

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.ABRAHAM MATHEW

FRIDAY, THE 20TH DAY OF FEBRUARY 2015/1ST PHALGUNA, 1936

CRL.A.No. 626 of 2013

AGAINST THE ORDER IN SC 231/2012 of ADDL.D.C. KOZHIKODE-III

PETITIONER(S)/APPELLANT/ACCUSED:

**HUSSAINKUTTY @ ASSANAR, CONVICT NO.966
CONVICT NO.966, CENTRAL PRISON, KANNUR.**

BY ADV.VINOD KUMAR C.Y. [STATE BRIEF]

RESPONDENT(S)/RESPONDENT:

**STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.**

BY PUBLIC PROSECUTOR SRI.GITHESH. R.

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 20-02-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

PJ

K. ABRAHAM MATHEW, J.

Crl.A. No.626 of 2013

Dated this the 20th day of February, 2015

J U D G M E N T

The appellant was tried for the offences under Sections 376, 380, 420 and 506 (ii) IPC. The prosecution story is this: The victim PW1 is a woman aged 40 years. She was deserted by her husband. She was living with her mother PW4. PW9 Shakeela called her on phone to tell her that she was informed by one Muhammad Shafi that an Arab national had come to Kerala and he was ready to extend financial help to needy people. The victim expressed her readiness to meet the informant Muhammad Shafi. PW9 Shakeela gave him the victim's mobile phone number with her consent. On the same day the victim received a phone call from Muhammad Shafi. Along with her mother, the victim went to Kozhikode where she met the appellant who claimed to be Muhammad Shafi alias Hussainkutty. He took the victim and her mother to Perinthalmanna, from where they proceeded to Coimbatore via Palakkad. He promised

them that the Arab national would give them financial help on their meeting with him at Coimbatore. They reached Coimbatore by midnight. The appellant took a room on rent in Hema Hotel near the railway station. The victim and her mother were lodged in the room. He told them that it was difficult to get a room for himself and so he would also sleep in the same room. Immediately after they went to bed the appellant had sexual intercourse with the victim after threatening her with a knife. The victim's mother had been made unconscious by the appellant by giving her some 'perfume' to smell. In the morning the victim and the mother were asked to go out to meet the Arab national. They were asked to take off their ornaments, so that the Arab national might not get an impression that they were not needy people. So they kept their ornaments and money in a bag in the room before they left with him. The appellant asked them to wait at the railway station. He went back to the room and committed theft of all their belongings. They realised it only on their coming back to

room after sometime. By that time he had disappeared.

2. The learned Sessions Judge found him guilty of the offences under Sections 376, 380, 417 & 506 (ii) IPC.

3. At the hearing, the learned counsel for the appellant fairly admitted that the conviction under Sections 380 and 417 IPC cannot be challenged. No doubt, there is clinching evidence to prove that the appellant committed those offences.

4. The only question that requires consideration is whether the allegation that the appellant committed rape on the victim is true or not. The learned counsel submits that the facts of the case are such that it is very difficult to believe that sexual intercourse took place between the appellant and the victim in the room taken on rent at Coimbatore.

5. The victim (PW1) and her mother (PW4) deposed that the appellant compelled the latter to smell something which he called perfume and this resulted in her losing consciousness and then the appellant committed rape on

her. It may be taken for granted that the mother became unconscious after she smelt the thing given to her by the appellant. There were only two cots in the room which of was a very small one. The appellant and the victim were lying on the cots and the mother on the floor. PW1 deposed that the appellant switched off the light in the room; but the light in the bathroom had not been switched off; after switching off the light in the room the appellant came to the victim's cot and caught hold of her. The learned counsel for the appellant submits that the victim was not aware that her mother was unconscious and so it is unbelievable that the appellant could commit rape on the victim. If what is stated by the prosecution is true, the victim was not aware that the mother had become unconscious; she allegedly knew about it only the next morning. If she was under the impression that the mother was awake, she would have certainly made a hue and cry when the appellant allegedly caught hold of her by force. Her testimony that she resisted the attempt cannot be believed. If she could resist, there

was no difficulty for her at least to cry aloud. But nothing happened. She did not produce even a sound. This is quite unnatural. There is no evidence to prove that she made any resistance. Her version is that after she resisted the appellant, he threatened her with a knife. Before she was threatened she could have certainly raised a hue and cry. That was not done at all. So it is very difficult to believe that the appellant had sexual intercourse with her by force. Even if it is assumed that sexual intercourse took place, it could be only with consent.

6. It is also pertinent to note that the investigating officer did not even make an attempt to recover the knife, for which there is no explanation.

7. The next morning the victim knew that the mother was unconscious. She found it very difficult to wake her up. So she must have realised that the accused committed foul play. Still she did not even inform the mother about the alleged rape. This also defies commonsense.

8. The facts discussed above incline me to believe

that the prosecution allegation that the appellant had sexual intercourse with the victim by force may not be true. The appellant is entitled to benefit of doubt so far as these allegations are concerned. He is entitled to be acquitted of the offences under Sections 376 and 506 (ii) IPC.

In the result, this appeal is allowed in part. The conviction of the appellant of the offences under Sections 376 and 506 (ii) IPC and the sentences imposed on him for the said offences are set aside. The conviction for the offences under Sections 417 and 380 IPC and the sentences imposed for the said offences are confirmed. If the appellant has already undergone the sentence, he shall be released forthwith if his further detention is not required in any other case.

Sd/-

**K. ABRAHAM MATHEW
JUDGE**

//True copy//

P.A. TO JUDGE

shg/