

**Anil Kumar and Others Vs. the State of Karnataka**

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**Court :** Karnataka

**Decided On :** Jul-19-2011

**Judge :** N. Ananda & V. Suri Appa Rao

**Appeal No. :** Criminal Appeal No. 133 of 2006 connected with Criminal Appeal No. 734 of 2006

**Appellant :** Anil Kumar and Others

**Respondent :** The State of Karnataka

**Advocate for Pet/Ap. :** For the Appellants: Sri Arunashyam for M/s. Dharmashree Associates, Advocates. For the Respondent: N.S. Sampangiramaiah, High Court Government Pleader.

**Judgement :**

N. Ananda, J:

1. CrI. A. No. 133/2006 is filed by the appellants (arrayed as Accused Nos. 1 to 5) against the judgment of conviction for offences punishable under Sections 366, 376(g), 328 read with 34 IPC. CrI. A. No.734/2006 is filed by the enhancement of sentence.

2. A1 to A5 were tried for the following charges and supplementary charges:

“That you all in furtherance of the common intention on 21.8.2000 at about 4.00 p.m. when CW1 was proceeding towards Sadana Clinic of Santhekatte followed her in while Maruthi Car bearing reg. No.KL. 13-4647 and stopped the said car by her side and inducted her saying that her husband Sathish sent you to take her in your car and you brought CW1 in the said Car to KSRTC Bust Stop at Mangalore and from KSRTC Bus Stop to Mangalore you abducted her to an old big vacant house at Thokkottu in an autorickshaw bearing Reg. No.KA-19-3683 with the intend that CW1 may be forced by you all to illicit intercourse and you thereby committed an offence under Sec. 366 read with. Sec.34 of the Indian, penal Code and within the cognizance and jurisdiction of this Court.

Secondly that you in furtherance of the common intention on 21.8.2000 in the night in the said big old vacant house at Thokkottu subjected CW1 (a married woman having 2 children) to criminal intimidation administered alcohol to the mouth of CW 1 and thereafter you - one by one - committed rape on CW-1-Lakshmi on that whole night i.e. at night on 21.8.2000 till 5.00 a.m. on 22.8.2000 and you thereby committed an offence under Sec. 376 read with Sec. 34 of the Indian Penal Code and within the cognizance and jurisdiction of this Court.”

“Firstly, that, you accused Nos. 1 to 5, in furtherance of the common intention, on the night of 21.08.2000, after abducting CW1 Smt. Laxmi, you brought her to an old big vacant house at Thokkottu 2nd Kolya of Somedwara Village which was in the occupation of CW2 and belonging to one Devanna @ Laxmana Shenava and without the consent of said CW1 Smt. Laxmi, you accused Nos.1 to 5. Committed gang rape one by one from 10.00 p.m. to 5.00 a.m. of 22.08.2000 and you thereby committed an offence punishable under Section 376(g) r/w Sec. 34 of the Indian penal Code, and within my cognizance.

Secondly, that you accused Nos.1 to 5, in furtherance of the common intention, on 21.8.2000 in the night and in the said big old vacant house situated at 23rd Kolya of Somedwara Village, subjected CW 1 (a married woman having 2 children) to criminal intimidation and administered alcohol to the mouth of CW1 forcibly, with intent to commit or facilitate the commission of the offence of gang rape upon said CW1 by you one by one, and thereby committed an offence punishable under

Section 328 r/w Sec.34 of the Indian Penal Code, and within my cognizance.”

3. The defence of the accused is one of total denial. On behalf of prosecution, PWs 1 to 14 were examined, documents Exs.P1 to P9 were marked and material objects MOs 1 to 8 were marked. On behalf of the defence, DWs.1 and 2 were examined and documents Exs.D1 to D7 were marked.

4. The learned trial Judge, on appreciation of evidence and after hearing the Counsel for the parties, convicted the accused for the aforesaid offences. Being aggrieved by the same they have filed Crl. A. No.133/2006. Feeling that the sentence imposed is inadequate, the State has filed Crl.A.No.734/2006 for enhancement of sentence.

5. We have heard Sri M.S. Sampangiramaiah, HCGP for the State and Sri Arun Shyam, learned Counsel for the accused.

6. The substance of the charges framed against the accused may be stated thus:

On 21-8-2000 at 4.00 p.m. when the victim (PW1) was proceeding from Santhekatte towards Sadhana Clinic, by the side of National High Way (West Coast Road), four persons abducted her in a Maruthi car bearing registration No.KL-13-4647 and reached Mangalore KSRTC bus stand and thereafter the victim was abducted in an autorickshaw and she was taken through Mangalore City. The accused took victim to a bungalow in Thokkottu (Mangalore City) forced her to consume alcohol and committed gang rape on her thereby committed offences punishable under Sections 366, 376(b), 328 read with 34 IPC.

7. PW-1 is said to be the victim of rape. PW-5 Satish is the husband of PW 1, PW-3 Ganesh is the elder brother of PW5. PW5 is related to PW-7.

8. According to the case of prosecution, the first part of abduction, was committed by four persons by abducting the victim from Santhekatte within the limits of Udupi in a Maruthi car to KSRTC bus stand at Mangalore. In order to prove this part of incident, the prosecution has relied on evidence of PW-1 (victim).

PW-1 has deposed that on 21.8.2000 at 4.00 p.m when she was proceeding from her house to Sadhana Clinic, four persons came in a Maruthi car bearing No. No.KL-13-4647 and asked her to get into the car stating that her husband had called her. When PW1 refused, those persons dragged her into the car. When PW1 requested them to give some water, one of the persons gave water, on consumption of which PW1 became unconscious. When she regained consciousness, she found that the car was in KSRTC bus stand at Mangalore. Those persons allowed PW1 to get down from the car and they disappeared from the scene.

9. I) PW1 has deposed that the persons (culprits) who abducted her from Santhekette to KSRTC bus stand at Mangalore are not the accused. She has categorically deposed that accused are not the persons who abducted her from Udupi to Mangalore.

ii). In the first information PW1 has not stated that when she was travelling in the car, one of the culprits gave water and on consumption of which she became unconscious. Thus, from the evidence of PW1 is clear that the persons who abducted her in car from Sunkadakatte in Udupi to KSRTC bus stand at Mangalore had not caused any harm to her. As per the evidence of PW1 after the car reached Mangalore, those persons allowed her to get down from the car and thereafter they disappeared with the car. There is no investigation as to the persons who allegedly abducted PW1 from Sunkadakatte at Udupi to KSRTC bus stand at Mangalore.

10. PW1 is the wife of PW5. She is a B.A. graduate. PW1 has deposed that she offered resistance when she was forced to get into the car. We do find any injuries which would have occurred if she had offered resistance. Above all, mere abduction is not enough to attract the provision of Section 366 IPC. In a decision reported in (2006) 5 SCC 740 (in the case of Gabbu Vs. State of M.P. ) the Supreme Court has held:-

“To constitute an offence under Section 366IPC, it is necessary for the prosecution to prove that the accused induced the complainant woman or compelled by force to go from any Place, that such inducement was by deceitful means, that such

abduction took place with the intent that the complainant may be seduced to illicit intercourse and/or that the accused knew it to be likely that the complainant may be seduced to illicit intercourse as a result of her abduction. So far as a charge under Section 366 IPC is concerned, mere finding that a woman was abducted is not enough; it must further be proved that the accused abducted the woman with the intent that she may be compelled. Or knowing it to be likely that she will be compelled to marry any person or in order that she may be forced or seduced to illicit Intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse. Unless the prosecution proves that the abduction is for the purposes mentioned in Section 366 IPC, the Court cannot hold the accused guilty and punish him under Section 366 IPC.”

11. The next part of the prosecution case relates to abduction of the PW1 (victim) from KSRTC bus stand at Mangalore to an old bungalow at Thokkottu in Someshwara village (within Mangalore City) and gang rape committed by A-1 to A-5.

i. PW1 has deposed that after she get down from the car, she wanted to go back to Udupi. PW1 has deposed that she was allowed to get down from the car near KSRTC bus stand at Mangalore PW1 did not go to KSRTC bus stand to catch a bus to go to Udupi. During cross examination when she was specifically questioned as to why did not go to KSRTC bus stand to catch a bus to go to Udupi, she has not given any explanation.

ii. PW1 has deposed that when she got down from the car near KSRTC bus stand it was 6.00 p.m. It was a busy place and police constables were posted near the bus stand. PW1 did not inform the police constable that she was abducted in a Maruthi car by some unknown persons from Sunkadakatte in Udupi to KSRTC bus stand at Mangalore.

iii. PW1 did not contact her husband to inform the incident. PW1 has deposed that one Ajith is her material uncle. He was residing at Mangalore she contacted him on the following day. PW1 has not informed the matter to her maternal uncle.

iv. PW1 instead of catching a bus in KSRTC bus stand to go to Udupi, got into an autorickshaw driven by the first accused and requested him to take her to Udupi bus stand. At this juncture, it is necessary to state that there are several bus stands in Mangalore City. The evidence of PW1 that she requested A-1 to take her to Udupi bus stand is as vague as it could be. In fact, evidence on record does not disclose that there is a place or land-mark called as Udupi bus stand in Mangalore City.

v. PW1 has deposed that autorickshaw driver (later identified as A-1) instead of taking her to Udupi bus stand, took her around Mangalore City. When A-1 was driving auto around Mangalore City. He was joined by A2 to A4. When PW1 requested the accused to allow her to contact her husband, the accused stopped the autorickshaw near a place and allowed PW1 to contact her husband from an STD booth. PW1 contacted her husband. However, she did not inform about her plight. PW1 informed her husband (PW-5) that she was in Mangalore and she was not able to trace the bus stand to go to Udupi and she was not taken to the bus stand by A-1. Thereafter A-1 spoke to the husband of PW1 and informed that he would take PW1 to the bus stand. PW1 has deposed that A-1 to A-5 took her to an isolated bungalow near Thokkottu and offered some drinks. After consuming the same, she became unconscious. In the next breath she has stated that four amongst the accused forced her to consume drinks.

During cross-examination learned Counsel for the accused had drawn the attention of PW1 to the contents of first information wherein she has stated that A-1 to A-5 offered and forced her to consume alcohol. PW1 has deposed that she was able to distinguish between alcoholic drink and soft drinks. PW1 has deposed that after consuming drinks, she became unconscious and regained consciousness on the following day morning. After regaining consciousness. PW1 realised that she had been subjected to gang rape by the accused. PW1 has deposed that as requested by her A-1 to A-5 dropped her near KSRTC bus stand at Mangalore from where she contacted her maternal uncle Ajith and reached his house.

12. From the evidence of PW-5 (husband of PW1) we find that at the relevant time he was working as Driver in Kundapur Fire Station. PW-5 has deposed that on 21-8-2000 at about 6.15 p.m when he was on duty, PW1 called him over phone and told that she was in Mangalore bus stand and she was not in a position to follow the route leading to Udupi bus stand. PW5 informed her to catch an autorickshaw and reach Lalbagh. After 15 minutes, again PW1 called PW5 and told him that the autorickshaw driver was not allowing her to go Lalbagh. Then PW5 told PW1 to give the mobile to the autorickshaw driver to talk. PW5 informed the autorickshaw driver to drop PW1 near Kadri Fire Station. Mangalore.

13. Contrary in the evidence of PW5. PW6 Karunakara, who was then working as Leading Fireman in Kundapura Fire Station has deposed that on 21-8-2000 PW1 contacted the fire station over phone. PW6 received the phone and PW1 asked him to give the phone to PW5. PW5 after talking to PW1, requested PW6 to grant leave. PW6 granted three days leave. On the next day PW6 received a phone call at about 6.30 a.m. from PW1 and told him that she was with an autorickshaw driver in KSRTC bus stand at Mangalore. PW6 informed PW1 to contact Kadri Fire Station and he would arrange to send PW5.

14. In the first information lodged at 8.00 p.m on 22.8.2000. PW1 has not stated that she informed her husband that she was not able to trace the route to go to Udupi. On the other hand she has stated that she contacted an officer of the fire station at Kundapur who in turn contacted the autorickshaw driver and told him to drop PW1 near Kadri Fire Station, Mangalore. In the first Information PW1 has not stated that she has contacted her husband over phone on 21-8-2000 or on the morning of 22-8-2000.

15. PW1 has deposed that when she was allowed to contact her husband from STD booth, she did not cry for help. She did not make any attempt to escape from that place. The conduct of PW1 would create a strong suspicion in her evidence. PW1 who wanted to get back to Udupi, did not enter KSRTC bus stand to catch a bus. On the other hand she came out side the bus stand and got into an autorickshaw to go to Udupi bus stand which infact was not really needed in the circumstances deposed by her. When PW1 was near KSRTC bus stand she did

not contact the police to inform about her abduction and her inability to go to Udupi. PW1 has categorically admitted that she did not go to KSRTC bus stand to catch a bus to go to Udupi.

PW1 has deposed that she was allowed to contact her husband over phone from STD booth. PW1 did not cry for help and did not inform the public of her plight. PW1 did not make any attempts to escape from that place. As could be seen from her evidence she was not a stranger to Mangalore City. Her maternal uncle Ajit was residing in Mangalore. Therefore PW1 by her own conduct has demonstrated that though she had several opportunities to cry for help and escape from the clutches of culprits, she did not do so for the reasons best know to her.

16. The evidence of PW1 that she contacted her husband from STD Booth who inturn contacted the autorickshaw driver (A1) looks improbable. If A1 had abducted PW1, he would not have ventured to contact PW5 to disclose his identity. It looks improbable that PW1 who had been abducted by the accused would inform her husband to inform the accused to take her to bus stand. Above all, from the evidence of Pws 1.5 and 7 we find their evidence regarding the point of time at which PW1 had contacted her husband in discrepant. PW1 in the first information has not stated that she contacted her husband over phone on the evening of 21.8.2000 or during the morning of 22.8.2000.

17. PW1 has deposed that she was taken through Mangalore City. Thereafter she was taken to a bungalow in Thokkottu. The accused offered drinks and she consumed the drinks. In the next breath she has deposed that she was forced to consume some drinks. She has stated that she regained consciousness only on the morning of following day and after regaining consciousness she felt that she was subjected to gang rape by A1 to A5. If A1 to A5 had committed gang rape on PW1, it looks highly improbable that PW 1 had remained in state of unconsciousness till the next day morning i.e. at 5.00 a.m. on 22.8.2000.

18. In the first information PW 1 has stated that on the following day at 8.00 a.m. the accused brought her to KSRTC bus stand at Mangalore. If A1 to A5 had committed gang rape during the intervening night of 21/22.8.2000, it looks improbable that accused had brought her from the isolated house to KSRTC bus

stand without being apprehensive of the matter being informed to police or public.

In the first information PW1 has stated that on 22.8.2000 at about 8.00a.m she was taken in the autorickshaw and she was dropped near KSRTC bus stand. PW1 has not deposed as to what she was doing between 5.00 a.m. and 8.00 a.m. This conduct of PW1 looks unnatural. If PW1 had been subjected to gang rape during the intervening night of 21/22.8.2000 and she became aware of the same at 5.00 a.m. on the next day, it looks improbable that till 8.00 a.m. she did not request the accused to take her to KSRTC bus stand.

19. Above all, the first information relating to the occurrence of incident was lodged at 8.00 p.m. on 22.8.2000. As per evidence of PW1 she was as gang raped in the city limits of Mangalore. PW1 did not go to the nearest police station to lodge first information. On the other hand she came to Udupi and lodged first information at 8.00 p.m. on 22.8.2000. There is no explanation for the delay in lodging first information.

20. PW 1 has admitted that she has not suffered any external injuries or internal injuries to the genitals and breasts, PW12 Dr. Dhamayanthi Krishnamohan, senior specialist in government hospital at Udupi who examined PW1 at about 10.30 p.m. on 22.8.2000 in the district hospital has deposed that she found no external injuries on the person of PW1. On local examination she did not find any injuries there was not evidence of sperms or blood stains over the external genitals. The medical evidence given by PW 12 completely rules out that PW1 was subjected to gang rape and that she was abducted by using criminal force. The medical examination does not reveal that PW1 had consumed alcohol. The FSL report Ex P5 do not reveal presence of seminal stains or blood stains on the undergarment and other articles sent for examination. Therefore the medical evidence is totally lacking.

21. We are conscious of the legal position that evidence of rape victim requires importance. However, the evidence of victim cannot be believed if it suffers from inherent improbabilities. In a decision reported in AIR SCW 1606 (in the case of Dinesh Jaiswal Vs. State of M.P.) the Supreme Court has held:

“5. Mr. C.D. Singh has however placed reliance on Moti Lal's case (AIR 2008 Sc (supp) 882: 2008 AIR SCW 4846) (Supra) to contend that the evidence of the prosecutrix was liable to be believed save in exceptional circumstances. There can be no quarrel with this proposition (and it has been so emphasized by this Court time and again) but to hold that a prosecutrix must be believed irrespective of the improbabilities in her story is an argument that can never be accepted. The test always is as to whether the given story prima facie inspires confidence. We are of the opinion that the present matter is indeed an exceptional one”.

22. PW1 has deposed that on 22.8.2000 after she was left near KSRTC bus stand she contacted her material uncle Ajit went to his house. Therefore she returned back to Udupi. From the evidence of PW1 it is clear that she was aware of her material uncle's house. Contrary to evidence of PW1, PW7 has deposed that on 22.8.2000 he received a phone call from PW5 that his wife was standing in KSRTC bus stand at Mangalore and PW5 requested him to take her to his house accordingly PW7 took PW1 to his house and thereafter PW1 came to Udupi.

23. PW5 has deposed that on 21.8.2000 at about 6.15 p.m. he received a phone call from PW1 and learnt that she was in KSRTC bus stand at Mangalore and she was not able to follow route to Udupi. Again he received second phone call from PW1 and learnt that the autorickshaw driver was not allowing her to go to lalbagh to catch a bus. PW1 gave the phone to autorickshaw driver and PW5 told him to drop PW1 near Kadri fire station. The evidence of PW5 indicates that PW1 contacted PW5 over a mobile phone, otherwise it would not have been possible for PW1 to handover phone to the autorickshaw driver. According to PW1 after the alleged incident she was dropped at KSRTC bus stand from where she had gone to her material uncle's house and from there to Udupi. After reaching Udupi First Information was lodged. Therefore, the events deposed after the alleged incident are entirely inconsistent and contradictory.

24. PW1 has deposed that not only she was subjected to gang rape by A1 to A6 but also by a foreigner. There is no investigation about the alleged foreigner.

25. Thus on reappreciation of evidence we find that the evidence of PW1 in proof of abduction from Sunkadakatte in Udupi to KSRTC bus stand at Mangalore does

not inspire confidence. The evidence of her abduction from KSRC bus stand to a bungalow at Thokkottu is unbelievable. The conduct of PW1 is not consistent with her evidence. The allegation of gang rape is not supported by medical evidence. The conduct of PW1 before and after of the alleged incident would belie her evidence. The evidence of PW5 also does not corroborate the evidence of PW1 relating to the post incident events. Therefore we hold that the prosecution has failed to prove the charges leveled against the accused.

26. The learned Trial Judge without noticing the discrepancies, improbabilities and the material contradictions in the evidence adduced by the prosecution, by implicitly placing reliance on the evidence of PW1. Ignoring the conduct of PW1, has held the accused guilty. Therefore the Impugned Judgment cannot be sustained. The appeal filed by accused is accepted. In view of acceptance of appeal filed by the accused, the appeal filed by the State for enhancement of sentence is dismissed.

27. In the result we pass the following:-

## **ORDER**

Crl.A.No. 133/2006 is accepted. The impugned Judgment is set aside. A1 to A5 are acquitted of offences punishable under Sections 366, 376(g), 328 r/w 34 IPC. The bail bonds executed by accused stand cancelled. The fine amount if any deposited by the accused shall be refunded to the accused.

Crl.A.No.734/2006 filed by the State is dismissed.

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