

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.T.RAVIKUMAR

FRIDAY, THE 4TH DAY OF SEPTEMBER 2015/13RD BHADRA, 1937

CRL.A.No. 789 of 2011 (C)

AGAINST THE JUDGMENT IN SC 634/2005 of ADDL.SESIONS COURT
(AD HOC-II), ERNAKULAM
CP 43/2005 of COURT OF JUDL. MAGISTRATE OF FIRST CLASS,
KOTHAMANGALAM

APPELLANT(S)/ACCUSED:

SEBASTIAN @ DAI, S/O.MATHAI
AGED 36 YEARS, MATTATHIL VEEDU, MULLANKUTHI BHAGAM
KALIYAR KARA, VANNAPPORAM VILLAGE, IDUKKI DISTRICT.

BY ADV. SRI.BIJU ABRAHAM

RESPONDENT(S)/COMPLAINANT:

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

BY PUBLIC PROSECUTOR SRI.V.S.SREEJITH

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 04-09-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C.T. RAVIKUMAR, J.

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Crl.Appeal No.789 of 2011

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Dated this the 4th day of September, 2015

JUDGMENT

This appeal is directed against the judgment of conviction passed by the Court of Additional Sessions Judge (Ad hoc-II), Ernakulam in S.C.No.634 of 2005. The appellant herein was the first accused therein. He along with two others were charged for commission of offence under section 376 (2)(g) of the Indian Penal Code for having committed gang rape on the prosecutrix, PW1 on 02.07.2003. Accused Nos. 2 and 3 were absconding and therefore, the case against them was split up and the appellant alone stood the trial in S.C.No.634 of 2005. The trial court found the appellant guilty for the offence punishable under section 376 (2)(g), IPC and convicted thereunder and sentenced him to undergo simple imprisonment for a period of ten years and to pay a fine of ₹25,000/-. In default of payment of fine,

he was ordered to undergo simple imprisonment for a further period of six months. The amount of fine, if realised was directed to be given to PW1 as compensation under section 357(1) Cr.P.C.

2. The facts leading to this appeal are as hereunder:-

At about 3 p.m. on 02.07.2003, the prosecutrix PW1, was walking along the Kunnathur-Kaliyar public road. She was going from the tea shop of her father (PW2) and was carrying the food for her grandmother who was residing at Mullankuthy. While she reached in front of the house of PW5 Vijayan, the appellant caught hold of her from behind and took her inside the said house. Accused No.3-Aneesh opened the door. Thereafter, the appellant and accused No.2- Nibu Joseph, committed rape on her from the northern bedroom of the said house and thereby they committed the alleged offence. On being permitted to go from there, the prosecutrix went outside and then bathed in the nearby river and went to her grandmother's house. She divulged the entire incident to the grandmother who, in turn, informed the same to the parents of the prosecutrix. Though they attempted to lodge a complaint on 2.7.2003 itself, they could not do so and on the

next day, PW12, the Sub Inspector of Police, Pothanikadu recorded Ext.P1 statement of PW1 from the police station based on which he registered Ext.P1(a) FIR alleging commission of offence under section 376 read with section 34 IPC against the appellant and the other accused persons. PW14, the then Circle Inspector of Police, Kalloorkade conducted the investigation and he seized MOs 1 to 3 which are respectively the pillow, bed sheet and mat found on the cot involved in the incident, under Ext.P4 mahazar. He has also seized the dresses allegedly worn by the prosecutrix on the fateful day viz., the nighty (MO4), underskirt (MO5) and bra (MO6) under Ext.P5. The shirt allegedly worn by the appellant was seized under Ext.P6. However, it is pertinent to note that the same was not legally brought on record and identified as a material object in this case. He submitted Ext.P10 report to the court for adding section 376 (g) IPC and sent the material objects for analysis to the Forensic Science Laboratory and Ext.P12 is the analysis report. After completing the investigation, PW14 laid the final report accusing the appellant and the others for having committed offence punishable under section 376(g) read with

section 34 IPC. The case was then committed to the Court of Session, Ernakulam as per proceedings in C.P.43 of 2005 by the Court of Judicial First Class Magistrate, Kothamangalam. The Sessions Court made over the case for trial and disposal to the Court of Additional Sessions Judge (Ad hoc-II), Ernakulam. On summons, the appellant and the other accused appeared before the court. After preliminary hearing, the charge for the offence under section 376(g) read with 34 IPC was framed, read over and explained to the accused. They pleaded not guilty and claimed to be tried. In fact, it was thereafter that accused Nos.2 and 3 absconded. The charge was then amended to one under section 376(2)(g), IPC and it was read over and explained to the appellant. He pleaded not guilty and claimed to be tried. To bring home the charge, the prosecution has examined 14 witnesses and got marked 12 documents besides identifying 6 material objects. After the closure of the evidence of the prosecution, the appellant herein was questioned under section 313 Cr.P.C and he denied all the incriminating circumstances put to him. He would further state that the father of the prosecutrix was not in good terms with his family due to

some boundary dispute and that was why he had falsely foisted a case against him. Finding that the appellant was not entitled to get acquittal under section 232 Cr.P.C, he was called upon to enter on his defence. Nonetheless, he has not adduced any evidence in defence. It was after appreciating the evidence and hearing both sides that the trial court arrived at the conclusion that the prosecution has succeeded in establishing the guilt of the appellant/accused as regards the commission of offence under section 376(2)(g), IPC and consequently, convicted and sentenced him as aforesaid. This appeal is filed in the said circumstances.

3. I have heard the learned counsel for the appellant and also the learned Public Prosecutor. The learned counsel for the appellant contended that the conviction of the appellant is nothing but an outcome of utter perverse appreciation of the evidence. It is contended that the prosecution has miserably failed to bring home the charge against the appellant and several fatal lacuna which would strike at the root of the matter were ignored to be taken serious note of, by the learned Sessions Judge. That apart, it is contended that certain

conclusions were arrived at by the trial court even in the absence of any evidence on record and a careful scanning of the evidence would reveal that certain aspects which were not at all spoken to by any of the witnesses, were treated to have been deposed and made the foundation for arriving at the conclusions.

4. Per contra, the learned Public Prosecutor contended that the evidence of PW1, the prosecutrix, with the evidence of PW3 doctor who examined her with Ext.P3 would undoubtedly reveal the factum of commission of rape on PW1. The learned Public Prosecutor further contended that despite thorough cross examination of PW1 as also PW4, nothing could be elicited from them to discredit their oral testimonies. Add to it, it is contended that the appellant had not cross-examined the investigating officer viz., PW14. In such circumstances, the appellant could not have canvassed the position that there was a defective investigation. In short, it is submitted by the learned Public Prosecutor that the conclusions and findings of the trial court are strictly in conformity with the evidence on record and the contention of perverse appreciation of evidence is bereft of any basis and

therefore, there is absolutely no scope for appellate interference.

5. Evidently, in the case on hand, the allegation against the appellant is one of commission of rape on PW1. For fixing culpability on the appellant/accused, the evidence has to be scanned. True that, even in the absence of any corroborative evidence, going by the position settled, a conviction could be entered against the accused relying solely on the evidence of prosecutrix, provided the evidence is credible. As noticed hereinbefore, one of the prime contentions raised by the appellant is that though he had not even suggested to any of the witnesses including PW1 regarding the element of consent, the trial court observed that such a defence was taken by the appellant. No doubt, the case of the defence can be the evidence revealing from the suggestions put to the prosecution witnesses or the statements made during the examination under section 313, Cr.P.C in the absence of any evidence adduced by the accused in defence. As noticed hereinbefore, the appellant has not adduced any evidence either oral or documentary. A careful cross examination of the prosecution witnesses as also the examination of the appellant under section 313,

Cr.P.C would undoubtedly go to show that no case was put forth by the appellant/accused to the effect that PW1, prosecutrix, was a willing party. In such circumstances, I am of the view that the entire evidence have to be re-appreciated. In such circumstances, I will proceed to consider the evidence on record.

6. The prosecutrix was examined as PW1. She is a divorcee and got a daughter in her marriage. She was residing along with her parents at the relevant point of time. She would depose that on 02.07.2003 at about 3 p.m, she proceeded from the tea shop being conducted by her father, PW2, at Thennathooru to Mullankuthy where her grandmother was residing. She was carrying food for her grandmother. She would further depose that when she reached in front of the house of PW5 Vijayan, the appellant caught hold of her from behind and took her inside the said house. She also deposed that from the northern side bedroom of the house, the accused who were three in numbers, committed rape on her alternatively. She would depose that she did not know how many times they had committed rape on her. She would further depose that immediately on entering the house, they

closed the door and she was made to lie on a cot. As there was torrential rain, nobody heard her hue and cry. She deposed that she sustained injuries on her hands, temple, elbow etc. and all along, she was trying to escape from the clutches of the accused. She deposed that she was permitted to go from the house only after the incident. Thereafter, she walked outside and went to a nearby river and had a bath and went to the house of her grandmother at Mullankuthy and she disclosed the factum of rape to her who in turn, informed the same to her parents. Later, on 3.7.2003, she gave Ext.P1 FIS based on which Ext.P1(a) FIR was registered. PW2, the father of PW1, would depose that he was conducting a tea shop at Thennathooru and on 02.07.2003 at about 3 p.m, PW1 went to her grandmother's house at Mullankuthy carrying food for her. He would further depose that at about 5 p.m, he came to the shop with his wife. On being disclosed about the factum of rape, he ran to the house of the accused persons. However, he could not trace them and thereafter, he went to the house of PW5. He would further depose that on the next day, he along with PW1 went to Pothanikadu Police Station where Ext.P1(a) FIR was registered based

on the statement given by his daughter. PW3 is the doctor who examined PW1 prosecutrix and issued Ext.P2 wound certificate. He examined PW1 on 4.7.2003 at about 4.30 p.m and noted the following injuries:-

“Abrasion 2x1cm left elbow
Abrasion left big toe. Scab found on both
wounds.”

7. Obviously, Ext.P1(a) FIR was registered on 3.7.2003 at 6 p.m. Ext.P3 would reveal at about 8.20 p.m on the same day, she was taken by PW12 the then S.I of Police, Pothanikadu Police Station to Community Health Centre, Kothamangalam. PW4 examined PW1 from there and noted the following injuries.

“1.Abrasion over the left elbow.
2.Abrasion over left big toe.”

8. PW4 deposed to the effect that she had collected vaginal swab and smear and had issued Ext.P3 certificate. During the cross examination, PW4 deposed that there was no evidence with regard to forcible intercourse though there are general injuries. Further it is stated that both general injuries could be caused by the contact with hard substance. When being asked as to what happened to the

specimen collected by her, PW4 deposed to the effect that she had to verify the result of the specimen to say whether there was any recent sexual intercourse and without verifying the result of the specimen she could not say as to whether there was any recent sexual intercourse. True that during the re-examination, PW4 had deposed to the effect that she has mistakenly recorded that there was no evidence of recent sexual contact in Ext.P3. Further, she deposed:-

“For penetration it is not necessary the detection of sperms or semens in the vaginal. If the penetration is not recent there will not be sperm or semen in the vagina.”

9. Ext.P2 revealed that on the next day viz., on 4.7.2003 at about 4.30 p.m, PW1 was again examined at Community Health Centre, Kothamangalam by PW3. PW3 issued Ext.P2 wound certificate. He noted that PW1 sustained 2 abrasions respectively on the elbow and on the left big toe. In this context, it is to be noted that the very same injuries were noted by PW4 in Ext.P3 wound certificate. PW5 is the owner of the house where the incident took place. PW5 would depose that he is residing along with his wife and son viz., PWs 6 and 7. He would also depose that during the day time, he along with

his wife go for work and his son would also go for work. He had also deposed that he got acquaintance with accused/appellant and he seldom visits his house. It is apposite to note in this context that in paragraph 16 of the judgment, the learned sessions Judge noted that PW5 had deposed that the incident had happened in his house. However, a scanning of the deposition of PW5 would reveal that he had not actually spoken to that effect either during chief examination or during the cross examination. PW6 is the son of PW5 and he would depose that accused/appellant is his friend. He would further depose that during the day time there would not be anyone in the house and they would close the house and keep the key near the front door while leaving for work. PW7 is the wife of PW5 and she would depose that PW2 had visited her house and enquired about the incident. She also deposed that on the date of occurrence at about 4.30 p.m while she was returning after collecting logs from the nearby rubber plantation, she had seen Nibu sitting on a stone near her house. She would further depose that Nibu told her that he had asked Sajitha for an umbrella. PW8 is the witness to Ext.P4 scene mahazar. She deposed that she

had witnessed the handing over of MOs 1 to 6 by PW1. She would also admit her signature in Exts.P4 and P5 mahazar. PW9 is that father of accused No.3. He deposed that he had seen the appellant producing shirt and dhoti. He would also admit his signature in Ext.P6 which was prepared for the seizure of the shirt and dhoti. It is to be noted at this juncture that though they were allegedly seized under Ext.P6, they were not produced before the court and naturally, not marked in this case. PW10, Village Officer prepared Ext.P7 site plan and PW11 is the Scientific Assistant who prepared Ext.P8 after examining the scene of occurrence. As noticed hereinbefore, PW12, the then Sub Inspector of Police, Pothanikadu recorded Ext.P1 FIS from PW1 based on which he registered Ext.P1(a) FIR for the offence under section 376 read with 34 IPC. PW13 is the Civil Surgeon of Community Health Centre, Kothamangalam who had examined the appellant and issued Ext.P9 potency certificate to the effect that the appellant is capable of indulging in sexual acts. PW14 was the then C.I of Police, Kalloorkade who conducted the investigation and prepared Ext.P4 mahazar for seizure of MOs 1 to 3 as also Ext.P5. He

filed application to incorporate section 376(2)(g) IPC in the charge. After completing the investigation, he laid the charge before the court. The evidence adduced by those witnesses were considered by the learned Sessions Judge for arriving at the finding that the prosecution had succeeded in establishing commission of offence under section 376(2)(g) IPC.

10. Evidently, the case of the prosecutrix is that she was subjected to gang rape by the appellant and two others. Her evidence would reveal that on 02.07.2003, she was proceeding to her grandmother's house at Mullankuthy carrying food for her and when she reached in front of the house of PW5 Vijayan at about 4 p.m, the appellant caught her from behind and took her inside the house of PW5. On the northern side bedroom of the said house, she was subjected to rape by three persons simultaneously. She would also depose that she did not know how many times they had committed rape on her. She had also deposed that she had resisted the said act and sustained injuries during the course of such resistance. She deposed further that thereafter the accused persons permitted her to go

outside. Thereupon, she went to a nearby river and had a bath and thereafter returned to the house of her grandmother. On being divulged about the same, grandmother informed the matter to her parents. The evidence of PW2 is to the effect that at about 5 p.m his wife took PW1 to him and told him about the incident. According to PW2, immediately thereafter, he went to the house of accused persons as also to the house of PW5 and thereafter took PW1 to Kaliyar Police Station. PW2 deposed that citing objection with respect to territorial jurisdiction no case was registered there and thereafter, he returned home along with PW1. On the next day, he took PW1 to Pothanikadu Police Station and after recording her statement, Ext.P1(a) FIR was registered. According to PW2, he went to Pothanikadu Police Station along with PW1 in the morning on 3.7.2003. However, Exts.P1 and P1(a) would reveal that after recording FI statement, Ext.P1(a) FIR was registered only at 6 p.m on that day and on the same day itself, PW12 took PW1 to Community Health Centre, Kothamangalam where PW4 examined her and issued Ext.P3 wound certificate. PW11 the Scientific Assistant who visited the scene of occurrence, later

examined the sealed packets containing material objects and issued Ext.P8 certificate of analysis. Ext.P12 would reveal that the sealed packets contained the following items:-

1. Shirt alleged to be stained with human semen and spermatozoa.
2. Lunki
3. Shirt
4. Lunki
5. പുൽപ്പായ്
6. Bed sheet alleged to be stained with human semen, spermatozoa and blood
7. Nighty alleged to be stained with human semen and spermatozoa.
8. Skirt
9. Brassire
10. Hair samples

11. It would reveal that on analysis, item Nos.1 to 8 which were allegedly stained with human semen and spermatozoa, human semen was found only on bed sheet viz., item No.6. Precipitin test for blood stain in item No.6 was conducted and it was found as human blood. In the light of the aforementioned facts, it is evident that the materials available for considering the culpability of the appellant in the crime were the oral testimony of PW1, PW2 and PW3 respectively with Exts.P2 and P3, the evidence of PW1 with Ext.P8. As noticed

hereinbefore, PW3 had deposed to the effect that on examination conducted on 4.7.2003 he noted two abrasions sustained by PW1 on her elbow, temple and left big toe. PW4 who examined PW1 on 3.7.2003, as noticed hereinbefore, deposed to the effect that she had collected vaginal swab and smear and further deposed that she could state about the recent sexual intercourse only after ascertaining the result of the analysis of the vaginal smear and swab. Evidence in this case would reveal that though PW4 collected vaginal smear and swab, the result of examination of the vaginal smear and swab (if at all conducted) was not produced before the court. PW4 also deposed that there was penetration, but to say whether it was recent or not, the result of examination of the vaginal smear and swab had to be verified. In this context, it is to be noted that going by the deposition of PW1, the prosecutrix, she was subjected to rape by three persons. PW1 would depose:-

“ഭയങ്കര മഴയായിരുന്നു. 3 പേരും മാറിമാറി ബലാത്സംഗം ചെയ്തു. എത്ര പ്രാവശ്യം ചെയ്തു എന്ന് ഓർക്കുന്നില്ല.”

12. On a careful analysis of the oral testimony of PW4 who examined the prosecutrix on the very next day of the alleged incident,

she did not depose regarding any recent sexual intercourse and in fact, what she had deposed is that, to say whether there was any recent sexual intercourse she had to verify the result of the examination of the vaginal smear and swab collected by her on 3.7.2003. In this context, it is to be noted that though PW4 asserted that she had collected the vaginal smear and swab on 3.7.2003 there was nothing on record to show that the same were subjected to examination and at any rate, the result of such examination was not produced before the court. When that be the nature of the medical evidence the question to be considered is whether the evidence of PW1, the prosecutrix and the evidence of PW11 with Ext.P8 report are sufficient to arrive at the conclusion of the commission of the offence by the appellant. Before analysing the evidence of PW1, the prosecutrix, it is only appropriate to consider the evidence of PW11 based on Ext.P8. Evidently, the report in Ext.P8 to the effect that item No.6 which is MO2 bed sheet was found contained human semen was taken as a piece of material evidence for arriving at the culpability of the appellant.

13. PW11 is the Scientific Assistant attached to the Forensic

Laboratory, Thiruvananthapuram. He examined the scene of occurrence on 7.7.2003 and thereafter issued Ext.P8. Ext.P8 would reveal that few items viz., 10 in numbers, sent in a sealed packet containing the material objects involved in Crime No.91 of 2003 of Pothanicaud Police Station, were subjected to chemical examination. Ext.P12 is the chemical analysis report in respect of such items. It was proved through PW14, the Investigating Officer. It would reveal that analytical data for semen and spermatozoa was conducted in respect of eight items viz., shirt, lunki, mat, bed sheet, nighty, skirt and brassier which were allegedly stained with semen and spermatozoa. However, Ext.P12 would reveal that the test was positive only in respect of item No.6 viz., the bed sheet wherein human semen was detected. It would also reveal that analytical data for bloodstain in item No.6 viz., bed sheet was conducted. Though it was found positive and the origin was found by precipitin test as human, the blood group could not be ascertained as the test results were inconclusive. Therefore, the question is whether merely because in MO2 bed sheet human semen was found how it could be treated as a material conclusively

connecting the appellant with the crime in question ? It is to be noted that MO2 bed sheet was seized under Ext.P4 mahazar on 4.7.2003 at 9 a.m. Going by the case of the prosecution rape was committed on PW1 at about 4 p.m. on 2.7.2003 from the house of one Vijayan. The said Vijayan, his son and wife were examined respectively as PWs 5 to 7. A careful scanning of their oral testimonies would reveal that prosecution has not brought out anything from them to suggest that when they returned after their work on 2.7.2003 in the evening they noticed any sign of occurrence of a crime inside their house. It is not brought out whether MOs 1 to 3 viz., the pillow, bed sheet and mat were used by them either on 2.7.2003 or on 3.7.2003. It is also to be noted that no evidence is forthcoming as to whether MOs 1 to 3 were being used by PW5 and PW7 or by PW6. PW5 and PW7 are husband and wife. PW6 is a grown up boy and in such circumstances, merely because human semen was detected in MO2 bed sheet pursuant to its seizure on 4.7.2003 cannot be considered as a conclusive material to connect the appellant with the crime. As noticed hereinbefore, no question whatsoever connecting such material objects were put to PWs

5 to 7 from whose house those material objects were seized. Though small areas of stains of blood found in MO2 was subjected to analytical data for blood stains its result in Ext.P12 is to be looked into. Though by precipitin test it was found that the origin of blood is human Ext.P12 would reveal that the blood groups of the stains could not be ascertained as the test results were inconclusive. In such circumstances, evidently, the evidence in this case will be reduced to the oral testimony of PW1, the prosecutrix.

14. The learned Public Prosecutor contended that even in a case where the prosecution is for commission of an offence under Section 376, IPC a conviction could be entered solely based on the testimony of the prosecutrix. To buttress the said contention the learned Public Prosecutor relied on the decisions of the Hon'ble Apex Court in **State of U.P. v. Munshi** (2009 Crl. L.J. 393) and **State of Punjab v. Gurdip Kaur** ((2009) 1 SCC 120). A perusal of the decisions referred supra would reveal that the Hon'ble Apex Court held that merely because evidence of the prosecutrix alone is available that by itself is not a ground for arriving at a conclusion of innocence of the

accused if the oral testimony of the prosecutrix is believable and cogent. There cannot be any doubt with respect to the said position. But, in such circumstances, the question of conviction would depend upon the credibility of the evidence of the prosecutrix. To contend that the evidence of the prosecutrix in this case cannot be relied on for the purpose of arriving at the guilt of the accused the learned counsel for the appellant relied on the decisions of the Hon'ble Apex Court in **Jai Krishna Mandal and Another v. State of Jharkhand (2010 KHC 855)** and **Dinesh Jaiswal v. State of M. P. (AIR 2010 SC 1540)**.

15. In **Dinesh Jaiswal's** case (supra) the prosecutrix (PW1) was alone in her house on 8.7.1989. At about 4 p.m. the appellant/accused allegedly entered the house and inflicted three tangi blows on her and committed rape on her. The prosecutrix, in defence, snatched the tangi from the appellant and caused several injuries on him while he was leaving the room. Injury No.6 therein was grievous and his teeth was knocked out. In the said case, the doctor who conducted the medical examination on her has opined that he was unable to confirm the

factum of rape. The Hon'ble Apex Court held that the story given by the prosecutrix did not inspire confidence and the conviction of the appellant was reversed. In **Jai Krishna Mandal's** case (supra) the prosecutrix PW6 went out of the village for grazing her goat on 7.2.1999 at about 4 p.m. but, she did not return even the next day. She was allegedly kidnapped and raped repeatedly. Her statement under Section 164 Cr.P.C. was recorded wherein she stated that she had gone out of the house at 10 a.m. to graze her goat and as she came out of the village the two appellants and Shanker Singh, a 3rd co-accused caught hold of her and closed her mouth and administered some medicine to make her unconscious and then they had taken her to another village and thereafter raped her repeatedly and that she had been moved from village to village till her release about four days later. She was medically examined at about 11.30 a.m. on 16.2.1999 and the attending Doctor did not find any injury on her person nor any evidence of spermatozoa on the vaginal smear. Still the Doctor opined that possibility of sexual intercourse could not be ruled out. Statement of the prosecutrix itself was found good enough to record a conviction

against the accused as there was ample evidence to show that the appellants/accused had disappeared from the village simultaneous with the absence of the prosecutrix. The verdict of trial court was affirmed in appeal by the High Court. The matter went up to the Apex Court. The admitted position in that case was that there was deep enmity between the family of the prosecutrix and the appellants in respect of a dispute over a piece of land. Paragraph 6 of the said judgment would reveal that the Hon'ble Apex Court had gone through the statement of the prosecutrix and ultimately found that they are virtually unworthy for acceptance. In that case, the Doctor deposed to the effect that she had handed over the saree of the prosecutrix allegedly worn at the time of the commission of the offence to the Investigating Officer. It was found that those articles were not sent for examination nor even produced in evidence. It is to be noted that, that was also a case where three persons allegedly committed rape on the prosecutrix repeatedly. The Doctor who examined did not find any injury on her person nor any evidence of spermatozoa on the vaginal smear. Though the Doctor opined that the possibility of sexual intercourse could not be ruled out

taking into account all such aspects the Hon'ble Apex Court held that the evidence of prosecutrix in such circumstances was unworthy for acceptance. Consequently, the conviction of the appellant entered by the trial court which was confirmed by the appellate court, was set aside.

16. In this case, the evidence of prosecutrix (PW1) is to the effect that on 2.7.2003 at about 4 p.m. she reached in front of the house of PW5 Vijayan and the appellant caught hold of her and himself and the other co-accused took her inside the house of PW5. She was made to lie on a coat and all the three raped her repeatedly. In fact, she deposed to the effect that she did not know how many times they had raped her. She had further deposed that after the incident she was allowed to go outside. She walked and went to nearby river and had a bath before reaching the house of her grandmother. On being revealed the factum of rape the grandmother took her to her parents. Before proceeding further I am of the view that the evidence of PW2, father of PW1 is to be looked into. It is also to be noted that PW1 herself deposed to the effect that a civil dispute was there between her

father and the family of the appellant/the first accused. In this context, the demeanour of PW2, going by his own version as also the version of PW7, has to be screened. Immediately on being informed the factum of rape on PW1, by his wife, PW2 rushed to the house of the appellant/first accused. He would depose:-

“ഞാൻ ഭാര്യയോട് ചോദിച്ച് മനസ്സിലാക്കാൻ പറഞ്ഞ് പുറത്തിറങ്ങി. ഞാൻ ഒന്നാം പ്രതിയുടെ വീട്ടിൽ ആദ്യം ചെന്നു. ഒന്നാം പ്രതിയുടെ അപ്പനെ വിളിച്ച് കാര്യങ്ങൾ പറഞ്ഞു. അവനിവിടെയില്ല. അവനെപ്പറ്റി എന്നോട് ഒന്നും പറയേണ്ട എന്ന് പറഞ്ഞു. 2-ാം പ്രതിയുടെ വീട്ടിൽ ചെന്നു. അമ്മയുണ്ടായിരുന്നു. അമ്മയോട് പറഞ്ഞപ്പോൾ 2-ാം പ്രതി ഇവിടെയില്ല അവനോട് ഞാൻ ചോദിക്കട്ടെ എന്ന് പറഞ്ഞു. ഞാൻ സംഭവം നടന്ന വീട്ടിൽ ചെന്നു. അവിടെ ആരുമില്ല. വാതിൽ അടച്ചിട്ടിരിക്കുകയാണ്. തൊട്ടടുത്ത ബേബിയുടെ വീട്ടിൽ ചോദിച്ചു. വലിയ മഴയായിരുന്നു ഞാൻ ഒന്നും അറിഞ്ഞില്ല ഹുസൈൻ എന്നു പറഞ്ഞു. ഞാൻ കടയിൽ തിരിച്ച് ചെന്നു. അവിടെ എന്റെ 2, 3 കുട്ടുകാരുണ്ടായിരുന്നു. അവരോട് ഞാൻ എന്താണ് ചെയ്യേണ്ടതെന്ന് ചോദിച്ചു. Hospital-ൽ admit ആക്കാൻ പറഞ്ഞു. സർക്കാർ ആശുപത്രിയിൽ ചെന്നു. Jurisdiction ഇല്ലാത്തതിനാൽ കാളിയാർ P.Sൽ ചെന്നു. ഞങ്ങളുടെ അതിർത്തിയല്ല പോത്താനിക്കാട് പോകാൻ പറഞ്ഞു. പിറ്റേ ദിവസം രാവിലെ പോത്താനിക്കാട് P.Sൽ ചെന്നു. അന്ന് പോകാൻ പറ്റിയില്ല. ഭയങ്കര മഴയായിരുന്നു. നേരം വൈകി മകളെക്കൂട്ടി പോത്താനിക്കാട് P.Sൽ ചെന്നു. മകൾ വിവരം പറഞ്ഞു. എന്റെ മൊഴിയെടുത്തു.”

Going by the version of PW2 on 3.7.2003 evening he took PW1 to Pothanicadu Police Station and thereafter her statement was taken. Ext.P1 would reveal that the first informant is PW1, the prosecutrix herself and that PW12 recorded Ext.P1 statement and he registered Ext.P1(a) F.I.R based on the said statement at 6 p.m. on 3.7.2003. As

noticed hereinbefore, PW12 took her to Community Health Centre, Pothanicadu at about 8.30 p.m. on the same day and there she was subjected to examination by PW4. I have already adverted to the evidence of PW4. PW4 did not depose conclusively that there was recent sexual intercourse and as noticed hereinbefore she had deposed that to say with respect to a recent sexual intercourse she has to verify the result of examination of the vaginal smear and swab. PW4 had also deposed to the effect that no injuries were found on the genitalia. But, at the same time, noted general injuries viz., abrasions on the elbow and big toe. It is also to be noted that PW4 categorically deposed that she had collected vaginal smear and swab and she asserted that for ascertaining recent sexual intercourse the result of examination of those materials has to be looked into. It is to be noted that such an opinion was given by PW4 who examined PW1, the prosecutrix on the very next day of the alleged incident where allegedly the appellant and the two other co-accused repeatedly raped her. Even when such was the allegation a doctor who examined the prosecutrix on the very next day could not physically find any injuries

and opined that even to say there was sexual intercourse the result of the examination of the vaginal smear and swab is to be obtained. It is in the said circumstances that the admitted dispute between the families of the appellant and PW2 and the immediate action from the part of PW2 on being informed of the factum of crime is to be considered. Evidently, in this case, even if the vaginal smear and swab collected by PW4 was sent for examination it was not produced in evidence. PW4 and PW12 another doctor who examined PW1 the prosecutrix respectively on 3.7.2003 and 4.7.2003 did not depose regarding the factum of rape. When that be the nature of the evidence, the evidence of the prosecutrix that she was raped repeatedly by the appellant and two other accused cannot be said to be worthy of acceptance. Certain other aspects also assume relevance in this context. After the investigation commission of offence of rape was charged only against the appellant and the third accused. It is also to be noted that there is no case for the prosecution that immediately after the incident any of the accused remained perdu. These aspects were not given due weight by the lower appellate court. At the same time, a

scanning of the impugned judgment would reveal that it is infected with another perversity. If a piece of material which was relevant was not taken into account or if an evidence which was not actually there, was treated to have been in existence the verdict has to be styled as perverse. Admittedly, in this case, no defence evidence was adduced by the appellant who alone stood the trial. A careful scanning of the suggestions made by the learned counsel for the appellant while cross examining the prosecution witnesses and also in the statement under Section 313 Cr.P.C. would reveal that the appellant had never taken a defence that PW1 prosecutrix was a willing party. Even then the court below observed that the learned counsel appearing for the appellant argued that PW1 was a willing party. In the absolute absence of anything on record to show that such a defence was specifically taken by the appellant and this assumes relevance in the context of an amendment brought into Section 114A of Indian Evidence Act. It reads thus:-

“114A. Presumption as to absence of consent in certain prosecutions for rape.- In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub-section (2) of Section 376

of the Indian Penal Code, (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.”

17. It is to be noted that if such a contention is taken up necessarily, the onus to prove the same would lie on the appellant/accused. In such circumstances, I am of the view that without the suggestions as also the statement under Section 313 Cr.P.C. as also in the absence of anything on record to show that such a definite defence was taken by the appellant the observation of the trial court that such a defence was taken cannot be a reason for putting the burden on the appellant to show that the prosecutrix was a willing party. Arguments advanced before the trial court as also the defence ground raised in this appeal to mount challenge against the impugned judgment of conviction, would reveal that the case of the appellant was that he had not committed the offence alleged and that he had no sexual intercourse with the prosecutrix. In this context, it is also to be noted that the trial court while dealing with the evidence of PW5 Vijayan who was the owner of the house where the incident allegedly

took place held that he deposed to the effect that such an incident occurred in the house. But, a scanning of the evidence of PW5 would reveal that PW5 had not deposed in that regard either in his chief examination or during the cross examination. Taking into account all these aspects I am of the view that a proper appreciation of the evidence on record in this case would reveal that it is unsafe to rely on the sole testimony of the prosecutrix, PW1 to record a conviction against the appellant. Taking into account the nature of the evidence, the testimony of PW1 is not worthy for acceptance and to enter a conviction. It can only be held that the prosecution had failed to conclusively prove the offence of commission of rape alleged against the appellant.

In view of the discussion as above, I am of the considered view that the conviction entered against the appellant for commission of the offence of a rape and the consequential sentence imposed on him for the conviction cannot be sustained. The judgment calls for appellate interference. Accordingly, the judgment in S.C.No.634 of 2005 passed by the Court of Additional Sessions Judge (Adhoc-II),

Ernakulam dated 6.5.2011 is set aside. The appellant is set at liberty.

The bail bond stands cancelled.

Sd/-
C.T.RAVIKUMAR
Judge

TKS/spc