

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

THURSDAY, THE 26TH DAY OF NOVEMBER 2015/5TH AGRAHAYANA, 1937

CRL.A.No. 1462 of 2004 (C)

**SC 249/2003 of ADDITIONAL DISTRICT & SESSIONS COURT (ADHOC),
FAST TRACK COURT NO.1 MANJERI**

APPELLANT(S)/ACCUSED::

**N.T.VELAYUDHAN, S/O SANKARAN,
NELLIKKATHODI HOUSE, CHULLICHOLAPURATH COLONY
PERUVALLUR, KOLLAMCHINA, MALAPPURAM DISTRICT.**

**BY ADVS.SRI.P.SIVARAJ
SRI.PRAMOD KUMAR, LEGAL AID COUNSEL (BY ORDER)**

RESPONDENT(S)/COMPLAINANT AND STATE::

- 1. S.I.OF POLICE
THENHIPALAM POLICE STATION.**
- 2. THE STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.**

BY PUBLIC PROSECUTOR SRI.JIBU P.THOMAS

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 26-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

VS

K.RAMAKRISHNAN, J.

Crl.Appeal No.1462 of 2004

Dated this the 26th day of November, 2015

JUDGMENT

Accused in S.C.No.249/2003 on the file of the Additional District and Sessions Court, (Fast Track Court No.I), Manjeri, is the appellant herein. The appellant was chargesheeted by the Sub Inspector of Police, Thenhipalam Police Station, in Crime No.19/2003 under Sections 450 and 376 of the Indian Penal Code.

2. The case of the prosecution in nutshell was that on 23.01.2003, at about 1.p.m., the accused criminally trespassed into the house of PW2 Chinna, situated at Peruvallur Amsom, Koomallam desom and subjected her minor daughter Anila, aged 12 years, who is a mentally retarded girl, the prosecutrix to rape and thereby he had committed the offence punishable under Sections 450 and 376 of the Indian Penal Code.

3. After investigation, final report was filed by the

Investigating Officer before the Judicial First Class Magistrate Court, Parappanangadi, where it was taken on file as C.P.No.26/2003. After complying with the formalities, the learned Magistrate committed the case to the Sessions Court, Manjeri, under Section 209 of the Code of Criminal Procedure(hereinafter called 'the Code' for short). After committal, the learned Sessions Judge took cognizance of the case as S.C.No.249/2003 and thereafter it was made over to Additional Sessions Court, (Fast Track-I), Manjeri, for disposal.

4. When the accused appeared before the court below, after hearing both sides, charge under Sections 450 and 376 of the Indian Penal Code was framed and the same was read over and explained to him and he pleaded not guilty. In order to prove the case of the prosecution, PWs 1 to 15 were examined and Exts.P1 to 14 and MO1 series were marked on the side of the prosecution. After closure of the prosecution evidence, the accused was questioned under Section 313 of the Code and he denied all the incriminating

circumstances brought against him in the prosecution evidence. He had further stated that he had not committed any offence and he has been falsely implicated in the case, due to the enmity for PW2 towards him. The father of the victim used to beat his mother, in which he had interfered and on account of that enmity, the present case has been foisted against him. Since the evidence in this case did not warrant an acquittal under Section 232 of the Code, the accused was called upon to enter on his defence. DW1 his sister-in-law was examined on his side to prove his case. After considering the evidence on record, the court below found the appellant guilty under Sections 450 and 376 of the Indian Penal Code and convicted him thereunder and sentenced him to undergo rigorous imprisonment for 7 years and also to pay a fine of Rs.10,000/-, in default to undergo simple imprisonment for 1 year. No separate sentence was awarded under Section 450 of the Indian Penal Code. It is further ordered that if the fine amount is realised, the same be paid to PW6 as compensation under Section 357(1)(b) of

the Code. Aggrieved by the same, the above appeal has been preferred by the appellant/accused before the court below.

5. Though the appeal was filed by another counsel, since the counsel for the appellant reported 'no instructions', Adv.Sri.P.Sivaraj was appointed as Legal Aid Counsel. Thereafter, since there was no representation for the Legal Aid Counsel, one Adv.Pramod Kumar was appointed as Legal Aid Counsel and later the earlier Legal Aid Counsel expressed his willingness to argue the case and it was reported by the High Court Legal Services Committee that the name of Sri.Pramod Kumar has already been removed from the panel of Legal Aid Counsel, his appointment was terminated and earlier Legal Aid Counsel Sri.P.Sivaraj was permitted to argue the case on behalf of the appellant.

6. Heard the Legal Aid Counsel Sri.P.Sivaraj and Sri.Jibu P.Thomas, learned Public Prosecutor appearing for the respondents.

7. The Legal Aid Counsel submitted that the

victim did not fully support the case of the prosecution, though she had stated about the presence of the accused in the house and taking her inside the house, but she did not say anything about the actual act of intercourse said to have been committed by the accused on her. So her evidence is not helpful to prove the rape, alleged to have been committed by the accused, at the most, it may amount to offence under Section 354 of the Indian Penal Code and nothing more. Further, the evidence of PW2, the mother of the victim is also not sufficient to attract the offence. It was she who had taken all the initiative to narrate the incident, which was not fully supported by PW6, the victim girl. No DNA test was conducted to match the spermatozoa found in the vagina of the victim with that of the accused, so as to connect him with the incident. Further, the fact that the accused with his family was residing in the house of PW2 for quite long time and some days prior to the incident, he had shifted his residence to some other place, which was spoken to by DW1 and there was some enmity between PW2 and

the accused on account of the same etc. were not properly considered by the court below at all, so as to rule out the possibility of false implication of the accused in a case like this. According to him, there is no legal evidence available to convict the accused and the court below was not justified in convicting the appellant for the offences under Section 376 of the Indian Penal Code. Further, being the house of a relative, his coming to the house cannot be said to be a trespass, so as to attract the offence under Section 450 of the Indian Penal Code. So according to him, the conviction entered by the court below is not proper. He had further submitted that if for any reasons, this Court is not inclined to interfere with the conviction, considering the fact that the incident is of the year 2003 and he is having a family to look after, sentence imposed by the court below is harsh and he prayed for leniency.

8. On the other hand, the learned Public Prosecutor submitted that the accused had committed a gruesome rape on a mentally retarded girl, who is a close

relative of the accused as well. So there is nothing to interfere with the conviction, as it is fully supported by the evidence. The sentence imposed also is in fact very low, considering the gravity of the offence.

9. The case of the prosecution as emerged from the prosecution witnesses was as follows: PW6 is the victim prosecutrix in this case. She is the daughter of PW2 and she was residing in the house, along with PW2, her father and brother. According to the prosecution, PW6 is a mentally retarded child, aged 12 years. On 23.01.2003, PW2 had gone to the school to fetch her son, leaving PW6 in the house, entrusting her to PW1, a neighbour to look after. When she came back from the school, she saw the accused standing in the Varanda and PW6 sitting in the half wall in the Varanda and laughing. When she asked the reason for her laughing, the accused showed some gestures to the victim not to say anything and the victim girl did not say anything at that time. After some time, her husband came and thereafter the accused and her husband went outside.

At that time, when she enquired with PW6, she narrated the entire incident that when she was standing outside, the accused came there and she was taken inside and he asked for water and thereafter, he took her to the room, where there is a table and made her lie down on the room and asked for some coconut oil and when she told that it was not there, he removed the dress and committed rape on her. After some time, the accused and her husband came and when they were about to discuss about the same, the accused left the place. She informed the matter to the wife of the accused and she told her to make a complaint to the authorities and during night, another sister of her husband and her husband came and thereafter, they had taken the victim girl to hospital, from where she was seen by PW8, who issued Ext.P5 medical certificate. She had collected the pubic hair, smear and swab of the victim and sent for it chemical analysis and Ext.P6 report obtained, in which it was mentioned that human spermatozoa was found in all these items. Thereafter, PW2 went to Police Station, along

with the victim girl and gave Ext.P1 statement, which was recorded by PW13, Head Constable attached to Thenhipalam Police Station and handed over the same to PW15, who registered Ext.P14 First Information Report, against the accused as Crime No.19/2003 of Thenhipalam Police Station, under Section 376 of the Indian Penal Code. Thereafter, the investigation in this case was conducted by PW14, the Circle Inspector of Police, Tirurangadi, who went to the place of occurrence and prepared Ext.P4 scene mahazar in the presence of PW5 and another. He seized MO1 series dress as per Ext.P2 seizure mahazar in the presence of PW3 and another. He arrested the accused on 25.01.2003 and subjected him to medical examination by PW9, who issued Ext.P7 potency certificate. He seized the dress of the accused as per Ext.P3 seizure mahazar. As per his request, PW10 issued Ext.P8 ownership-cum-possession certificate of the house, which shows that PW2 is the owner of the house. He collected Ext.P9 Birth Certificate of the victim as given by PW11, the Headmistress of the School. As per his request,

PW12, the additional Village Officer prepared Ext.P10 plan of the place of occurrence. During investigation, it is revealed that the offence under Section 450 of the Indian Penal Code was committed by the accused. He gave Ext.P11 report to add that Section also in the first information report. When he arrested the accused, he prepared Ext.P12 arrest memo. He produced the articles seized, along with Ext.P13 and P13 (a) property lists before court and as per his request the smear, swab etc. were sent for chemical examination and Ext.P6 chemical analysis report obtained. He questioned the witnesses and recorded their statements and completed the investigation, submitted final report.

10. Prosecution relies on the evidence of PWs 1, 2, 6 and 8 and also Exts.P5 and P6 to prove the case against the accused. PW6 is the victim girl. It is true that when she was examined in court, she had narrated the incident till she was taken inside the house by the accused and make up to lie down. Thereafter, she did not say anything in spite of the attempts made by the additional Public Prosecutor to elicit

the matter further from her. In the cross examination, it was brought out that after taking her to the room, he was made her to lie on floor and the dresses were removed and the accused had laid on her.

11. It is true that PW1 has stated that when PW2 went outside, she was asked to look after the victim girl, who is a mentally retarded child and when she went for taking bath, she asked her daughter to look after her and to give food. When she came back after taking the bath, she saw the accused standing in the Varanda of the house and the victim girl sitting in the half wall of the varanda and PW2 had reached there and there was some conversation occurred and thereafter, she saw the accused going from there. Later she came to know that the accused had committed rape on the victim girl. The fact that she had seen the accused in the house at the time when PW2 came there, was not challenged much in the cross examination.

12. Further, PW2 had narrated the incident. According to her, she went to school to fetch her elder son,

leaving the mentally retarded victim girl, PW6 to be supervised by PW1, her neighbour. When she came from the school, she saw the accused standing on the Varanda and the victim girl sitting on the half wall of the Varanda, laughing at her. When she asked as to why she was laughing, she saw the accused showing some gestures not to say anything and the victim did not say anything at that time. Thereafter, her husband came and after sometime, the accused and her husband went away. At that time she enquired with the victim girl and she narrated everything as to how the accused had committed sexual assault on the victim girl. When she examined her dress, she found some pasty substance on her dress and there was some injuries on her private part and her body was in black colour. So she had removed the dress and gave bath to the victim girl and washed the dress. Thereafter, after making discussions with the family members on the evening, they had taken the victim girl to the Doctor and the Doctor examined her and the victim girl had narrated the incident to the Doctor.

Thereafter, she went to the Police station, gave Ext.P1 statement. Though she was cross examined at length, nothing was brought out to discredit her evidence regarding these aspect. The possibility of PW6 narrating the incident to her mother in the absence of the accused, considering her mental capacity cannot be ruled out. She would not have disclosed the fact to PW2 in the presence of accused due to his intervention showing some gesture to her. Further, the presence of human spermatozoa in the pubic hair, smear and swab collected from her vagina which were sent for examination and presence of fresh injuries in the private part of the victim, indicated that she was subjected to sexual assault by the accused, as at the time when PW2 came to the house except the accused and the victim girl, none were there in the house. So under the circumstances, court below was perfectly justified in coming to the conclusion that the accused had criminally trespassed into the house by taking the victim inside the house and committed rape on her.

13. It is true that at the time when the accused came to the house, he may not have any intention to commit any offence. So the entry may be lawful at that time. But when he took the child inside and committed rape, then his presence inside the house become unlawful as he had taken the child with an intention to have sexual intercourse with her and that will make his act punishable under Section 450 of the Indian Penal Code. So under the circumstances, the court below was perfectly justified in convicting the appellant for the offences under Section 450 and 376 of the Indian Penal code and the finding does not call for any interference.

14. Even assuming that PW6 did not state anything, that alone is not sufficient to disbelieve the case of the prosecution, in view of the other medical and corroborating evidence from the mother of the victim available on record. So the finding regarding the conviction of the accused for the offences alleged, do not call for any interference.

15. As regards sentence is concerned, the court below had sentenced the accused to undergo rigorous imprisonment for 7 years and also to pay a fine of Rs.10,000/- in default to undergo simple imprisonment for 1 year. It is further ordered that if the fine amount is realised, the same be paid to PW6 as compensation under Section 357(1)(b) of the Code. No separate sentence was awarded for the offence under Section 450 of the Indian Penal Code.

16. It may be mentioned here that the accused is none other than a close relative of the victim girl, namely husband of sister of her father and he is having family and also children. He had used a mentally retarded 12 year old child to satisfy his lust, ignoring the fact that she is a helpless child, not even able to resist his act. In spite of this, the court below had only imposed a minimum sentence provided for the offence under Section 376 of the Indian Penal Code. Though he is liable to be sentenced for the offence under Section 450 of the Indian Penal Code, no separate sentence was awarded for that offence as well. So

under the circumstances, it cannot be said that the sentence imposed is harsh or excessive, warranting interference at the hands of this Court. The court below had considered all the aspects and imposed proper sentence, which does not call for any interference.

In the result, the appeal fails and the same is hereby dismissed. The order of conviction and sentence passed by the court below against the appellant for the offences under Sections 376 and 450 of the Indian Penal Code are hereby confirmed. This Court place appreciation, on record for the manner in which the case was argued by the Legal Aid Counsel Sri.Sivaraj on behalf of the appellant. Office is directed to communicate this judgment to the concerned courts immediately.

Sd/-
K.RAMAKRISHNAN
JUDGE

VS

/TRUE COPY/

PA TO JUDGE