant delay. Even no complaint was filed after six months, when the factum of rape was divulged by the victim to her mother and in turn to her father. The complaint was filed, even thereafter, more than four months later. Such delayed compliance especially on a serious offence shall necessarily result in acquittal alone. Mere child birth cannot be a corroboration of the evidence of the victim. Even if the description of the prosecutrix alone is to be believed it shall repose confidence in the Court and the Court shall be sure that she is telling truth and truth alone. Then alone prosecution shall end in conviction. So there is no reason for reversal of the acquittal, the counsel submits. He has relied on the decisions reported in *Rameskwar, S/o. Kalyan Singh v. The State of Rajasthan*, AIR 1952 SC 54, *Krishan Lal v. State of Haryana*, (1980) 3 SCC 159, *Jagannivasan v. State of*

Kerala, 1995 Supp. (3) SCC 204, Surjan and Ors. v. State of M.P., 2002 (10) SCC 214 and Vimal Suresh Kamble v. Chaluverapinakeapal S.P. and Anr., (2003) 3 SCC 175.

5. As held by the Supreme Court in Kamti Devi and Anr. v. Poshni Ram, AIR 2001 SC 2226. 'The result of genuine DNA (Dioxy Nucleic Acid) is said to be scientifically accurate' to prove paternity. If there was a DNA test in this case as suggested and proposed, as spoken to by PW2, necessarily that would have given quietus to the point agitated. On one reason or other, though there was such proposal, it did not come through. As there was such an attempt at the negotiation stage, I suggested to the counsel for the accused whether the accused would be prepared to undergo the DNA test. He fairly submitted that it may turn prejudicial to him being an additional evidence brought in. Therefore that scientific evidence is not available to the court and I have to scan through the available evidence in this case to find the fate of this appeal.

6. Even going by the evidence adduced by the defence, she was a minor even on the date of filing the complaint, after more than ten months of the alleged incident. It is also proved and not much disputed that PW1 was unmarried at that time and that she had given birth to a child on 5.12.1990. Even on that date she was a minor, the date of birth being 25.3.1975, as found by the Court below based on Ext.P2. Even on child birth she was below the consenting age of 16 years. When thus an unmarried minor girl below sixteen years of age had given birth to a child, it can be the result of a rape and rape alone. Because consent is immaterial as per clause sixthly of Section 375. Thus the factum of rape has been proved in this case. The only thing to be probed into is whether the accused is guilty of that offence.

7. As in any case relating to rape the primary evidence shall be that of the prosecutrix. There cannot have any occurrence witness for the offence of rape. That is why the Courts have been giving importance to the version given by the victim. As expounded by Lord Reading in Baskerville's case, (1916) 2 KB 659, 'indeed, if it were required that the accomplice should be confirmed in every detail of the crime, his evidence would be essential to the case, it would be essential to

the case, it would be merely confirmatory of other and independent testimony'. The great Judge further held that 'some additional evidence rendering it probable that the story of the accomplice (or complainant) is true and that it is reasonably safe to act upon it' may become necessary.

The rape victim is in a more better pedestal than an accomplice. But at the same time as held by the Supreme Court in *Rameshwar v. The State of Rajasthan*, AIR 1952 SC 54, 'the only rule of law is that this rule of prudence must be present to the mind of the judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must in every case, be corroboration before a conviction can be allowed to stand. Thus as a note of caution given by the Supreme Court in that case 'it would be impossible, indeed it would be dangerous, to formulate the kind of evidence which should, or would be regarded as corroboration. Its nature and extent must necessarily vary with the circumstances of each case and also accordingly to the particular circumstances of the offence charged'.

8. Now a woman who has been found to be raped if she was ravished she is victim of outrage. When finding out who was the culprit it is necessary that 'the judge should give some indication in his judgment that he has had this rule of caution in mind and should proceed to give reasons for considering it unnecessary to require corroboration on the facts of the particular case before him and show why he considers it safe to convict without corroboration in that particular case.' So what is to be looked into is whether the evidence of PW1, the prosecutrix in this case is sufficient enough to bring guilt home on the accused, if her evidence gives confidence in the Court and whether the other materials on record are sufficient corroboration. So much depends upon the re-appreciation of the evidence of PW1 with reference to that of PWs.2 to 4, to come to a conclusion as to the guilt or otherwise of the respondent/accused.

9. PW1 was just 18 years when she was examined before the Court below. She has stated that on the noon of a day just before three years while she was alone in her house, the accused came to her house. She was in the kitchen. He caught hold of her. She was forced to lie on the floor. She cried. There upon the accused

threatened her that she would be done away with. He raised her skirt and committed sexual intercourse on her. She did not tell her parents as the accused had threatened her that she would be done away with. Therefore, she did not divulge it to any one, including to PW.3, her mother. After about six months she developed pain on her abdomen. There upon PW3 took her to the doctor. It was at that time, on hearing from the doctor that she was pregnant, that her mother asked her about the incident. She told that it was because of the accused that she became pregnant. She later gave birth to a child. She was at the time of occurrence a student of 7th standard. These are the facts divulged by her in her chief examination. But in the cross examination attempt was made to discredit her with the questions that she did have sexual intercourse with others, that too in a vacant shop building nearby her house on the day of marriage of her elder sister. But she was stoutly refuted such imputations. In cross examination she had stated that she had been raped on the noon of an examination day. It was a Thursday and that the examination commenced at 2.30 p.m. After the incident she took bath, cleaned her cloths and gone to the school for the examination. During cross examination she further deposed that she had cleaned the cloths because the cloths were stained with blood because of the alleged incident. These new aspects, fortifying the case, have been brought in the cross examination. It has also been very categorically stated by her in the cross examination that the accused had threatened to kill her if she had divulged about the incident to anyone. This evidence really thus disclosed that there was a threat on her by the accused from divulging the incident to anyone.

10. In the circumstance of such threat the delay occurred in this case to file the complaint cannot be said to be of any adverse consequences to the prosecution. As pointed out by the great Judge Justice Krishna Iyer in *Krishan Lal v. State of Haryana*, 1980 (3) SCC 159, 'the inherent bashfulness, the innocent naivete and the feminine tendency to conceal the outrage of masculine sexual aggression' is also the reason for such concealment until it had come out in its natural course.

11. PW4, the father of the prosecutrix has stated that soon he got information about her pregnancy from PW3, he went to the accused and the accused admitted that he was responsible for the pregnancy of the victim and he had agreed to

marry the victim after her child birth, as it was not conducive to contract a marriage with a pregnant girl.

12. PW2 says that he had been even before the child birth mediated in this incident and there was a proposal for DNA test. Thus, it is proved that there was mediations. The mediation was not fruitful. PW4 therefore waited until the child birth. After child birth, the accused withdrew from his promise. Therefore immediately after the child birth and attendant care to PW1 during antinatal stage, complaint was filed. This is sufficient explanation for the delay in filing the complaint. On scanning through the evidence of PW2 and PW4, who seek about the mediation, I see that there is no much cross examination by the accused disputing such mediation.

13. In the decision reported in *State of Punjab v. Gurmeet Singh*, 1996 (2) SCC 384, the Apex Court has held that:

'The Courts cannot overlook the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged'.

14. In the decision reported in *State of Rajasthan v. N.K.*, 2000 SCC (Crl.) 898, it has been held by the Apex Court that:

'We may however state that a mere delay in lodging the FIR cannot be a ground by itself for throwing the entire prosecution case overboard. The Court has to seek an explanation for delay and test the truthfulness and plausibility of the reason assigned. If the delay is explained to the satisfaction of the Court it cannot be counted against the prosecution'.

15. The Apex Court in *State of Rajasthan v. N.K.*, 2000 SCC (Crl.) 1898, noted the delay of almost same nature, as follows:

'PW. 10, the father of the prosecutrix, the prosecutrix, PW2 and other witnesses have stated that while they were about to move to the police station they were prevented from doing so by the community fellows of the accused who persuaded them not to lodge a report with the police and instead to have the matter settled by convening a Panchayat of the village people. After all the family of the victim had to live in the village inspite of the incident having taken place. The explanation is not an afterthought. An indication thereof is to be found in the FIR itself where the complainant has stated -- 'the delay in lodging the report is due to village panchayat, insult and social disrepute'. Nothing has been brought out in the cross-examination of the witnesses to doubt the truth and reasonableness of the explanation so offered.'

16. In this case also PW2 had stated about the mediation. He is none other than the local Panchayat President. PW4 had stated about the promise of the accused to marry the victim after the child birth and later withdrawal from that promise. The complaint was lodged without much delay after the child birth. These have been explained in Ext.PI complaint itself. So relying on the decisions in *State of Punjab v. Gurmit Singh*, (1996) 2 SCC 1393 and *State of Rajasthan v. N.K.*, 2000 SCC (Cri.) 898, it can be found that the delay in filing the complaint has been sufficiently and satisfactorily explained in that case.

17. PW1 was a school girl and was below the age of 15 years at the relevant time. Even when she was examined by the Court below as PW1, she was just 18 years. Her testimony reveals that she has been speaking very naturally. Of course that evidence came belatedly. Even then it, certainly, by itself, reposes confidence in the Court. But at the same time, being a person who had divulged the sexual ravage against her after about six months, it is safe that some corroboration has to be sought for, for her version . as held by the Supreme Court in *Rameshwar v. The State of Rajasthan*, AIR 1952 SC 54.

18. That corroboration is available in this case from PWs. 2, 3 and 4. If there had not been such an incident as spoken to by PW1, there was no necessity for a mediation. That too at the instance of the head of that village, PW.2. He had certainly stated that the accused, PW.1 and PW.4, the father of PW.1 were known

to him. He has also spoken to that there was a talk in his village that accused was responsible for the pregnancy of PW1. At that time he had been a mediator in it. He had enquired with the accused. But the accused did not concede. There was also a proposal for the conduct of DNA test. Two others were also asked to involve in the mediating; but it did not fructify. If PW.1 had not divulged this fact earlier, as spoken to by PW3, on consultation with a doctor when she experienced pain on the abdomen, necessarily there was no occasion for PW.2 to be a mediator. Thus the mediation conducted by PW.2 itself is sufficient corroboration for the evidence of PW.1. The bashfulness and innocent naivete and the feminine tendency to conceal the outrage of masculine sexual aggression of girls is the reason why PW.1 did not divulge the outrage on her until six months when the doctor revealed the pregnancy. It cannot be said to be so unnatural, in the Indian village circumstances. It is natural that when a daughter of that age experienced abdominal pain, any mother will take her to a doctor. The doctor revealed to PW.3 that her daughter was pregnant by six months. It was at that time the incident was disclosed to PW.3 and PW.3 naturally informed PW.4, the father of the victim and as spoken to by PW.4 he had approached the accused. He had spoken to that the accused had promised to marry PW.1 after the child birth. These are sufficient corroboration in a case of this nature. Ultimately PW1 had given birth to a child as is revealed by Exts.P3 and P3(a) duly proved by PW.5, the doctor. The child birth also thus corroborates the evidence of PW.1.

19. The decision reported in *Jagannivasan v. State of Kerala*, 1995 Supp. (3) SCC 204, is a case of rape on a girl. It was held there that 'the peculiarity in that regard which creates doubt is that the prosecutrix kept quiet for six days and did not whisper a word about it to anyone. Her getting pain in her private parts six days later is unbelievable when no tenderness was found by the doctor and no complaint of pain was made to her'. It was taking into account such circumstance, the evidence of prosecutrix was disbelieved. The delay of six days is found to be vital, when there was no case of threat by the aggressor towards the prosecutrix; unlike in the case on hand. The decision reported in *Krishnan Lal v. State of Haryana*, 1980 (3) SCC 159, also does not help the accused in this case. Even in that case, the Apex Court carefully pointed out that:

'We must bear in mind human psychology and behavioural probability when assessing the testimonial potency of the victim's version. What girl would foist a rape charge on a stranger unless a remarkable set of facts or clearest motives were made out? The inherent, bashfulness, the innocent naivete and the feminine tendency to conceal the outrage of masculine sexual aggression are factors which are relevant to improbabilise the hypothesis of false implication'.

In such circumstances that the PW1 had concealed the sexual atrocity on her until six months, till she developed abdominal pain, is a natural human psychology and behaviour. Certainly, so, as far as a girl in the village, like PW1 is concerned.

20. Even in the decision in *Vimal Suresh Kamble v. Chaluverapinakeapal S.P. and Anr.*, 2003 (3) SCC 175, relied on, on behalf of the accused it has been held that:

'conviction of an accused on the basis of the testimony of the prosecutrix alone is permissible, but that is in a case where the evidence of the prosecutrix inspires confidence and appears to be natural and truthful'.

In that case the evidence of the prosecutrix was 'not of such quality and there is no other evidence on record which may even lend some assurance, short of corroboration that she is making a truthful statement'. On the other hand, in this case the evidence of PW.1 which by itself reposes confidence, has been duly corroborated by the evidence of PWs.2, 3 and 4. Therefore, the decision in *Vimal Suresh Kamble's* case is of no assistance to the accused to say that the evidence of PW1 does not worth believing.

21. In *Surjan and Ors. v. State of M.P.*, (2002) 10 SCC 214, yet another decision cited on behalf of the accused, it has been held that even the uncorroborated testimony of the prosecutrix can be relied on for enter in conviction if it inspires confidence in the judicial mind and be of such a nature that the Court must be able to certify that the testimony is wholly reliable. But in that case the Court did not believe the prosecutrix's evidence because of 10 days' delay which has not even been attempted to be explained'. In this case as found above even though delay is more than 10 months, it has been satisfactorily explained through the evidence of PW.2 and 4 relating to the mediation in the matter. So this decision is also of no

avail to the accused.

22. On the other hand, as held in *State of Rajasthan v. Om Prakash*, 2002 SCC (Cri.) 1210, it has been held that 'conviction for offence under Section 376 IPC can be based on the sole testimony of rape victim is a settled position'. It was further held that:

'it must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime, but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice'.

As again pointed out by the Apex Court, 'the inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, Courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury'.

23. In this case taking her testimony as a whole, I am of the view that this is a case where the testimony of PW1 by itself inspires full confidence and the delay to divulge the sexual outrage is because of the bashfulness and the normal female tendency to conceal sexual outrage. Even apart, there was due corroboration by none other than PW.2, the village head, who had mediated far earlier than institution of Ext.P1 complaint, in the matter. In such circumstances, there is sufficient corroboration as well to the evidence of PW.1. Under no circumstances, a minor girl will unnecessarily foist accusation of sexual assault by another on her, as it will affect her own prestige. Therefore, I am of the view that the evidence of PW1, duly corroborated by that of PWs.2, 3 and 4 is sufficient enough to bring guilt home on the accused. On reconsideration of the whole issue and on reappraisal of the entire evidence on record, I am of the view that the Court below did not appreciate the evidence in the right perspective in a case of this

nature. The doubt regarding the date of rape as to whether it was an examination day is immaterial. It cannot be a reason for acquittal in the light of the cogent evidence on record. There was justification for the father to wait until child birth. Therefore, I have no hesitation to reverse the acquittal ordered by the Court below. The guilt of the accused has been undoubtedly and beyond reasonable doubt proved in this case. The respondent/accused is therefore found guilty of the offence punishable under Section 376 IPC and I convict him.

24. In terms of Section 386, Appellate Court shall pass, in appeal from acquittal, guilty sentence only in accordance with law. Before the sentence is passed it is necessary that the accused shall be heard, in the matter of sentence. Therefore, as he has been found guilty, a warrant be issued against the respondent/accused to produce him before this Court on 22.11.2004 to decide about the sentence.

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