

Thomas Alias Thomachan Vs. State of Kerala

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Court : Kerala

Decided On : Jul-21-1998

Reported in : 1999CriLJ1297

Judge : K.A. Mohamed Shafi, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 376; Code of Criminal Procedure (CrPC) , 1974 - Sections 357 and 391

Appeal No. : Crl. Appeal No. 107 of 1993 and Crl. M.P. No. 740 of 1998

Appellant : Thomas Alias Thomachan

Respondent : State of Kerala

Advocate for Def. : P.N. Sukumaran, Public Prosecutor

Advocate for Pet/Ap. : T.V. Prabhakaran, Adv.

Disposition : Appeal dismissed

Judgement :

K.A. Mohamed Shafi, J.

1. The accused in Sessions Case No. 32 of 1990 on the file of the Assistant Sessions Court, Thodupuzha has filed this appeal challenging the judgment dated 25-2-1993.

2. The accused was prosecuted for an offence punishable under Section 376, I.P.C. on the basis, of the charge-sheet laid by the Circle Inspector of Police, Idukki in Crime No. 170 of 1989 of the Idukki Police Station alleging that the appellant committed rape on a woman by name Aleyamma without her consent at about 9.15 p.m. on 24-8-1989 at the road in front of the house of Kozhithanath Kunjeep.

3. The first information in this case was given by the victim of the offence at about 10.30 p.m. on 24-8-1989 at the Idukki Police Station before PW-16 the Head Constable who registered the above Crime No. 170/89 against the respondent for an offence punishable under Section 376, I.P.C. The Circle Inspector of Police conducted investigation and after completing the investigation laid charge sheet against the respondent before the Judicial Second Class Magistrate, Thodupuzha. The Judicial Second Class Magistrate, Thodupuzha, after preliminary enquiry, committed the case to the Court of Sessions, Thodupuzha as per order dated 1-5-1990 in C.P. No. 1/90, The Sessions Court, Thodupuzha made Over this case to the Assistant Sessions Court, Thodupuzha for trial and disposal. The Assistant Sessions Court, Thodupuzha, after trial, found the appellant guilty of the offence punishable under Section 376, I.P.C. convicted and sentenced him to undergo rigorous imprisonment for 8 years and to pay a fine of Rs. 5,000/-, in default of payment of fine to undergo rigorous imprisonment for a further period of 2 years and directed to pay Rs. 4,000/- to the victim being compensation under Section 357, Cr. P.C. The accused filed this appeal challenging the finding of guilt, conviction and sentence entered by the lower Court,

4. The prosecution case is as follows. P. W-1, the victim of the offence, Aleyamma is an active worker and office-bearer of the 'Janadhipathya Mahila Association' which is a ladies' organisation of the Marxist Communist Party. The Association organized propagation processions in three wings in the Idukki District on 24,-8-1989. The procession in one wing was led by an Advocate Smt. Mary Syriac, who was also an office-bearer of the organisation, and examined as PW-2 in this case. P.W.1 prosecutrix, her friend Mrs. Leela Sukumaran and others ladies had participated in the procession on 24-8-89. Late in the evening, PW-1 and Leela Sukumaraji left the procession and went home. They first went to the house of

Mrs. Leela Sukumaran. They reached there at about 8 p.m. and from there Leela Sukumaran who was examined as PW-3, her daughter PW-4 and a boy in the neighbourhood PW-5 accompanied PW-1 to her house as it was in the night. While they were walking through the Mariyapuram-Thankamany road, they found the appellant coming driving his jeep. Leela Sukumaran stopped the jeep and asked the appellant to take PW-1 in the jeep to her house, PW-1 is the neighbour of the appellant. At that time PW-7 was also travelling in front seat of the jeep. The appellant agreed to give a lift to PW-1 and she sat on the back seat. On the way, PW-7 alighted from the jeep. Though the appellant made some amorous overtures while travelling in the jeep, PW-1 escaped from them. Then the appellant stopped the jeep in front of the house of Kanamkombil Sunny Pappan, PW-1 got down from the jeep and ran along the road towards her house. But the appellant chased her and caught her by force, held her tight with his hands from behind in a bending position, removed her sari, lifted her underskirt from behind, pulled down her shuddy and satisfied his lust from behind against her will and consent on the road in front of the house of Kozhithanath Kunjeep. Immediately after the incident PW-1 went to the house of Madathil Karunakara Pillai, who is the neighbour to the scene of occurrence and narrated the incident to Karunakara Pillai and his wife PW-9 and hearing the hue and cry, PW-8 the husband of PW-1 came there to whom PW-1 narrated everything. At that time PW-1 was wearing only a blouse and an underskirt. PW-8 gathered her sari from the road and went to the house and immediately went to the police station and lodged Ext. P1 F.I. statement.

5. The appellant had denied the allegation of rape before the lower Court. He has contended that himself and PW-1 belong to rival parties and while travelling in the jeep driven by him PW-1 used some abusive words against him. Therefore, he sent her out from the jeep and due to that enmity this false case is foisted against him. Another defence suggestion was that she foisted a false case against the accused to create some ground or reason fearing that her husband will rebuke her for reaching home late in the night Both those suggestions are denied by PW-1.

6. The lower Court carefully and meticulously analysed every piece of evidence on record and found that the appellant is guilty of the offence punishable under Section 376, I.P.C. The learned Counsel for the appellant assailed the finding of

the lower Court mainly on the basis of medical evidence on record. According to him, it is impossible to have sexual intercourse with a woman from behind without her consent and cooperation in standing posture as it is against human anatomy. The learned counsel for the appellant further submitted that PW-1 victim of the offence and prosecutrix in this case has filed an affidavit in this appeal before this Court along with CrI. M.P. No. 740/98 to receive the affidavit stating that the appellant had sexual intercourse with her consent and she concealed the truth and material facts before the lower Court and, therefore, the affidavit filed by PW-1 has to be treated as additional evidence in this case, under Section 391, Cr. P.C. and appropriate orders should be passed by this Court.

7. The fact that PW-1 travelled in the jeep driven by the appellant on that fateful night is admitted by the appellant. That fact is proved by, the evidence of PWs. 1,3 to 5 and 7. The evidence of PWs. 1,3 to 5 and 7 also established that PW-7 and PW-1 were the only travellers in the jeep. PW-7 has deposed that on the way He alighted from the jeep at the place called Kanjamala. Therefore, the evidence on record established that the appellant and PW-1 alone were travelling in the jeep in that night after-PW-7 alighted from the jeep.

8. The lower Court after analysing the evidence of PWs. 1 and 8 minutely found that the evidence of PW-1 with regard to the actual incident is believable. The lower Court also found that the evidence of PW-1 coupled with the other evidence on record has to be preferred against the opinion evidence given by PW. 12 the Doctor who examined PW-1 after the incident. It was the case of PW-1 that when she got down from the jeep and ran through the road, the appellant followed her, caught hold of her from behind; removed her sari, held her tight in a bending position, lifted underskirt to her back, pulled down her brief and by force subjected her to sexual intercourse from behind, against her will and consent. She has also deposed that though she struggled to escape from the clutches of the appellant she did not succeed as she was tired in that night after the procession and though she made hue and cry, it was not heard by anybody. It is in evidence that the road from which the incident took place is a village road not very much frequented by travellers. Ext. P8 plan of scene of occurrence prepared by PW-15 village officer shows that the nearest house from the scene of occurrence is 80 metres away.

Therefore, there is no possibility of hearing her cries by somebody residing in nearby house or anybody witnessing the incident though it occurred on the road in that remote area.

9. Immediately after the incident, the underskirt and jetty worn by PW-1 at the time of incident were taken into custody by the police and they are marked as M.Os. 1 and 2. M.Os. 1 and 2 and the vaginal smear taken by PW-12 who examined PW-1 the next morning at 9.15 a.m. were sent for chemical analysis. The pubic hair collected from M.O.-2 underwear of PW-1 and the pubic hair of the appellant collected by PW-13 who examined him were also sent for chemical analysis. In Ext. P7 report of the Chemical Analyst and in the evidence of PW-14 Director of Forensic Science Laboratory, it is stated that human spermatozoa was detected in M.O.1 skirt and M.O.2 jetty and vaginal smear. It is also stated in Ext. P7 and by PW-14, that the pubic hair collected from M.O.2, the jetty of PW-1 were similar to the pubic hair collected by PW-13 Doctor from the appellant and sent for chemical analysis. Therefore, in this case, there is conclusive evidence which established that the appellant had subjected PW-1 to sexual intercourse.

10. PW-12 the Doctor who examined PW-1 has deposed that if a lady of normal height and weight holds her thigh close tight, sexual intercourse with her from behind is not possible without the co-operation of the lady. On the basis of this opinion given by PW-12, the learned Counsel for the appellant vehemently argued that it is impossible to accomplish sexual intercourse with PW-1 in a standing posture from behind as alleged by PW-1. But it is pertinent to note that in the re-examination, PW-12 has deposed that if the assailant uses force with hand or anything else/(not penis) and wins over the lady and separates the thighs, he could have sexual intercourse by force from behind. It is clear from the opinion given by PW-12 in the re-examination that sexual intercourse for a man with a woman without her co-operation from behind in standing posture is absolutely impossible as contended by the learned Counsel for the appellant is not at all correct or acceptable. It is also pertinent to note that the lower Court has observed that from the nature and appearance of the parties the physique of the appellant was such that he was capable of easily overpowering PW-1 by force. The very contentions raised by the appellant relying upon the opinion of PW-12 that, the

story of PW-1 that she was. subjected to sexual intercourse from behind by force against her will and consent is not believable or acceptable, is absolutely of no force on the face of the clinching evidence given by PW-1 and the presence of semen in her underskirt, jetty, vaginal smear and also pubic hair of the appellant in the jetty worn by PW-1 at the time of the incident. Therefore, it has to be held that the lower Court is perfectly justified in holding that the evidence on record proved beyond reasonable doubt the rape alleged to have (been) committed by the appellant on PW-1 against her will.

11. It is also pertinent to note that the appellant has not adduced any evidence against the evidence adduced by the prosecution to establish any animosity or ill-will against PW-1, who was a woman aged 38 years at the time of the incident and a social and political worker in the locality to foist such a very grave false case against the appellant.

12. What remains to be considered is CrI. M.P. No. 740/98 filed by the appellant to receive the affidavit of PW-1 with the averment that she has in fact consented for sexual intercourse with the appellant and she had concealed the truth and material facts from the lower Court. Even though the appellant's counsel submitted that the facts and circumstances of this case justify the acceptance of the affidavit as additional evidence under Section 391 of the Cr. P.C., it has to be noted that Section 391 is of no help to the appellant. Section 391 of the Cr. PC. deals with the discretion of the appellate Court to take further evidence, or direct it to be taken. Section 391 of the Cr. P.C. reads as follows:

391. Appellate Court may take further evidence or direct it to be taken- (1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry.

It is clear from the provisions of Section 391, Cr. P.C. that the discretion is given to the appellate Court to take further evidence by itself or direct the Sessions Court or the Magistrate to take additional evidence in appropriate cases by recording reasons for taking additional evidence. The discretion vested in the appellate Court under Section 391 of the Cr. P.C. to take additional evidence is not intended to fill up the lacuna in the prosecution evidence or to make out a case different from the one already on record. It is also pertinent to note in this case that no additional evidence is sought to be adduced by the appellant but by tendering the affidavit of PW-1 the victim and prosecutrix in this case, the appellant is seeking to erase the entire prosecution evidence regarding rape in the guise of further evidence at the appellate stage by cutting at the very root of the prosecution case. I do not think such an affidavit sworn by the prosecution witness can be accepted as additional evidence under Section 391 of the Cr. P.C. Tendering of such affidavit by the prosecution witness who has given specific evidence before the trial Court making contradictory statements against the evidence given by them before the trial Court is not contemplated or envisaged under the provisions of Section 391 of the Cr. P.C. Therefore, the affidavit of PW-1 sought to be produced in this case as additional evidence under Section 391 of the Cr. P.C. is not at all acceptable as additional evidence under Section 391 of the Cr. P.C.

13. Acceptance of such affidavit sworn by the victims of the offence or material witnesses in criminal cases in appeals cannot be allowed, It is human nature that the wounds created by the culprit or the aggressor on the victim by the offence will be healed by efflux of time and even the scars will be erased by passage of time. If in cases in which the trial Court found the accused guilty long back and pending in appeal for sufficiently long time, the accused is permitted to file affidavit of the victim of the offence or the material witness either by their own volition or by inducement contradictory to the evidence given by them in the trial Court, the very

justice administration system will be rendered ineffective and mockery. Administration of criminal justice is intended to bring the offender to book and award proper punishment commensurate with the offence in the interest of the society at large. If the offenders who are found guilty by the trial Court are set at liberty, by finding not guilty at the appellate stage after a long lapse of time, like in this case, since the offence in this case is committed on 24-8-88, and still the case is pending in appeal for long time, it will lead to utter chaos and confusion in the society by leaving the culprits unpunished at a later point of time though they were found guilty by the trial Court. Therefore, such tendency of tendering of affidavits of the victims of the offence in appeal in contradiction of the evidence given by them at the trial stage cannot be encouraged by this Court in the guise of additional evidence under Section 391, Cr.P.C. as it will undermine the very criminal justice administration system and the rule of law. Therefore, CrI, M. P. No. 740/98 is dismissed as unsustainable.

14. After a careful and anxious perusal of the evidence on record and the judgment passed by the lower Court, I find that the findings and conclusions arrived at by the lower Court are just and proper and no interference with those findings and conclusions is warranted in this appeal. Considering the nature and circumstances of this case and the gravity of the offence committed by the appellant, I find that the sentence awarded by the lower Court is reasonable and appropriate. Therefore, no interference regarding sentence is also called for in this appeal, Hence, the finding of guilt, conviction and sentence entered by the lower Court against the appellant are confirmed and this appeal and CrI. M.P. 740/98 are dismissed.