

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.T.RAVIKUMAR

FRIDAY ,THE 05TH DAY OF JUNE 2015 / 15TH JYAISHTA, 1937

CRL.A.No. 562 of 2009

AGAINST THE JUDGMENT IN SC 256/2003 of ADDITIONAL DISTRICT COURT
(ADHOC), KALPETTA DATED 19-02-2009

APPELLANT/ACCUSED:

ATHI PRAKASH
KOTTAPPPADI,
WAYANAD DISTRIST.

BY ADV. SRI.GRASHIOUS KURIAKOSE (SR.)

RESPONDENT/COMPLAINANT:

STATE - S H O MEPPADY,
REP. BY THE PUBLIC PROSECUTOR,,
HIGH COURT OF KERALA,
ERNAKULAM.

PUBLIC PROSECUTOR SMT.P.MAYA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 05.06.2015, THE
COURT ON THE SAME DAY PASSED THE FOLLOWING:

JUDGMENT

This appeal is directed against the judgment of conviction dated 19.2.2009 in S.C.No.256/2003 passed by the Court of Additional Sessions Judge (Adhoc) I, Kalpetta. As per the same for the conviction under section 354, IPC the appellant was sentenced to undergo rigorous imprisonment for a period of two years and also to pay a fine of ₹5,000/-. Three months time was granted to pay the amount of fine. It was ordered that in case of default to pay the amount of compensation he must undergo simple imprisonment for a period of three months. The fine, if realised was directed to be paid to the defacto complainant as compensation under section 357(1), Cr.P.C.

2. The case of the prosecution is that on 24.12.2002 the prosecutrix-PW6 was returning home from workplace. At about 3.45 p.m she reached at Njaval junction. Then the appellant-accused came from behind and caught hold her. When she resisted he pushed her down, caught hold and lifted her dress and torn her underwear. He squeezed and bitten her breast and embraced her. He tried to drag her to the nearby forest. Somehow, she managed to get up. On hearing her scream PWs 3

to 5 came there and on seeing them appellant-accused ran away. On reaching home she informed the mother about the same and at the instance her mother she went to the mother of the appellant-accused as well, to appraise her of the incident. The witnesses divulged the incident to her husband. She was then taken to the hospital by her husband and from there she gave Ext.P7 F.I.Statement. Ext.P10 FIR was then registered at Meppady Police Station based on Ext.P7. After the investigation a final report was laid before the Court of the Chief Judicial Magistrate, Kalpetta. The Chief Judicial Magistrate committed the case to the Court of Sessions, Kalpetta and from there it was made over for trial and disposal to the Court of the Additional Sessions Judge (Adhoc) I, Kalpetta.

3. To prove the charge the prosecution had examined PWs 1 to 9 and marked Exts.P1 to P12 besides identifying MOs 1 to 3. After closing the evidence of the prosecution the appellant-accused was questioned under section 313 of the Code of Criminal Procedure and he denied all the incriminating circumstances put to him. Finding that it was not a case fit for acquittal under section 232, Cr.P.C. The appellant was asked to enter on his defence. However, the accused-appellant did not adduce any evidence either oral or documentary. After

appreciating the arguments advanced and the evidence on record the trial court found that the prosecution has failed to prove the charge under section 511 of 376, IPC against the appellant-accused. But, at the same time, found the appellant was guilty for the offence under section 345, IPC. Consequently, he was convicted thereunder and sentenced as aforesaid. The appeal is filed in the aforesaid circumstances.

4. The contention of the learned counsel for the appellant is that when no specific charge was framed against the appellant for the offence under section 354, IPC and when the charge was admittedly framed only for the offence under section 511 of 376, IPC the appellant could not have been found guilty and convicted for the offence under section 354, IPC. The learned Public Prosecutor resisted such contentions and submitted that no illegality or irregularity could be attributed to the framing of the charge and also the subsequent conviction for the offence under Section 354, IPC. In the contextual situation a reference to sections 215 and 222, Cr.P.C is inevitable. Going by section 215, Cr.P.C no error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was, in fact, misled by such

error or omission, and it has occasioned in failure of justice. Thus, a bare perusal of the said provision would reveal that the mere error in stating either the offence or the particulars required to be in the charge would not by itself be a reason for interfering with and holding a judgment as invalid unless the aforesaid twin conditions thereunder are satisfied. The conditions being the accused must have been misled by such error or omission, and such error or omission must have occasioned a failure of justice. Section 222, Cr.P.C deals with the situation where the charge of offence which consist of several particulars and at the same time, a combination of some such particulars would constitute a complete minor offence. In such cases, if an accused has put on notice regarding graver charge but only some of such circumstances were proved against him and if those particulars proved would constitute a complete minor offence then, by virtue of the provisions under section 222, Cr.P.C. the particular accused could be convicted for the said complete minor offence which was established against him. Evidently, in this case a series of actions were attributed on the petitioner for charging for the offence under section 511 of 376, Cr.P.C. Undoubtedly, it is evident that the petitioner was alleged to have caught hold of the hands of PW6 and on her breast and thereafter, mounted on her. The

allegation is also there to the effect that he had lifted her dress and torn the nightie and also the underwear. Evidently, the trial court found that the prosecution had failed to establish the commission of offence under section 511 of 376, Cr.P.C against the appellant. At the same time, the court below found that the prosecution has succeeded in establishing that while PW6 reached Njaval Junction the accused reached behind her and squeezed and bitten her breast and mounted on her. The further finding is that at that point of time she cried aloud and on hearing her scream PWs 3 to 5 reached the spot and on seeing them the appellant-accused fled away from there. If such accusations are proved, as held by the trial court, there cannot be any doubt with respect to the position that they would constitute an offence under section 354, I.P.C and in such circumstances, there can be no doubt that if the ingredients of section 354, IPC are proved the mere fact that no specific charge was framed under section 354, IPC would not and could not disable the court from convicting the appellant for the offence under the said section since he was admittedly, charged for the graver offence of section 511 of section 376, with the aid of section 222, Cr.P.C. But, the question in this case is whether the prosecution had actually succeeded in proving the offence of 354, IPC against the appellant?

5. PW6 is the prosecutrix. She deposed that on 24.12.2002 on her way back home from work place she reached Njaval junction at about 3.45 p.m and then, the appellant came from behind and caught hold of her. She deposed that on putting resistance she was pushed down and the appellant caught hold of her breast and lifted her dress. In Ext.P7 F.I.S she gave the version that her nighty and underwear were torn by the appellant. But, at the same time, a scanning of the evidence of PW6 would reveal that in the box PW6 had not deposed that her nightie and the underwear were torn by the appellant. As noticed hereinbefore, the trial court found that the prosecution has failed to prove that the appellant had committed the offence under section 511 of 376. Still, a scanning of the impugned judgment would reveal that the court below, however, found that the appellant pushed down PW6 and lifted her dress and the dresses were torn and mounted on her. But for certain exceptional cases, preparation in general is not punishable. There is distinction between an act of preparation and an attempt to commit a crime though of is difficult to draw the dividing line. I do not think it necessary to consider the said question in this appeal as this is not an appeal against the finding of the trial court that the appellant is not guilty under the offence punishable under

Section 511 of 376, IPC or in otherwords, against the acquittal of the appellant of the said offence. Thus, obviously, the position in this case is that the appellant was found not guilty under section 511 of 376 and the oral testimony of PW6 is to the effect that her dresses were not torn by the appellant on that day. In such circumstances, MOs 1 and 2 allegedly worn by PW6 produced in a torn condition could not be taken as the dresses worn by her on that particular day in the light of the oral testimony of PW6. In short, the seizure of MOs 1 and 2 in such circumstances would become inconsequential.

6. Now, to arrive at the finding that the appellant has committed the offence under section 354, IPC evidently, the trial court relied on the following circumstances: The oral testimony of PW6 and seizure of MOs 1 to 3. Evidently, the contradictions of PWs 4 and 5 marked in this case were relied on by the prosecution to support its case. I will deal with the evidence of PW6 a little later. Going by the prosecution PWs 3 to 5 are the occurrence witnesses and they did not support the prosecution. True that they were contradicted with the previous statements recorded from them under Section 161, Cr.P.C and the contradictions were marked. But, a careful scrutiny of PWs 3 to 5 would reveal that they had deposed to the effect that they had

not witnessed any untoward incident. In otherwords, the series of acts allegedly committed by the appellant were not witnessed by PWs 3 to 5 going by their versions in the box. Their deposition is only to the effect that when they reached Njaval junction they saw the appellant and PW6 standing there. PW3 would depose that on seeing them PW6 screamed. PWs 4 and 5 also deposed to the effect that they had not witnessed commission of any of the alleged actions viz., offences by the appellant and they say so PW6 and the appellant standing there at the junction. PW5 would add that when he reached there along with PWs 3 and 4 he found them chatting. Though they were not declared hostile to the prosecution it is in evidence that they were permitted to be cross examined for the prosecution. A scanning of their oral testimony would reveal that apart from the fact that PW6 and the appellant were seen together at the Njaval junction they did not depose anything in favour of the prosecution. In such circumstances, the evidence to that effect alone could be relied on by the prosecution. In otherwords, the prosecution could rely on the evidence of PWs 3 to 5 only to canvass the position that going by their evidence PW6 and the appellant were seen together at the relevant point of time at Njaval junction. Though the prosecution has a specific case that PWs 3 to 5 reached there on hearing the

scream of PW6 their evidence would reveal that they did not support the said case of the prosecution. The evidence of PW8, the Doctor who examined PW6 on 24.12.2002, the date of the alleged incident, would reveal that there was no evidence of any injury on her breast, lower abdomen or on genital area. He deposed that he found aberration on the left hand. But, at the same time, from Ext.P9 Wound Certificate, which is that particular portion upon where aberration was caused is not discernible. A scrutiny of Ext.P8 would also reveal that nothing was elicited from Ext.P8 in that regard. I have already referred to the admissibility of MOs 1 and 2 and found that the production of MOs 1 and 2 would not support the case of the prosecution that they were the dresses worn by PW6 during the alleged incident, in the light of the oral testimony of PW6. A perusal of the impugned judgment would reveal that the learned Sessions Judge had given weight for the seizure of MO3 broken bangles allegedly from the place of occurrence. In this context it is to be noted that no seizure mahazar was prepared in relation to MO3. Though the incident allegedly occurred on 24.12.2002 MO3 was allegedly recovered from the place of occurrence, which is a junction on 27.12.2002 under Ext.P1 scene mahazar. If MO3 was seized from the place of occurrence after properly describing it in the said mahazar the

mere non-preparation of a separate seizure mahazar would not be fatal to the prosecution. It was allegedly recovered from the place of occurrence by PW9 only on 27.12.2002. In Ext.P1 scene mahazar with respect MO3 what is stated is thus:-

"സംഭവ സ്ഥലത്തുനിന്നും S.G. കോളനിയിലേക്ക് സുമാർ 150 മീറ്റർ ദൂരമുള്ളതായും കാണുന്നു. സംഭവസ്ഥലത്ത് കാണപ്പെട്ടതായ പൊട്ടിയ കുപ്പിവളയുടെ കഷണങ്ങൾ കേസ്സിന്റെ തെളിവിലേക്കായി ബന്തവസ്സിൽ എടുത്തു“.

7. It is thus evident from Ext.P1 scene mahazar that the description therein would not mention anything about the colour of the broken bangles allegedly recovered from there. It is also to be noted that neither PW6 nor PW9 while being examined had deposed regarding the colour of the broken bangles allegedly recovered from the place of occurrence. In such circumstances, the recovery of some broken bangles from a road junction, that too, on the third day of the alleged incident could not be an evidence or an incriminating material against the petitioner. However, in this case, evidently, that was taken as a crucial evidence to believe the evidence of PW6. In view of the aforesaid lacuna on the part of the prosecution I have no hesitation to hold that MO3 could not have been taken as a pointer to the culpability of the appellant and should not have been relied on for the

purpose of arriving at the guilt of the appellant.

8. Now, what survives for consideration is whether the oral evidence of PW6, the prosecutrix was sufficient for finding the appellant guilty for the offence under section 354, IPC. True that, there can be no doubt with respect to the position that in a case where the evidence of prosecutrix is found trustworthy even in the absence of any other corroborating evidence, conviction could be entered against the accused. The question is whether the trial court was justified in finding that the evidence of PW6 was trustworthy. As noticed hereinbefore, the trial court found reliable piece of evidence in the recovery of MO3 under Ext.P1 scene mahazar with the oral account of PW9, in relation to the same. I have already held the recovery of MO3 could not have been relied at all to arrive at the guilt of the appellant. Evidently, PW6 herself would depose before the court that she had earlier, lodged a complaint against the parents and brother of the appellant herein. That apart, she had deposed that there was animosity between the appellant and her husband. When PW6 admitted such aspects, the evidence of PW6 has to be scanned scrupulously. PW6 deposed to the effect that it was on hearing her scream that PWs 3 to 5 reached the spot. The evidence of PWs 3 to 5 as mentioned hereinbefore would undoubtedly reveal that they did

not support that case. Evidently, there was nothing in their evidence to show that they had witnessed anything even to suggest occurrence of any untoward incident involving the appellant and PW6. Their versions would reveal that when they reached Njaval junction they saw PW6 and the appellant therein. In this context it is also to be noted that PW5 would depose to the effect that when he saw them they were chatting. Prosecution had made no endeavour to bring out anything to show that it was a heated conversation between them or at least elicit from PW5 that they were not indulging in a happy conversation. The evidence of PW6 would reveal that she gave the first information to the effect that the nightie and also the underwear which she was wearing on that day was torn by the accused. In the box she had not deposed to that effect. In short, it is evident that there was no eye witness to the incident. Though, the court below found that PWs 3 to 5 must have decided later not to support PW6 but to support the accused. The oral testimonies of PWs 3 to 5 would not reveal that they had not seen the scuffle between the two or any sign suggesting occurrence of any unpleasant incident except to the effect that they had seen only PW6 and the appellant there. In such circumstances, there was no justification for drawing such an inference. A perusal of paragraphs 12 and 16

of the impugned judgment would reveal that in order to arrive at the finding of the guilt of the accused/appellant the trial court relied on surmises and conjectures rather than on evidence. There cannot be any doubt with respect to the position that surmises and conjectures cannot take the place of proof. In the said context it is only apposite to extract paragraphs 12 and 16 in the impugned judgment which read thus:-

"12. Even though the exact incident, the attempt of the accused to molest the defacto complainant is not revealed from the evidence of PWs 3 to 5, it is very much apparent from the evidence of these witnesses that all these persons were present at place. They had seen the defacto complainant and the accused at the place. PW3 has stated during his cross examination that the defacto complainant had informed him that the accused had behaved badly towards her. Of course it was brought out on cross examination of this witness by the counsel for the accused that he did not make any such statement to the Police. Even though such words are not there in his statement, he has stated to the Police then that he had seen scuffle between the defacto complainant and the accused from the place. This statement was marked as Ext.P3 during his cross examination. What is to be understood from the version of PW3 and the case diary contradiction marked as Ext.P3 is that he had either seen part of the incident or PW6 had informed him about the incident immediately, from the place of incident itself, after PW3 saw her and the accused at the place. What seems probable from the evidence of PW6 is that PWs 3 to 5 reached the place at the last stage of the incident. PW6 had stated during his examination that while the accused has embraced her, she has managed to get up and had screamed and it was by then PWs 3 to 5 had reached there. If this is the case

the possibility is that they reached there only by the time she got up. So it is not surprising that these witnesses have stated that they did not see the scuffle between the two. There is also the possibility that these witnesses have now decided to support the accused who is still residing in the place. They might have thought that since the defacto complainant is now away from their place they need not show any loyalty to her.

16. The allegations made by PW6 revealed from Ext.P9 the wound certificate is also relevant in this aspect. As could be seen, the First Information Statement was recorded much later, on 26-12-2009 on the basis of the intimation received from the Taluk Head Quarters Hospital, Vythiri where PW6 was admitted consequent to the incident. On the other hand she was examined by the doctor on 24-12-2009 itself, a few hours after the alleged incident. In this itself she was alleged that the accused had made sexual assaults upon her. It is stated in Ext.P9 that the accused had held her by shoulder, torn her dress, broken her bangles pushed her down, had to upon her and had kissed her. At that time there was no reason for PW6 to make such an allegation against the accused, if not for some incident that had taken place immediately before. No woman of sense would make false allegation of sexual allegation against a man, at the risk of herself being looked down upon by others. The general public had not progressed even an inch when it comes to the matter of viewing woman. As the old saying is whether she was assaulted or she has assaulted, it is both the same. In the view of the public the woman is the person at fault. Every woman is aware of this and it

is rarely that they come forward with such allegation at the risk of being humiliated by the public. As seen in the scene mahazar the investigating officer have found broken bangles at the place of occurrence. This fits in with the case of PW6 that her bangles were broken. Her dress which is produced and marked as MOs 1 and 2 are found torn. She could not have been wearing a torn dress while attending her job along with others. These are also aspects that probabalise the case of the prosecution. "

9. A scanning of the aforesaid paragraph in the impugned judgment would undoubtedly reveal that the recovery of MOs 1 and 2 as also the recovery of MO3 were taken as materials enabling to conclude that the appellant has committed the offence. The learned Sessions Judge has found that the broken bangles were found from the place of occurrence and they were seized under the scene mahazar. I have already dealt with the recovery of the same and found it as an unreliable piece of evidence. The evidence of PW9 that MOs 1 and 2 are torn dresses, became irrelevant and inconsequential with the evidence of PW6 that the dresses were not torn by the appellant and hence, the seizure of MOs 1 and 2 also became inconsequential. Taking into account the fact that PW6 herself lodged a complaint against the parents and brothers of the appellant and when she herself admitted the fact that there was a hatred between her

husband and the appellant, the evidence of PW6 could have been relied on for entering conviction for the appellant only if it was fully reliable. Certainly, in such circumstances, it is always safe to search for corroborative evidence. Hence, the question is whether conviction could have been entered against the appellant solely relying on the oral testimony of PW6. The discussion as above with respect to the evidence of PW6 would reveal that it is absolutely unsafe to convict the appellant herein, solely relying on the oral testimony of PW6. In short, I am of the view that it is the utter perverse appreciation of the evidence that ultimately culminated in the finding of the guilt against the appellant herein. In such event, that be so, the judgment of conviction passed against the appellant is liable to be interfered with. In such circumstances, the impugned judgment is set aside. The conviction and the sentence imposed against the appellant in S.C.No.256/2003 passed by the Court of Additional Sessions Judge (Adhoc) I, Kalpetta is set aside. His bail bond will stand cancelled. The appeal is allowed.

Sd/-

C.T.RAVIKUMAR, JUDGE

JUDGE