

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

TUESDAY, THE 8TH DAY OF DECEMBER 2015/17TH AGRAHAYANA, 1937

CRL.A.No. 601 of 2011 (A)

(AGAINST THE ORDER/JUDGMENT IN SC 235/2010 of ADDL.DISTRICT
COURT, KOTTAYAM)

APPELLANT(S)/ACCUSED::

AJAYAN M.K @ KUNJAN,
AGED 27, MAKKAN HOUSE, 15TH MILE BHAGAM,
VAZHOORKARA, CHANGANASSERY TALUK.

BY ADVS.SRI.K.A.HASSAN
SMT.JULIA PRIYA RESHMY

RESPONDENT(S)/COMPLAINANT::

STATE OF KERALA,
REP. NY S.I.POLICE, PALLIKKATHODU, KOTTAYAM DISTRICT.686101

R BY PUBLIC PROSECUTOR ABHIJITH LESLIA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 01-10-2015,
THE COURT ON 8/12/2015 DELIVERED THE FOLLOWING:

SUNIL THOMAS, J.

Crl.A. No. 601 of 2011

Dated this the 8th day of December, 2015

JUDGMENT

The sole accused, who stands convicted for offence punishable under Section 376 IPC in SC No.235/2010 of the Additional Sessions Court, (Special) Kottayam, has preferred this appeal.

2. The allegation of the prosecution was that on 14/3/2008 at about 9.45 p.m. the accused committed rape on the victim, who was a married woman with one child, at her residence. The accused was the friend of the victim's husband. The accused was an autorickshaw driver, who used to bring the husband to the house of the victim in drunken condition. On the relevant day, after dropping the husband and making him sleep, he committed rape on her. It was further alleged that, thereafter while she was bathing, he took her photographs on mobile, which was shown to her and by black mailing her, he continued to commit rape on her till 6/11/2009. In the meanwhile, she shifted her residence to other places wherein also, it is alleged that, he continued to have physical relationship with her against

her will. She gave birth to a second child on 17/12/2008. The accused allegedly informed the husband about the paternity of child and the matrimonial relationship got strained. Thereafter, the FI Statement was laid on 10/12/2009, pursuant to which crime was registered. After investigation, the final report was laid. The accused appeared and pleaded not guilty. On the side of the prosecution, evidence was let in the form of oral testimony of PWs 1 to 15 and Exts.P1 to P16. MOs 1 to 3 were identified. The court below, on an evaluation of the entire inputs, concluded that the accused had committed offence alleged, convicted and sentenced him to undergo rigorous imprisonment for eight years and to pay a fine of Rs.10,000/- and in default to undergo rigorous imprisonment of three months more.

3. The accused has challenged this conviction and sentence in this appeal. Heard both sides and examined the records.

4. The case set up by the prosecution, as is evident from Ext.P1 F.I Statement dated 10/12/2009, was that the first incident took place on some day in March 2008. Thereafter, the accused is alleged to have taken photograph of the victim secretly while she was bathing and on the next day of the first

incident, showed the photograph to her and under that threat, he continued to commit offence repeatedly on various dates at three different houses, wherein she had lived with her husband. In the meanwhile, she became pregnant and after her delivery, the accused revealed it to the husband of the victim and his brother. Consequently, she attempted to commit suicide by consuming poison. After recovery, though the husband abandoned her, the accused allegedly continued to have physical relationship against her will, on an offer to marry her.

5. To substantiate the case of the victim, she was examined as PW1. Her evidence was sought to be corroborated through the oral testimony of PW2 and PW3, who were her neighbours, PW4, who was the mother of the victim and PW5, another neighbour. PW2 could not reveal any material which could support the prosecution case. On the other hand, PW3 turned hostile and did not support the prosecution case in any manner. PW4, the mother, deposed only to the extent that she knew the accused, and that he used to visit the house of PW1. She further stated that the victim gave birth to a child on 17/12/2008 and thereafter she was taken to her home. PW4 deposed that later, she was informed that PW1 had consumed poison and was

admitted in the hospital. She immediately rushed to the hospital and on enquiry, PW1 revealed the entire incident. PW5 was a neighbour, who deposed that after PW1 had consumed the poison, she enquired about the reason and PW1 revealed the involvement of the accused. PW5 also further disclosed that one day the accused had come to the residence of PW1 and had beaten her. On hearing her cries, she along with the husband rushed to the house of PW1 and saved her. PW6 was a witness to the mahazar. PW7 was the doctor who examined the victim and issued Ext.P5 wound certificate.

6. The defence set up by the accused was one of total denial. According to him, he had decided to get married in December 2009 and to spoil his marriage, PW1 had laid the complaint. He denied the allegation that he had committed rape on the defacto complainant .

7. The crucial allegation against the accused, that he had committed rape on the defacto complainant during the period from March 2008 to 6/11/2009 at three different places of her residence, is sought to be proved through the oral testimony of PW1. A limited corroboration is obtained from the oral testimony of PWs 4 and 5. Version of PW4, the mother only proved that

the accused used to visit the house of PW1, that she had delivered a child on 17/12/200, that, after few days of the above, PW1 consumed poison, and that that on getting information, she visited the daughter at hospital and the husband of the victim disclosed that accused had requested him to send PW1 and the child to his house. According to the husband, the accused had fathered the second child of the victim. This was confirmed by PW1 also.

8. PW5, corroborated the version of PW1 to a very limited extent only. According to PW5, the accused used to visit the defacto complainant at her residence. When she enquired PW1 about the cause for consuming poison, PW1 disclosed that the accused committed rape on her, that he had shown a mobile clipping and blackmailing her, continued to commit rape on her. PW4 further deposed that one day the accused had come to the house of PW1 and had beaten her. On hearing her cries, PW5 and her husband went there and intervened .

9. Regarding the actual allegation of commission of rape by the accused, in the light of the limited version of PW4 and PW5, the only available evidence is that of the oral testimony of PW1. It is settled law that even a solitary testimony of the victim in a

case of rape is reliable, if it is sufficient to inspire confidence. This has been considered in the decision in **Sudhansu Sekhar Sahoo v. State of Orissa [2003 SCC(Cri.) 1484]**, wherein it was held that sole testimony of the victim in a sexual offence can be the basis for conviction, provided it is safe, reliable and worthy of acceptance. It is reasonable to assume that no woman would falsely implicate herself in a sexual offence as the honour and prestige of that woman also would be at a stake. It was reiterated in the subsequent decisions and ultimately even in one of latest decision of the Supreme Court in **Hem Raj S/o. Moti Ram v. State of Haryana [Laws (SC)-2014-1-73]**. It was held that in a case involving charge of rape, the evidence of the prosecutrix is most vital. If it is found credible and if it inspires total confidence, it can be relied on even sans corroboration.

10. Hence, the version given by PW1 has to be analyzed carefully, to find out whether it is sufficient to inspire confidence in the mind of the court to sustain the conviction of the accused. The oral testimony of PW1 shows that several minor inconsistencies or omissions were brought out in her testimony with reference to her previous statement given to the police.

The above inconsistencies and contradictions were confirmed by the investigating officer who was examined as PW13. Though each of the contradiction or inconsistency independently is not sufficient to cast any doubt on her version, the cumulative impact is a caution that the version of PW1, requires close scrutiny. One of the substantial inconsistency, that was brought out in the evidence of PW1, was that in her First Information Statement, she had deposed that the husband had re-married after abandoning her. This was repeated by her to the police also. However, at the time of cross examination, she was challenged about her statement that her husband had remarried after abandoning her, she admitted that he had not.

11. The first episode of the incident is stated to have taken place on 14/3/2008. PW1 in her version has narrated as to what transpired on that day. According to her, her husband was brought in a drunken condition by the accused and he was laid on the floor. After he fell asleep, the accused caught hold of PW1 and committed rape on her. On the next day, while she was engaged in the household affairs, the accused came and a mobile clipping of her taking a bath was shown. He threatened her by stating that it would be shown to others and he committed rape

on her. It was repeated thereafter on the subsequent several days. She ultimately became pregnant and delivered a child. The specific explanation given by her for not disclosing it to any other person including her family members was that she was afraid that she may lose her family life and her son.

12. This, being the specific reason stated by her, the subsequent conduct of PW1 has to be evaluated in the background of the above explanation offered by her. According to PW1, after her delivery, she was taken to her house. In the meanwhile, the accused allegedly called the husband of the defacto complainant and his brother and informed that the child was born in his relationship with PW1. He demanded that PW1 and the child should be sent to his house. The husband of PW1 allegedly harassed her and out of desperation, she, attempted to commit suicide by consuming poison and was taken to the hospital. The specific reason given by PW1 for this act was that she felt that the family life was ruined. She is stated to have revealed this to PW4 and PW5 also. Immediately after discharging from the hospital, the husband abandoned her and took the son along with him. She thereafter moved to her mother's house. According to the victim, the specific cause that

prevented her from complaining about the rape was a fear that she may lose her husband and child. When the incidents that led to her attempt to commit suicide are analyzed, it is clear that she attempted to commit suicide on a fear that her matrimonial life was ruined. That being the explanation of the victim, whatever fear that prevented her from complaining to the police stood removed after the alleged disclosure by the accused. In other words, after the alleged disclosure by the accused to her husband, leading to an attempt to commit suicide, whatever fear that prevented her from complaining to the police stood removed. Thereafter, nothing prevented her from complaining to the police about the rape, especially since the accused had not only ravished her but also spoiled her family relationship. This was reiterated by the mother in her evidence who deposed that when the daughter disclosed about the rape to her, she was determined to complain to the police. However, she also did not persuade the daughter to lodge a complaint at that time. Though the incident leading to her attempt to commit suicide happened some time in December - January 2008 - 2009, she did not file any complaint at least for a further period of more than ten months. This delay cast serious doubt on the case of victim

and renders the prosecution case shaky.

13. These incidents were followed by the second part of the episode. It has come out in evidence that after her discharge from the hospital, she started living with her parents. It is on record that even thereafter, the accused used to visit her and had physical relationship. Even her parents were aware of the continued relationship between both of them. The explanation of PW1 was that this was also against her will and by force. According to her, the accused had offered to marry her and to live together after taking a building on rent. The above version of PW1 reveals that there was an offer to marry and maintain her, at the same time, a specific allegation that rape was committed on her. The claim of victim, analysed in the facts and circumstances can only mean that either she was under psychological pressure that the accused had exploited her, or by physical force continued to have physical relationship. Another explanation can be that under a false promise to marry, he continued to sexually exploit her. Both these explanations do not appear to be sustainable in the background of allegation in the first episode, wherein accused not only physically ravished her by force, but also ruined her family life. Normal human conduct

in such a case will be of one of hatred and contempt towards the perpetrator. Apparently, her reasoning and her conduct are inconsistent, which do not go together.

14. If she had a specific case that they had physical relationship on the basis of a false promise to marry or a promise that failed later, the first question to be decided is whether it was based on misconception of facts. PW1 had a specific case that the accused had offered to marry her. This was reiterated by PW4 also. Evidently, after she started living with her parents, there was no surviving threat or coercion and there was no reason also to succumb to any fear of threat. Her family relationship had broken and entire facts were known to others. In the above circumstances, it can only be presumed that they had physical relationship only on the basis of his offer to marry her. To a specific question in cross examination for not complaining to the police even after the matrimonial relationship with her husband had broken down and shifting to her parent's house, she categorically replied that it was based on the offer to marry.

15. This clearly shows that even though PW1 asserted that the accused raped her, at the same breath she also asserts that

the accused had offered to marry her. The allegation that the accused had forceful sex on her is hence doubtful. At the most, it can be presumed that she budged on a belief or a false promise that the accused would marry her. The delay in filing the complaint as well as the reason for not complaining were suggested to her in the cross examination. The specific reason of PW1 for lodging the complaint to the police was that the accused visited her lastly on 6/10/2009, had physical relationship and thereafter remained elusive. In the re-examination PW1 reiterated that though the accused had made an offer to marry, he resiled from it and hence she complained. This clearly shows that the relationship with the accused during the previous ten months was on a promise to marry. The earlier instances during the subsistence of the matrimonial relationship has also to be analysed in the background that she continued to have physical relationship on a promise to marry, even after her family relationship had broken down. Necessarily, the allegation of rape against her will during the first episode become doubtful in the above circumstances. Before lodging the complaint, PW1 had consulted her family members.

16.The above discussion of facts clearly show that whatever impediment, that prevented the defacto complainant from approaching the police and complaining about the allegation of rape, stood removed or vanished after two specific incidents. The first one was, after the husband was informed by the accused, which led to her consuming poison. After her return from hospital, the threat of disclosure of entire incidents to others, including her family members, stood removed. There was no bar or any restriction on her in approaching the police and complaining that she had a genuine allegation that the rape was committed on her. Second one was after the husband abandoned her and she shifted her residence to her parents house. This was again another ideal time, when she could have complained to the police about the rape, but it was not done. This casts serious doubt on her allegation that the previous acts were done by the accused against her consent and against her will. The complaint was laid about ten months thereafter. In the meanwhile, she continued to have the relationship with the accused, on a reasoning that he had offered to marry her.

17. There is yet another reason that casts serious doubt on the case set up by the prosecution. The specific case of the victim, which was reiterated by her in the evidence was that, after the incident that happened in March 2008, she did not disclose it to any other person, since she apprehended that her family relationship would be broken. However, according to the accused, after the birth of the second child, the accused disclosed to the husband of the victim and his brother that he was the father of the 2nd child. It is hard to believe that a person who allegedly committed rape will go around and inform the husband of the victim and the entire world that he was the father of the child born in a rape. It is very unlikely that a person who commits a crime, would disclose it to outside world especially the husband of the victim himself, thereby exposing himself to penal consequences.

18. There is another reason, that casts serious doubt on the prosecution case. According to PW1, showing a mobile clipping, the accused used to exploit her sexually. The case of PW1 is that, one day the accused came to her parents house in a drunken condition, picked up a quarrel with her and her parents. Thereafter in a fit of anger he threw the mobile to her varanda

and it broke into pieces. It is hard to believe that a person, who was sexually exploiting a woman with an alleged mobile clipping, would voluntarily destroy the vital piece of evidence. Further, as far as the defacto complainant was concerned, it was vital piece of evidence which was being used against her and it turned out to be a vital piece of evidence for proving the allegation against the accused. At that time either she could have retained that vital piece of evidence or once the embargo in approaching the police was removed, she could have laid a complaint. Both were not done.

19. Another aspect is that even though the accused is alleged to have claimed paternity of the child and that the prosecution alleged that the child was born out of rape, no DNA test was conducted to confirm the paternity of the child. This would have been a vital piece of evidence which could have supported the prosecution case. This was not done. However, there are few other medical and forensic evidences which are available. Ext.P5 is the certificate issued by the Doctor after having examined the victim which only confirms previous physical relationship. This is not of much help to the prosecution, since the defacto complainant was a married

woman having given birth to two children. MO1 was her nighty and MO2 was her underskirt. According to PW1, they were the dress worn by her on 6/11/2009, the day on which the accused visited her lastly and had physical relationship. Ext.P10 is the chemical analysis report which shows that MO1 and MO2 evidenced indications of human semen and spermatozoa. However, this also may not completely establish the allegation of the prosecution in the absence of any clinging evidence to show that it belonged to the accused. It at the most, only evidence a physical relationship.

20. These discussion on facts lead to a question as to whether the accused had maintained relationship with the defacto complainant on the basis of a false promise to marry or that after giving her promise to marry and after continuing to have physical relationship resiled from the above promise. The law, on the question whether the physical relationship on the basis of a false promise to marry would amount to rape, has been considered by the Supreme Court in various decisions. The law is well settled in this regard as laid down in the various decisions of the Supreme Court. In **Uday v. State of Karnataka (AIR 2003 SC 1639)**, after referring to the various earlier decisions,

the Supreme Court held that the consensus of judicial opinion was in favour of the view that the consent given by the prosecutrix to have physical relationship with a person with whom she was deeply in love on a promise that he will marry her on a later date, cannot be said to be given under a misconception of fact. It was held that a false promise is not a fact within the meaning of the Code. However, the Supreme Court held that there was no straight jacket formula for determining whether the consent given by the prosecutrix to have the physical relationship was voluntary, or whether it was given under a misconception of facts. The court must, in each case consider the evidence and the surrounding circumstances. In **Deelip Singh alia Dilip Kumar v. State of Bihar**[AIR 2005 SC 203], the Supreme Court had occasion to reiterate the above presumption of law with a clarification that a representation deliberately made by the accused with a view to elicit the assent of the victim without having the intention or inclination to marry her, will vitiate the consent.

21. However, in the case at hand an appreciation of the facts, as sought to be established by the prosecution, indicates that while the first part of the episode is based on a specific

allegation of rape coupled with one being continued over a long period of time on the basis of the threat used with the help of alleged mobile clipping, the second part is one wherein the defacto complainant set up a case of physical relationship on a false promise to marry. The first part of the prosecution case has to be analyzed in the background of the second part wherein the defacto complainant, though clearly alleges physical relationship against her consent, tried to take up yet another contention that it was based on a false promise to marry. A complete evaluation of the entire evidence clearly shows that though there are sufficient indications that there had been physical relationship between the accused and the defacto complainant, whether it amounts to offence is doubtful. Evidently, when two views are possible, the benefit of doubt should be given to the accused.

22. In the light of the above discussion on facts, the evidence tendered by PW1 is not sufficient to inspire confidence in the mind of the court to prove the ingredients of Section 376. Hence, the accused is entitled for the benefit of doubt. Finding of the court below in this regard to the contrary is liable to be set aside.

In the result, the appeal is allowed. The judgment of the

court below is set aside. The accused is acquitted. The bail bond executed by him stands discharged.

Sd/-

SUNIL THOMAS
Judge

dpk

/true copy/ PS to Judge.