

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

THURSDAY, THE 10TH DAY OF DECEMBER 2015/19TH AGRAHAYANA, 1937

CRL.A.No. 773 of 2014 ()

AGAINST THE JUDGMENT IN SC 931/2012 of ADDL. SESSIONS COURT - V,
KOZHIKODE DATED 13-02-2014
CRIME NO. 239/2012 OF BALUSSERY POLICE STATION , KOZHIKODE

APPELLANT/ACCUSED:

BHARATHAN S/O.CHEKKUTTY, C.NO.2562, CENTRAL PRISON, KANNUR

BY ADV. ADV. DILEEP M.S. (STATE BRIEF)

RESPONDENT:

STATE OF KERALA REPRESENTED BY the
PUBLIC PROSECUTOR, HIGH COURT OF KERALA
ERNAKULAM

BY PUBLIC PROSECUTOR:SRI.ABHIJITH LESLIE

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 10-12-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SUNIL THOMAS, J.

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Crl.A.No.773 of 2014

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Dated this the 10th day of December, 2015

JUDGMENT

A 48 year old accused, who stands convicted for offences punishable under Sections 354 and 376 of the Indian Penal Code in S.C.No.931 of 2012 of the Court of Sessions, Kozhikode division for outraging the modesty of a 43 year old women and thereafter committing rape on the 75 year old mother, is the appellant herein.

2. The allegation of the prosecution is that PWs.6 and 7, who are the mother and daughter, have been living in an old building. On 07.05.2012 at about 3 a.m., accused allegedly trespassed into the house and molested the daughter, PW7. She resisted, escaped from the house and sought asylum in the house of the neighbour. The neighbour along with PW7 and others returned to the house. There, they allegedly found the accused lying without any dress on the body of the mother and committing rape. She was found in a pool of blood. The accused immediately fled from the scene of occurrence. The mother was immediately rushed to the hospital and FIS was lodged. A crime registered,

investigation proceeded and ultimately, accused was arrested. He pleaded not guilty and faced trial before the court below. On the side of the prosecution, PWs.1 to 15 were examined and Exts.P1 to P18 were marked. There was no defence evidence. The court below, on an evaluation of the available materials found the accused not guilty for offence alleged under Section 459 but convicted him for offences punishable under Sections 354 and 376 of the IPC. He filed this appeal from jail, aggrieved by the conviction and sentence.

3. Heard Mr.Dileep M.S., learned counsel on State Brief and Mr.Abhijith Leslie on behalf of the prosecution. Examined the records.

4. The prosecution is essentially relying on the oral testimony of PW6, the victim and PW7, daughter, both of whom were claimed to be eye witnesses to the incident. PW6 deposed in her evidence that the accused is her sister's son. She deposed that on the date of incident, the accused came to the house, undressed her and lying on her body, committed the sin. She could not further explain the details of the incident, which had been taken note of by the court below also. In the cross examination also, she could not further depose on the details of the incident and

remained silent. But her answer given in the cross examination touches on the crux of the allegation against the accused and had revealed that he committed the offence, though in few words.

5. This was sought to be corroborated by PW7 the daughter, who gave a detailed version of the incident. She deposed that while she was sleeping, she could feel that somebody had touched her body and when she woke up, she found the accused. He tried to get hold of her but she escaped. Thereafter, she went to one of the neighbours house. When she, along with neighbours and others returned to the spot, they found the accused committing rape of the mother. Mother was lying in a pool of blood and she was rushed to the hospital.

6. The oral testimony of PWs.6 and 7 with respect to the crucial facts touching upon the main incident and the incident following thereafter was sought to be proved through the oral testimony of PWs.8 and 9. Both of them, though spoke corroborating the version that they had gone to the house of PW7 after the incident and that, they found the mother lying in a pool of blood and another person fleeing from there, both of them did not mention that it was the accused who escaped from the scene. To that extent, they did not support the prosecution case also.

However, both of them could only confirm the identity of the accused. The versions of PWs.6 and 7 are sought to be proved through other material evidence, forensic evidence as well as from the circumstantial evidence.

7. Mr.Dileep M.S, the learned counsel on State Brief vehemently attacked the prosecution case on the ground that there was considerable delay in taking the victim to the hospital. According to the learned counsel, it casts serious doubt on the prosecution case. It was pointed out by the counsel that the medical evidence which were in the form of Exts.P1 to P3 indicated that PW1 doctor, who examined her, had seen her at 11.15 a.m. Though the incident happened in the early hours, there was considerable delay in taking her to the hospital. According to the counsel, it casts serious doubt in the prosecution case. I am not inclined to accept this contention, since the available records explain the delay. PW7 in her evidence had stated that after the incident, they had gone to the Balussery Community Health Centre. They reached there at 4.44a.m. The doctors were not there. They were advised to take PW6 to the Koyilandy hospital. From there, they took about 45 minutes to reach the Koyilandy hospital. This tallies with the prosecution case and hence, there

does not appear to be any delay. However, even otherwise, in a case of this nature, the minor difference in time may not assume much, unless it is so considerable, as to affect the substratum of the prosecution case.

8. The material evidence MO1, the lunki worn at the time of incident was collected by Ext.P15 seizure mahazar. Ext.P17 is the forwarding note and Ext.P18 is the forensic report. It evidences that the lunki contained traces of human blood. This tallies with oral testimony of PW7 that lunki of the victim was stained with blood.

9. It is also pertinent to note that the medical records marked as Exts.P1 to P3 specify the physical injury caused to her. Ext.P1 is the wound certificate issued from the Koyilandy hospital which indicates that the victim had bleeding through her private part. The doctor had noted that she had sustained an injury 0.5 cm x 1 c.m on her private part. She was referred for expert opinion. Ext.P2 is another wound certificate issued by another doctor attached to the same hospital, who also had occasion to see the patient. He has also noted that even though there were no external wound, her cloths were stained with blood. He substantially noted that he has not examined her private part and referred to the

Gynecologist. Thereafter, she was referred to the Medical College Hospital, Kozhikode. Ext.P3 is the discharge certificate issued from that hospital. It also indicates that she had a small tear of 0.5 x 0.5 cm on her private part. PWs.1 to 3 who had occasion to see the victim had uniformly deposed that she was profusely bleeding through her private part. It was noted that she was depressed and was unable to speak. These facts proved the fact that she had sustained the injury and the allegation of rape, as spoken by PWs.6 and 7, is only to be believed.

10. The crux of the prosecution case as to whether the act was committed by the accused as mentioned above, the prosecution has necessarily to rely on the evidence of PWs.6 and 7. PW6 in her evidence had specifically mentioned that the sin was committed by Bharathan. She also stated that Bharathan was the accused. It is true that, as correctly pointed out by the learned counsel on State Brief, PW6 did not specifically say that the person who committed the offence was the person in the dock. Evidently, learned Public Prosecutor did not put such a question requiring her to identify the accused in the dock. However, she through her cryptic words had unambiguously stated that Bharathan committed the act and that, he was the accused. On the other hand, PW7 had

specifically identified the accused and deposed that he was the person who committed the offence of rape.

11. Learned counsel for the accused submitted that the incident happened at 3 a.m and there is no indication in the mahazar to show that there was sufficient light. It was contended that in the above circumstance, identification would not have been possible and is only to be rejected. I am not inclined to accept this contention for more reasons than one. It has come out in evidence that the accused is a close relative of PWs.6 and 7. Being the sister's son of PW6, there cannot be any doubt that he is a person well acquainted with PWs.6 and 7. PW7 had on two specific occasions, in the course of the incident, seen the accused. First was the incident wherein the accused attempted to outrage the modesty of her inside the room. She resisted it and then, he caught hold of her neck. Thereafter, she pulled him aside and escaped. The sequence of incidents as spoken by PW7 indicates that there was sufficient time lag in between for her to identify the culprit. The process of identification was spoken by her with reference to two specific facts. Firstly, she stated that he could identify the accused by his sound. Secondly, she had stated that kitchen door and veranda door were kept lying open and moon

light was entering through these two doors. This fact was not specifically challenged nor confronted in the cross examination. The second incident is when she returned along with the neighbours, when she had occasion to see the person who was committing rape on her mother. She had stated that when she reached the spot, the accused was lying, without any dress, above the victim PW6 and on seeing them, he stood up, dressed himself up and fled from the place. This also shows that she had sufficient time to identify the accused. Since the alleged incident happened in the veranda, there was definite possibility of proper identification. With these facts, I am not inclined to accept the contention of the learned counsel for the accused that there was no sufficient opportunity for a proper identification and that, identification of the accused was faulty. The identity of the accused as the person who committed the offence is so confirmed.

12. Learned counsel for the accused further contended that there was no sufficient evidence as to how the accused entered into the house. The prosecution case appears to be that one of the wall of the bedroom was half broken and the accused entered through that portion. However, Ext.P10 scene mahazar does not indicate that. However, there are materials to disclose that the

accused entered the house either through the doors or through the half opened wall. The finding of the court below was that there was no lurking house trespass. The court below appears to have arrived at a faulty conclusion with respect to the interpretation of Section 459 and arrived at a conclusion that there was no criminal trespass.

13. The defence set up by the accused was that it was a case of wrong implication of the accused due to personal reasons. The reason attributed by the accused was that he had an item of property over which the daughter of the victim had an interest. So to snatch that property, he was falsely implicated. This is not acceptable for two reasons. Firstly, there was no evidence to indicate that. Secondly, it cannot be assumed even for a moment that the victim would leave apart the actual culprit and to take vengeance, implicate a wrong person, that too a relative. An appreciation of the entire facts lead to an irresistible conclusion that the accused had committed the rape. There was sufficient evidence to show that he has outraged the modesty of PW7. He is liable to be convicted for that and the finding of the court below is also sustainable to that extent.

14. It is also pertinent to note that the investigation appeared to be perfunctory. Though, sufficient evidence was let in by the Investigating Officer on other crucial facts sufficient to prove the offence, he has committed few faults. He has admitted that blood stains were found by him on the floor at the time of preparation of the scene mahazar. But that does not find a place in the scene mahazar. It is also to be noted that the crucial fact that the wall of the bedroom was half broken was another crucial fact, which also does not find a place in the mahazar. The lunki which was another vital piece of evidence was taken into custody only on 22nd, though the incident happened on 07.05.2012. Another important aspect is that the actual scene of occurrence with respect to Section 376 of IPC as spoken by PW7 was the veranda, though Ext.P10, scene mahazar shows the bedroom as the scene of occurrence. It is pertinent to note that even according to PW7, she herself had shown the scene of occurrence to the Investigating Officer. It is for the higher ups in the police to take note of such lapses.

15. Learned counsel on State Brief alternatively contended that if ultimately the accused is found to be guilty, Court may take a lenient view. The court below has imposed a sentence of 9 years

rigorous imprisonment with a fine of Rs.25,000/- and default sentence of rigorous imprisonment for one year. It is to be noted that the accused is a close relative of PWs.6 and 7. He trespassed into the house of the victim in the early hours and initially, he attempted to outrage the modesty of his own relative. When he failed in that attempt, he went to the extent of committing rape on a 75 year old helpless woman. This shows that both the incidents happened not in the split of seconds, but after lapse of considerable time. This evidently indicates the criminal mind of the accused. Evidently, the element of punishment should be have an element of deterrence also. Hence, I am not inclined to interfere in the sentence.

In the result, the appeal fails and is dismissed confirming the conviction and sentence imposed on the accused.

Sd/-
SUNIL THOMAS
Judge

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P.A to Judge