

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

FRIDAY, THE 27TH DAY OF NOVEMBER 2015/6TH AGRAHAYANA, 1937

CRL.A.No. 2049 of 2011 (A)

AGAINST THE JUDGMENT IN SC 656/2010 of ADDL.SESIONS COURT (ADHOC)-II,
ERNAKULAM DATED 04-11-2011

AGAINST THE ORDER/JUDGMENT IN CP 29/2010 of JUDICIAL FIRST CLASS
MAGISTRATE, KOTHAMANGALAM

APPELLANT/ACCUSED:

P.P.PRADEEP AGED 28 YEARS
S/O.PONNAPPAN, RESIDING AT PADINGAREYIL HOUSE
90 CENT COLONY, NERIYAMANGALAM KARA AND VILLAGE
KOTHAMANGALAM TALUK, ERNAKULAM DISTRICT
PIN CODE 686 691.

BY ADVS.SRI.NOBLE MATHEW
SRI.JESTIN MATHEW

RESPONDENT/STATE & COMPLAINANT:

STATE OF KERALA
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM
COCHINA 682 031, REPRESENTED BY CIRCLE INSPECTOR
OF POLICE, KOTHAMANGALAM.

BY PUBLIC PROSECUTOR: SRI.ABHIJITH LESLIE

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 16-11-2015,
THE COURT ON 27.11.2015 DELIVERED THE FOLLOWING:

SUNIL THOMAS, J.

Crl.A. No. 2049 of 2011

Dated this the 27th day of November, 2015

JUDGMENT

The sole accused who was convicted by the Additional Sessions Judge(Adhoc-II), Ernakulam in S.C.No.656/2010 for offences punishable under Sections 376 and 506(i) IPC is the appellant herein.

2. The case of the prosecution was that on 23/5/2010 at about 3 O' clock , the prosecutrix , who is a widow aged 30 years and mother of two children, had gone to a nearby stream to wash her dress and to bathe. After bathing and while she was engaging in wiping her hair with a towel, wearing the underskirt, one person caught hold of her from behind. She got frightened and cried aloud. He immediately gagged her mouth and directing her to keep quiet, dragged her to a deeper area, immersed her head in the water and on getting suffocated, she was lifted. When she cried for help, he threatened to kill her and directing her to keep quiet, he again immersed her head in the water and lifted her up. In

the meanwhile, he directed her to keep quiet and again threatened that if she resisted, he would kill her. Thereafter she was laid on the bund of the stream with her legs falling into the water and committed rape on her. Thereafter, he left the place. Since her dress got dirty, she washed it and proceeded to her house crying. She informed the matter to her mother, who in turn conveyed it to a neighbour and after discussion, they decided to lodge a complaint. Since it was late by that time, she proceeded to the police station on the next day and laid Ext.P1 FIS at 4 p.m.

3. The police in the course of investigation arrested the accused, completed the investigation and laid charges for offence punishable under Sections 307, 376 and 506(i) IPC. He faced trial before the court below on his plea that he was absolutely innocent of the crime. On the side of the prosecution, oral testimony of PW1 to PW12 were marshalled, Exts.P1 to P10 marked and MOs 1 to 10 identified. There was no defence evidence.

4. The court below, on an evaluation of the available materials, concluded that offence under Section 307 was not

made out, however he was found guilty for offence punishable under Sections 376 and 506(i) IPC. He was sentenced to undergo RI for ten years and to pay a fine of Rs.25,000/- with a default sentence of six months for offence punishable under Section 376 IPC. For offence proved under Section 506(i), he was directed to undergo RI for one year. It was directed that both the sentences shall run concurrently and that he was entitled for set off.

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

6. The prosecution is essentially relying on the oral testimony of PW1 alone in the absence of any other eye witness to the incident. They also relied on the evidence of PW2 and PW3 to corroborate the evidence of PW1 coupled with the medical records in the form of Ext.P9 and the oral testimony of PW10 who had occasion to examine the victim on the next day of the incident.

7. PW1 in her evidence had stated in detail and meticulously as to what transpired at the washing ghat.

According to her, after her bath while she was wiping and drying her hair with towel, leaning towards eastern side, the accused caught hold of her from behind. She further deposed that the accused dragged her to a deeper place of the stream and immersed her twice in the water and threatened her that he will satisfy his lust, even if she has to be murdered. According to her, she, due to fear of death, did not thereafter resist and had to succumb to the rape. She has given precise details of the various facts leading to the above incident. In spite of the cross examination, no contradiction or omission with her previous testimony was brought on record. PW2 is not a direct witness to the incident but was examined to depose about the incidents that happened thereafter. According to her, the mother of the prosecutrix had informed her that something had happened to the daughter while she had gone for bathing and that she was crying. PW2 met her and she disclosed the incident to her alone. They decided to lodge a complaint. PW3 is a person of the locality who deposed that he had seen a portrait prepared by the police on the basis of the inputs given by the prosecutrix and subsequently came across the accused. Since he had doubt

about the identity and found similarity with the portrait that he had seen, the matter was conveyed to his friend. Thereafter, it was informed to the police who came and apprehended him.

8. The version of the prosecution was seriously attacked by the learned counsel for the accused contending that there was considerable delay in lodging the FIS. Ext.P1 FIS indicates that it was laid on the next day i.e. on 24/5/2010 at about 4 p.m. It also discloses that the police station was about 3 k.m. away from the place of the incident. This delay was explained by PW1 by deposing that after the incident, she disclosed it to her mother and shared with PW2. She did not want to reveal it to her children . After having discussion with PW2, they decided to lodge a complaint. Since by that time it was late, they decided to pursue the police station on the next day. She deposed that on the next day, she went to the police station at 12 noon. She had to wait there for one hour and thereafter she was sent to the hospital. From 1 p.m. to 3 p.m. she remained at the hospital and thereafter was seen by the doctor. After that she returned to the police station and laid the complaint. It is clear that she had given a valid explanation for not laying the complaint

immediately after the incident. The delay, if any, in lodging the FIR has also been reasonably explained by her. Further in incidents of this nature, essentially emotional or other social issues are involved and delay, if any, is only to be discarded, unless found to be so unreasonable.

9. The learned counsel for the accused contended that the entire case against the accused is set up on the basis of the identity of the accused as spoken by PW1 alone. It is pertinent to note that in the FIS, she has given a very detailed and meticulous details of physical features of the accused. It is an admitted fact that she had no prior acquaintance with the accused. Even the accused has no case that he knew her. According to the FIS, the accused was about five and half feet height, dark complexioned and round face, dark hair and was wearing a gold chain, yellow coloured shirt and coffee coloured lungi. He was approximately 35 years old. At the time of the incident, he was chewing pan parag. According to PW3, who is a local person, he came to know about the incident, thereafter, he had seen the portrait of the suspect prepared by the police. On 22/6/2010 he came across the accused who had features

resembling with there in the portrait of the suspect. He intercepted him and informed the police. According to the witness, he knew the father of the accused who had earlier resided in the locality. The accused was arrested on 23/6/2010.

10. The most crucial test regarding the confirmation of the identity of accused was done by PW1 by identifying him in the court at the time of evidence. She, after identifying the accused, asserted that he was the person who committed the act. Though in her evidence, she had stated that at the time of dipping her in the water, he had gagged her mouth with towel which she had used for wiping her hair, regarding the identity of the accused, she had clarified that at the time of committing the rape, the towel was removed from her face. Hence, she could identify the person.

11. PW9, the investigating officer had deposed that after the arrest of the accused, he was shown to PW1 for the purpose of confirmation of the identity. According to the witness, she responded emotionally and identified him. It is pertinent to note that according to PW9, substantial part of the physical features of the accused tallied with that in the portrait. Ext.P10 is the

potency report of the accused issued by the concerned doctor, which also gives some details regarding the physical features of the accused. It shows that he had height of 174 c.m. and weight of 84 kgs and was aged about 28 years as disclosed by the accused. It corroborates some of the features spoken by PW1 regarding the physical appearance of the person.

12. MO2 was the lungi, MO3 was the shirt and MO4 was the gold chain worn by the accused. These were also identified by PW1 as those which he was wearing at the time of the incident. The evidence on record also indicates that at the time of seizure, packets of pan parag, marked as MO8, were also recovered from the accused. These facts clearly show that regarding the identity of the person, as asserted by PW1 in her evidence, was in conformity with the available materials.

13. The learned counsel for the accused, who vehemently challenged the prosecution case, contended that the various facts asserted by the prosecution did not tally with the scene mahazar. According to him, the oral testimony of PW1 did not suit with the geographical details available on record in the form of Ext.P2 scene mahazar and Ext.P5 site plan. The above

materials show that the stream had depth of 4.10 meters and was flowing from east towards west. It had a bund on the southern side. On the northern side, there was a rubber estate at a substantially higher plain. The ghat wherein the alleged incident took place was on the southern bund. According to PW1, she was bathing and washing near the southern ghat. The scene mahazar indicates that bund had a height of 52 c.m. and that the place of the incident had a depth of 16 c.m.. At a distance of 3.80 meters north of it, the stream had a depth of five and half cms. According to PW1, at the time of the incident, she was leaning towards east and wiping her hair, when the accused allegedly caught her from behind. According to her he dipped her twice in the water, laid her on the southern bund and committed rape.

14. The learned counsel for the accused contended that the stream had only 16 c.m. at the place and it was impossible for any person to dip her in the water. I find no merit in the above contention since PW1 in her evidence has stated that she was standing knee deep in the water. The accused caught her from behind and dragged her to a deeper part of the stream and there

the water was waist deep. She has specifically deposed that he gagged her mouth with towel, took her to deeper part of stream and dipped her head into the water. These facts clearly indicate that at the place of the incident, there were sufficient depth and the version of PW1 does tally with the geographical features.

15. Yet another contention raised by the learned counsel for the accused was that PW1 in her oral testimony had stated that there was a washing stone only on the southern side. However, Ext.P5 site plan indicated that there was a washing stone on the northern side. This contention appears to be too minor and trivial to merit any consideration.

16. The learned counsel for the petitioner contended that PW1 though stated that she was dragged through the water, laid on the bund and the act was committed, there was no corresponding injury on her body. It was further contended that before committing the act, the accused had threatened that if she resisted, he would even go to the extent of killing her for committing the act. The learned counsel contended that it is difficult to imagine that he would have stated all those words at that point of time.

17. However, it is pertinent to note that there appears to have been some time gap in between various acts alleged against the accused and I find nothing artificial in the version spoken by the witness consistently. Regarding the injuries, PW1 had stated that though she was dragged through the water, she was supported by the accused with his arms. Since she was dragged through the water, possibly there could not have been any bodily injury. She has further stated that she was laid on the bushes on the bund. She further asserted that she had sustained pain on the back and contusions on her buttocks.

18. Ext.P9 is the medical certificate issued by PW10, who was the Gynecology consultant of Taluk Hospital. She had recorded that there was no evidence of general bodily injuries. At the same time, it was recorded that the prosecutrix had complained of pain on the left side of the body. This supports the case of the prosecutrix and rejects the contention of the learned counsel for the accused that there was no bodily injury. It is also true that PW1 did not have a case that she had sustained any injury on the various parts of the body in the course of the acts allegedly committed by the accused.

19. Another contention set up by the learned counsel for the accused was that according to the prosecution, it was a case of violent attack which was resisted by the victim. However, there was no injury on her private part. It is true that Ext.P9 does not disclose that the victim had any injury on her private part. Sequence of the events, as narrated by PW1, shows that after she was dipped in the water twice, she was put to fear of death and she has clearly stated that thereafter she could not resist the violent attack. Evidently, she had to succumb to the attack and there was no resistance from her. Evidently, there could not have been any injury on her private part.

20. Medical evidence relied on by the prosecution is Ext.P9 dated 24/5/2012 issued by PW 10 after examining the injured at 5.55 p.m. In Ext.P9 certificate itself, a brief history of the incident is mentioned. PW1 had recorded that she could not form an opinion for want of chemical analysis report. There is no medical evidence directly corroborating the allegation of rape. The evidence of PW1 itself shows that after the incident, she had washed her cloth and thereafter went to the house. She was examined by the doctor only on the next day. Evidently, no trace

of rape could have been available. The prosecution has not relied on any such evidence either.

22. The learned counsel for the accused contended that the trial court committed an error in arriving at a conclusion that PW1 had deposed that there was evidence of recent sexual act. The learned counsel is justified in so arguing since Ext.P9 shows that the relevant entry is “ there is no evidence/evidence of recent sexual act.” The applicable part of the above printed entry has not been struck off. However, in the oral evidence it seems to be have been stated that there was evidence of recent sexual act. Hence, it can only be presumed that PW10 had not revealed that there was evidence of recent sexual act. Further it was contended by the learned counsel for the accused that PW1 did not specifically state that there was penetration. PW1, being a married woman with two children, specifically stated that the rape was committed on her. She used the term rape fully knowingly essential ingredients and the requirements and all the other ancillary aspects of the term. Hence, no specific detailed version was required or solicited by the prosecution.

23. The defence set up by the accused was a case of total

denial. However, it is pertinent to note that slightly different defences were put in the course of cross examination of PW1, PW3 and PW8. The suggestion put to PW1 was that the accused had an enmity with one Biju and Shyjan and he was wrongly implicated. Suggestion put to PW3 was that he was wrongly implicated due to enmity with one Shyjan and others. On the other hand, suggestion put to PW9 was that there was a dispute between the accused on one side and Biju and CW5 on the other side. The accused was called to Aji's house for settlement of the above dispute wherein the accused quarreled with others and police was called and he was falsely implicated. In Section 313 Cr.P.C. questioning, his specific defence was that there was a earlier dispute with Shyjan and Biju on 26/2/2010. He was called to the house of Aji for a settlement of the dispute, wherein a quarrel took place. Shyjan called the police and got him implicated in the case registered earlier.

24. I am not inclined to accept this defence for more reasons than one. Evidently, there is no material to prove or to believe any of the above suggestions. It is pertinent to note that the accused had lived in the locality long back and that at the

time of incident he was living at distance of about 10-15 kms. He had neither property in the locality nor any surviving relatives or interest in the area. However, during the relevant period, he has been moving around the place as disclosed from the evidence of PW3 and his defence that he came to the locality on 22/6/2010. He has not explained as to what exactly was his interest in the locality. Further, PW1 does not even have any prior acquaintance with the accused to have any enmity towards him. There is also no reason as to why he should be falsely implicated in a very serious case. It is also pertinent to note that even in the FI statement she has given precise details of the physical features of the person who allegedly committed the act and it could not be imagined for a moment that such details which were substantially similar with physical features of the accused could have been incorporated anticipating an incident which allegedly happened according to the accused on 22/6/2010 or with the intention of implicating accused, who is unknown to her. Hence, a wrong implication of the accused is only to be ruled out in the absence of any justifiable cause.

25. Evidently, the available material is only the oral

testimony of PW1. A limited corroboration is available from the attending circumstances. Her version perfectly tally with such attending circumstances. There is absolutely nothing on record to show that the version spoken by PW1 is tainted, embellished or to doubt the veracity of her version. Version spoken by PW1 that she was raped by the accused and the identity of the accused stands confirmed from the consistent version of PW1 and all other attending circumstances. Hence, it is only to be held that accused had committed rape on the defacto complainant as alleged. It is also brought on record that he had threatened her to kill her. Rape was committed under that threat. The evidence of PW1 with sufficient corroboration from attending circumstances is sufficient to establish the offence. Hence, it is proved that prosecution has succeeded in proving the allegation under Sections 376 and 506(i) set up against the accused. The conviction arrived at by the court below is hence supported by legal evidence and no interference is called for.

26. The court below has given a substantive sentence of ten years RI for the offence proved against the accused. The act committed by the accused is heinous and it is a case wherein

with by physical force the accused had committed a rape on a widow. This was done by at an open place, during day time, which evidences the criminality of the accused. Evidently the accused does not deserve any lenient view. The sentence imposed by the court below is commensurate with the seriousness of the guilty and the brutality involved in the commission of offence. I find no reason to interfere with the sentence also.

In the result, the appeal is dismissed confirming the conviction and sentence. The accused shall suffer the remaining part of the sentence.

Sd/-

SUNIL THOMAS
Judge

dpk

/true copy/ PS to Judge.

