

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

FRIDAY, THE 6TH DAY OF NOVEMBER 2015/15TH KARTHIKA, 1937

CRL.A.No. 857 of 2014 (A)

AGAINST THE JUDGMENT IN SC 32/2012 of ADDITIONAL DISTRICT COURT
(ADHOC), ERNAKULAM DATED 23-03-2013

APPELLANT/ACCUSED:

ARUN, AGED 25 YEARS
S/O.JOHN, PUTHENPURACKAL HOUSE, MADOMPADY BHAGOM
PERUMANOOR KARA, KUTTAMANGALAM VILLAGE
ERNAKULAM DISTRICT.

BY ADV. SRI.LAVARAJ M.G.

RESPONDENT/COMPLAINANT:

STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA - 682 031.

BY PUBLIC PROSECUTOR: SRI ABHIJITH LESLIE

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 06-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SUNIL THOMAS, J.

Crl.Appeal. No. 857 OF 2014

Dated this the 6th day of November, 2015

JUDGMENT

The sole accused, who stands convicted for offences punishable under Sections 450,323,324,354,506(i) and 376 IPC in SC No.32/2012 of the Additional Sessions Judge(Adhoc I),Ernakulam, is the appellant herein.

2. The allegation of the prosecution is that the defacto complainant, who is a widow with two children, was residing with her children in a house. The accused was known to her as the close friend of her deceased husband. It is alleged that on 9/5/2010 at about 10.30 p.m., the accused, with an intention of outrage her modesty and to commit rape on her, trespassed into the residential house, pushed her down by gagging her mouth and nose and forcefully committed rape on her. This was reported to her sister and her husband, who were residing away. On the next day morning, they came to the house of the de facto complainant and thereafter they proceeded to the nearby police station and laid the FIR. She

had complained that, in the course of committing the rape, she sustained injury on her cheek and on the left side of her chest. The accused after committing the act, threatened her to kill, if she disclosed it to any other person and left the house at about 11 .30 p.m. On the basis of her FIS, PW6 registered Ext.P4 FIR.

3. After completion of the investigation, final report was laid and the accused, who pleaded not guilty, faced the trial. On the side of the prosecution, PW1 to PW8 were examined and Exhibits P1 to P15 were marked. M.Os 1 and 2 series were identified.

4. On an evaluation of the entire evidence adduced, the court below found the accused guilty, convicted and sentenced to undergo imprisonment for various periods with a sentence of ten years awarded for offence punishable under Section 376 and to pay a fine of Rs.50,000/- with a default sentence of rigorous imprisonment for two years.

5. Aggrieved by the above conviction and sentence, the accused has preferred this appeal. Heard both sides and examined the records.

6. The specific allegation of commission of rape and the connected offences committed by the accused are sought to be established by the prosecution through the oral testimony of PW1, the defacto complainant, and corroborated by that of PW2 and PW3. PW1 in her chief examination had given a detailed version of commission of rape by the accused. She deposed that the accused reached her house at 10.30 p.m. and in spite of her request to return, he remained there, under the pretext of talking to her and thereafter trespassed into the house and forcefully raped her. She, in her chief examination, stood by her statement given in the FIS and deposed in accordance with the prosecution case. However, in the cross examination, she retracted from her version in the chief examination and deposed that she had a close relation with the accused and had consensual sex on various occasions. She deposed that since she was provoked by his act of beating on her head, she lodged the complaint. She was declared hostile to the prosecution and was cross examined.

7. The prosecution further relied on the oral testimony of PW2, the husband of the sister of the de facto complaint. He

deposed that on 9.5.2010 at about 11.pm., he got a phone call from PW1 requesting him to come to her home, but the phone got disconnected thereafter. Next day morning, he along with his wife, went to the house of PW1. PW1 had disclosed about the incident that happened on the previous day. They took her to the police station and laid FIS and thereafter accompanied her to the hospital. PW3 is a friend of the accused. According to the prosecution, when the accused was in the house of PW1, PW3 had also reached there and saw both of them. According to the version of PW1, she had requested PW3 to persuade the accused to leave the house. In spite of his persuasion, the accused is stated to have remained there. PW 3 left the house thereafter.

8. Version of PW3 is relied on by the prosecution to prove the incident that immediately preceded the commission of the crime. His version was relied on by the prosecution to prove that the accused was present at the house of PW1 prior to the commission of the offence.

9. PW1 in her chief examination was consistent regarding the acts committed by the accused. She specifically stated that the accused had committed rape on her. She even went to the

extent of mentioning that, after commission of the offence, the accused threatened her to kill her in case she disclosed the incident to any other person.

10. In the Section 313 Cr.P.C. reply statement of the accused, he did not say anything except denying the allegation. The trend of the answers given by him in the course of Section 313 Cr.P.C questioning also indicates that he had denied of the version spoken by the witnesses. The learned counsel for the accused, relying on the version of PW1 spoken by her in the cross examination, contended that even if the prosecution case regarding the act of sex is proved, it only indicates consensual sex. The learned counsel vehemently contended that the court below went wrong in discarding PW1's version given in the cross examination, that there was a consensual sex and that they had been indulging in such acts even on previous occasions. According to the counsel, that evidence should have been considered by the court. Counsel for the accused challenged the finding of the court below, that the version spoken by PW1 in the cross examination was an after thought and that she was persuaded by the accused. It was further contended that even

if the accused wanted to procure the evidence of PW1, the accused could have done it even prior to the chief examination.

11. It is pertinent to note that PW1 was examined in chief on 18/10/2012. Thereafter, the cross examination was held only on 12/11/2012 and there was a gap of about one month. A perusal of the cross examination of PW1 indicates that the counsel for the accused had made a series of suggestive questions, each of which were loaded with answers in favour of the accused. She was expected to affirm only the suggestions, which she dutifully did. Her answers indicate that she had given a complete go bye to her version in the chief examination, totally retracting herself from her chief examination, wherein she categorically asserted that she was raped which completely tallied with the prosecution case. Her answers show a complete summer sault. She went to the extent of saying that she had been indulging in consensual sex with the accused on several occasions. Even though she claimed that she had consensual sex with the accused, the unbelievable explanation tendered by her for lodging the complaint was that, on 9/5/2010 after committing the act, the accused kicked on her head. According

to her, this provoked her to give a complaint to the police. This appears to be artificial, since it contradicts her version recorded in the FIS as well as in the wound certificate marked as Ext.P3. Further she admitted that she understood the seriousness of the allegation against accused after she had reached police station. She admitted that she knew that the accused was arrested and was in jail for three months. In spite of this, she stood by the prosecution case, during the chief examination.

12. In the re-examination she was declared hostile and was confronted with the previous statement to the police, by the learned public prosecutor. She admitted that she had told the police that she was raped by the accused. The evidence on record also indicates that on 10/5/2010 she had gone voluntarily to the police station and had given the statement. She was accompanied by PW2. There is absolutely nothing on record to show that at that time she was agitated for being injured by the accused. Even though PW1 turned hostile in the cross examination, PW2, her close relative and PW3, a close friend of accused remained loyal to the prosecution and gave evidence to the extent of corroborating the attending circumstances.

13. Ext.P3 is the wound certificate recorded on 10/5/2010 at about 11.a.m. It is recorded therein that she was raped by the accused. It has been noted that she had pain on her groin during walking. She had complained of neck pain and had tenderness injuries on the left side of the face and abrasion on the back of left arm. There were tenderness of both breasts. Each of the above injuries totally correspond with her version regarding the overtacts committed by the accused, while committing rape. In the FIS itself, it has been mentioned by her that prior to the commission of the act, the accused had pushed her to floor and he got injured on the cheek and left shoulder. All the above acts correspond with the injuries noticed by the doctor in Ext.P3. PW5, the doctor of the Taluk Hospital, who examined PW1, corroborated the version seen in Ext.P3 and thereby affirmed the prosecution case that the accused had committed rape on PW1.

14. PW4 had examined the accused and issued Ext.P2 certificate. It indicated that there was nothing to suggest that he was incapable of performing any sexual act. Hence, the prosecution is entitled to rely on that document to prove the

physical capacity of the accused to perform sexual act.

15. Ext.P10 is the scene mahazar, it indicates that from the scene of occurrence, sample mud from the floor claimed to be stained with human sperm, alleged to be that of accused, as shown by the victim was taken. One nighty and one skirt, marked as MO 2 series, were also recovered. All the above items, so recovered, were forwarded for chemical examination. Ext.P14 is the report of the chemical analysis. It showed that item three, which was the underskirt allegedly worn by the victim on the relevant day, contained human semen and spermatozoa.

16. PW8, the CI of Police, Kothamangalam who was the investigating officer denied the suggestion put by the learned counsel for the accused that the accused and PW1 were having close relationship and had consensual sex. The witness stated that the investigation did not reveal such a claim. Evidently, the version, as spoken by PW1 in her cross examination, is negated by the oral testimony of PW2 and PW3 and the medical and forensic evidences. The medical evidence taken immediately after lodging of the complaint itself indicates a forceful sexual act. The version spoken by PW1 in the cross examination was

diametrically opposite to her version given in the chief examination. The court below has attributed this to the fact that she was won over by the accused. Though this finding is not substantiated, for the reasons best known to her, after tendering evidence in chief voluntarily supporting the prosecution case, she turned round and supported the accused. However, all the available materials corroborate her version in the chief examination and not that in the cross examination.

17. Evidently, it is disturbing that there was a time gap of almost one month in between her chief examination and cross examination. The court below at para 16 of the judgment has stated that after the chief examination on 18/10/2012 the accused kept away from the court till 12/11/2012. A perusal of the proceedings before the court below shows that this is not correct. It shows that on 18/10/2012 the accused was present. On the previous posting of 27/7/2012, the case was posted to 18/10/2012 after framing charges, for examination of CWs 1 to 3. On 18/10/2012, PW1 to PW3 were examined in chief, Ext.P1 and material objects were marked and the case was adjourned to 19/10/2012. On that day also, the accused was present and PW4

was examined. The case was thereafter adjourned to 20/10/2012. PW5 to PW7 were examined and marked three documents. It appears that though seven witnesses were examined within three days, all the examinations were in chief and cross examination were not done, though the accused was present. Absolutely, no reason is recorded as to why without cross examination of the each witness, the court proceeded to record the chief examination of witnesses. An indication is available only in the proceeding dated 22/10/2012, that he was present and he had not arranged the counsel till that time. It appears that even though the accused was present on 18th, 19^t, 20th and 22nd, October,2012, chief examination of the witnesses was done without cross examination and he was advised to get aid of a lawyer. If he had not engaged a lawyer, the court should not have proceeded with the examination in chief of all the witnesses. However, on 22nd October,2010, on the ground that the accused has not arranged a counsel, he was remanded to the District Jail and the DLSA was required to appoint the counsel. Thereafter, on 29/10/2012, sureties were present and accused was granted bail. Thereafter, the court below

proceeded to record the cross examination of witnesses who were examined in chief on the previous day. Evidently, the court should not have adopted such procedure. However, the accused has not raised any contention that such a procedure caused him any prejudice. On the other hand, the time gap that occurred after the chief examination of PW1 seems to have gone to his advantage, since PW1 retracted from her version in the chief examination.

18. In the light of the above, the retracted version of PW1 in her cross examination, which is totally contradictory to her version in the chief examination, has to be appreciated with caution. She has not disclosed as to why she has deposed in the chief examination implicating the accused. Clearly no explanation is forthcoming as to why she has shifted the stand in the cross examination that the accused was innocent and the sexual intercourse was with her consent. This is contrary to the version spoken by her in FI statement to the doctor and PW2, which consistently support the prosecution case. Hence, the version of PW1 in her cross examination is only to be discarded as unbelievable and given under highly suspicious

circumstances.

19. Evidence of PW1 in her chief examination beyond any doubt proves the offence committed by the accused. This is completely in conformity with the version spoken by her to PW2 immediately after the incident and to the police as narrated in her FI statement. The presence of the accused in her house is spoken by PW4. Ext.P3 wound certificate also confirms the prosecution case. Forensic report further corroborates the prosecution version. No omission or contradiction has been brought out in the cross examination, inconsistent with her prior statement given to the police.

20. An evaluation of the entire evidence shows that the evidence tendered by PW1 in her chief examination is to be believed and is fully corroborated by the other evidence. In the light of the above, the finding of the court below, that the accused has committed rape on the de facto complainant is only to be confirmed. Version of PW1 further indicates that she was threatened with dire consequences in case of revealing it to any other person, which amounts to a criminal intimidation. His entry to the house was legal initially, but by the commission of

offence turned out to be a criminal trespass thereafter. However, there is no evidence to hold that an offence under Section 324 was committed and finding of the court below to that extent, is not legally sustainable.

21. It is pertinent to note that the accused is in prison. He is not involved in any other case. He is young and married. The matter has been pending since long. The accused is a close family friend of the victim. Though the offence alleged against the accused stands proved by evidence and is a crime against the woman and society as such, the victim by her version as PW1 in cross examination, appears to have condoned the act of accused. The victim is a married woman and appears to have given evidence in cross examination consciously. Though this will not affect the nature of offence, it can be a vital mitigating special circumstance which can be considered, while awarding the sentence. The conviction of ten years imposed by the court below for offence punishable under Section 376 IPC is on the higher side. Sentence of rigorous imprisonment for four years would serve the interest of justice, since the element of reformation of the accused outweighs the deterrent element in

this case. For offence under Section 323 IPC a sentence of six months R.I. will be sufficient. For offence punishable under Section 450 IPC, RI for a period of two years alone will be sufficient. For offence punishable under Section 354, sentence of rigorous imprisonment of one year would serve the interest of justice. For the offence punishable under Section 506 IPC, sentence of two years RI would serve the interest of justice.

In the result, the appeal is allowed in part. The conviction under Section 324 is set aside. While, maintaining conviction for offences punishable under Sections 323,354, 450, 376 and Section 506 IPC, their respective sentences are modified. The accused is sentenced to undergo RI for six months for offence under Section 323 IPC, RI for four years for offence punishable under Section 376 IPC, RI for one year for offence punishable under Section 354 IPC, RI for two years for offence under Section 450 IPC and two years RI for offence punishable under Section 506 IPC. All the sentences shall run concurrently. The accused will be entitled for set off as per the law.

Sd/-

SUNIL THOMAS

Judge

/true copy/ PS to Judge.

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