

HON'BLE SRI JUSTICE C. PRAVEEN KUMAR

HON'BLE SRI JUSTICE P. KESHAVA RAO

CrI.A No.834 of 2011

ORDER: (per Jus.C.Praveen Kumar)

Assailing the judgment in S.C.No.145 of 2008 on the file of Special Sessions Judge – cum – IV Additional District and Sessions Judge, Chittoor, wherein the sole accused was found guilty and convicted for the offences punishable under Sections 376 read with Section 511 and Section 302 of IPC, the present appeal is filed.

2. The gravamen of the charge against the accused is that on 29.06.2007 at about 05.30 p.m., near Bandakadagutaa, S.R.Puram Mandal, the accused attempted to commit rape on one Kalavathy and in the said process he is alleged to have caused her death by strangulation. Two charges came to be framed against the accused. The first charge was under Section 376 read with 511, wherein he was convicted and sentence to rigorous Imprisonment for five years. The second charge was under Section 302 of IPC, wherein he was found guilty and sentence to suffer imprisonment for life.

3. The facts as culled out from the evidence of the prosecution witnessess are as under:

PW1 is the husband of the deceased, while PW2 is the nephew of the deceased, PW 5 is the wife of PW2 and PWs.3, 4 and 6 are residents of the same village.

4. On 29.06.2007 at about 04.00 p.m., the deceased went to the fields and asked a person, who was ploughing the neighbour's land, to plough their land as well with tractor. Then he said that their land would be ploughed on the next day, as the diesel in his tractor was over. Thereafter the deceased, who is the wife of PW1, started returning home from the fields. When she reached Bandakadagutta, the accused came behind her, covered her face with towel, attempted to commit rape on her and beat with stone on her face. When she raised cries, the neighbouring villagers namely PWs.2, 3 and 4 gathered there and on seeing them, the accused, who was lying on the deceased, got up, removed towel from her face and left the place. As she was unable to speak, they brought water and gave the same to her. Thereafter, the victim is alleged to have narrated the incident. Then PWs.2, 3 and 4 questioned the deceased as to what happened, to which she replied that the accused dragged her into bushes and attempted to commit rape on her and when she did not agree for the same, he beat her with stone and also tied a towel which was covered on her face. The villagers also noticed one injury on the cheek. About ten to fifteen minutes thereafter, PW1 came to the spot and questioned the deceased as to what has happened, to which she reiterated the version disclosed to PWs.2 to 4. Thereafter, the villagers, who gathered there, telephoned to Ambulance and then the injured was taken to Gangamma temple and therefrom she was shifted to Government Hospital, Chittoor. On 29.06.2007, at about 08.00 p.m., PW12 – the SI of Police, received information about the incident in the village and also about the shifting of the injured to

the Government Hospital in Chittoor. Then, he along with his constable went to Kannikapuram village, inquired into the matter and thereafter, reached Government Hospital, Chittoor, where he noticed the injured undergoing treatment and was in a position to talk. PW12 is said to have recorded the statement of the victim in the presence of Doctor and also obtained his endorsement. Ex.P8 is the statement recorded from the injured Kalavathy. Basing on Ex.P8, PW12 registered a case in Crime No.38 of 2007 of S.R.Puram Police Station, Chittoor, for the offences punishable under Section 376 read with Section 511 and 324 of IPC and issued FIR – Ex.P9. On the next day i.e., on 30.06.2007, PW12 came to know that the victim was shifted to Ruia Hospital, Tirupathi. He visited the hospital and found the injured in unconscious state. He examined PWs.1,2,3 and 5 at Ruia Hospital and recorded their statements. From there, PW12 visited the scene of offence at Kannikapuram Village, prepared panchanama of the scene of offence, which was marked as Ex.P1. On 02.07.2007, he received intimation about the death of the deceased. Ex.P10 is the death intimation report. Basing on the said intimation, PW12 altered the Section of law from Section 376 read with Section 511 and 324 of IPC to Section 302 of IPC and issued an altered FIR – Ex.P11. PW 13 – Inspector of Police took up further investigation. On 02.07.2007, PW13 left the police station and proceeded to SVIMS hospital, Tirupathi and noticed the body being kept in mortuary. In the presence of PW7, he conducted inquest over the body of the deceased. Ex.P2 is the inquest report. Later, the body was sent for post mortem examination. PW11, who is the Assistant Professor in Forensic

Medicine, SV Medical College, Tirupathi, conducted autopsy over the body. He noticed internal and external injuries over the body, apart from fracture of thyroid cartilage and tricoïd cartilage. Ex.P5 is the post mortem certificate, Ex.P6 is FSL Report. The cause of death as per Ex.P7 is due to pressure over the neck due to strangulation. After completing the investigation, the police filed a charge sheet before the Court of Judicial Magistrate of First Class, Puttur, who took the cognizance of the case against the accused for the offences under Section 376 read with Section 511 and 302 of IPC and registered the same as PRC No.3 of 2008. On appearance of the accused, copies of documents were furnished to the accused as contemplated under Section 207 of Cr.P.C. Since the offence under Sections 302, 376 read with Section 511 of IPC is exclusively triable by the Sessions Court, the Sessions Judge committed the case to the Sessions Court, Chittoor, under Section 209 (a) of Cr.P.C. Charges were framed, read over and explained to the accused, to which the accused pleaded not guilty and claimed to be tried.

5. To substantiate their case, the prosecution examined PWs.1 to 13 and got marked Exs.P1 to P12 and M.Os.1 to 8. After the closure of prosecution evidence, the accused was examined under Section 313 Cr.P.C., with reference to the incriminating circumstances appearing against him in the evidence of the prosecution witnesses, to which he denied. No oral or documentary evidence was adduced on behalf of the accused in support of his defence. However, he got marked Exs.D1 and D2.

6. Learned counsel for the appellant mainly submits that though there were enough opportunities to get the dying declaration of the deceased recorded by the State, no steps were taken to get the statement recorded through a Magistrate. Insofar as dying declaration recorded by the Sub-Inspector of Police, it is urged that the same cannot be relied upon, as the endorsements of the Doctor made on the dying declaration does not contain the date and time. It is their case that the deceased was not in a position to make the statement at all and Ex.A8 is brought into existence at the behest of the prosecution. Insofar as offences punishable under Sections 376 read with Section 511 is concerned, learned counsel for the appellant submits that PWs.1 to 4 are interested witnesses and as such their evidence cannot be relied upon to base a conviction.

7. On the other hand, learned public prosecutor opposed the same contending that evidence of PWS.1 to 4 amply establishes the presence and participation of the accused in commission of the offences, more particularly, in relation to the sexual assault on the deceased. Coming to the major offences viz., Section 302, learned public prosecutor fairly states that there is no evidence on record to show as to what happened after 10.00 p.m. of 29.06.2007, relying upon the judgments of the Apex Court in *State of Rajasthan Vs. Ram Kailash*¹, *State of Andhra Pradesh Vs. Rayavarapu Punnayya and another*², *Jayaraj Vs. State of Tamil Nadu*³

¹ =2016(1) ACR 842, AIR 2016 SC 634

² (1976) 4 SCC 382

³ (1976) 2 SCC 788

8. Since the evidence on record shows that the victim got herself discharged from the hospital against the medical advice and in the absence of any evidence on record as to what happened between 29.06.2007 and 02.07.2007, a doubt arises as to whether the accused can be held liable for the death of the Kalavathy. But the evidence of PWs.2, 3 and 4 coupled with evidence of PW1 establishes the attempt made by the accused to rape said Kalavathy.

9. In order to appreciate the same, it would be useful to extract the evidence of PWs.1,2,3 and 4, which reads as under:

PW 1 in his evidence deposed as under:

“Three years back about 04.00 p.m., my wife went to the fields and asked a person to plough our land with the tractor who is ploughing the neighbouring land. Then the said person told her that our land will be ploughed on the next day as the diesel in the tractor is over. Then my wife returning from the lands to my house. When my wife reached Bandakadagutta, the accused came behind her, covered the face with towel, fell down her, attempt to rape her and beat her with a stone on her face. Then my wife raised the cries and neighbouring villagers Subramanyam Naidu, Venkatamuni Naidu, Sivasubramanyam Naidu and other villagers gathered there...”

PW2 in his evidence deposed as under:

“About three years back in between 06.00 to 06.15 p.m., while I was in my house, I came to know that my paternal aunt Kalavathy brought on a cot to Gangamma temple. Then I went to Gangamma Gudi where I came to know that on that day during evening hours Kalavathy went to the fields for ploughing and the concerned person told that he will be ploughed the land on the next day as the diesel in the tractor is over and so she was returning to house and when she reached Bandakadavanka the accused covered

her face with a towel and dragged her into bushes, fell down her and attempt commit rape on her and when Kalavathy refused he tied the towel to the neck and also beat with a stone on her face and other parts of the body”.

Similarly PWs.3 and 4 deposed as under:

“.....When we asked the Kalavathy she told that while she was returning from the fields, accused dragged her into bushes and attempt to commit rape and when she was not agreed for it, the accused beat her with a stone and also tied a towel which was covered on her face”.

“About three years back at about 05.00 p.m., while I was in my fields, I heard the cries of Kalavathy from Bandakadaguttavanka. Then I rushed to the spot along with Tayaramma and PW3. We found the accused was lying on Kalavathy and on seeing us, accused lifted from her and went away by removing towel and kept the same on his shoulder. We found injuries on the face of Kalavathy and she was not able to talk except giving signals for water. Sivasubramanyam Naidu brought the water and given to Kalavathy. Then she became normal. We asked Kalavathy what happened and then she told that accused taken her and attempt to rape her when she raised cries, we came thee and he went away. She also told us that accused covered her face with a towel”.

10. Though PWs.1 to 4 were cross examined on this aspect, but nothing useful was elicited to discredit their testimony. Apart from the evidence of PWs.1 to 4, the deceased herself disclosed to PWs.2 to 4 about the manner in which she was dragged into bushes by the accused and thereafter the attempt made by the accused to commit rape on her. Since the evidence of witnesses with regard to this aspect remained consistent and unimpeached, we find no reason to interfere with the findings given by the Court below for the offence punishable under Section 376 read with Section 511 of IPC.

11. Coming to the major offence of murder, it is to be noted that even as per the evidence of PW12, on 29.06.2007 at about 08.00 p.m., he received information about the incident in the village, reached the Government hospital, Chittoor and recorded the statement of the victim in the presence of Doctor, which was brought on record as Ex.P8. Ex.P8 is the statement recorded. There is no evidence to show as to when the deceased was shifted from Government hospital, Chittoor to Ruia Hospital at Tirupathi. His evidence discloses that on 30.06.2007, PW12 proceeded to Ruia Hospital, Tirupathi and found the injured Kalavathy in an unconscious state. He then received the death intimation on 02.07.2007. There is no evidence on record as to nature of treatment given to the victim from 30.06.2007 to 02.07.2007 or as to whether the victim was in the hospital during that period and also as to whether she was unconscious till her death. No effort was made by the prosecution to bring the medical record, and the treatment if any given on to the record. No explanation is given as to why the prosecution failed to produce the said record. Even the evidence of the investigating officer is silent on all these aspects. It is also to be noted that the oral evidence of PWs.1 to 4 and also inquest report discloses existence of only one injury in the cheek, but the post mortem report refers to number of injuries on the body of the injured. A perusal of the post mortem certificate shows not only abrasions, but also contusions on the body apart from fracture to ribs.

12. PW9, who is Civil Assistant Surgeon, deposed as under:

“On 29.06.2007, a patient namely Kalavathy brought to our hospital in 108 ambulance and I examined the said Kalavathy at 08.45 p.m., and found a laceration of 1 x 0.5 c.m., below lower lip. By that time the said patient Kalavathy is conscious and coherent and answering to my questions. I examined the patient and given treatment at Casualty and referred to Gynec ward but on 30.06.2007 at 07.00 a.m., the said Kalavathy left the hospital against our medical advice after making endorsement in the case sheet. I have issued wound certificate in that regard. Ex.P3 is the said wound certificate. Kalavathy told before me that an attempt of rape was done by a known person and beaten with hands and the same was noted in Ex.P3. While Kalavathy was conscious and coherent, the police examined Kalavathy in my presence.”

In Ex.P9 – Wound certificate, placed on record, the Doctor noticed only one Laceration below the lower lip. Strangely, three days later the post mortem doctor found so many injuries externally and internally in the body of the deceased.

13. No explanation is forthcoming from the prosecution as to how the deceased sustained so many injuries, which are not visible to the doctor, who examined her at the earliest point of time and also to the witnesses who were examined at the time of the inquest or prior to her death. In the absence of any explanation with regard to the number of injuries on the body, which were not noticed even by the Doctor earlier, a doubt arises as to whether really the cause of death was due to the incident which occurred on 29.06.2007. Further, even in the alleged dying declaration/statement of the

deceased recorded by PW12, she only refers to one injury on the lower jaw. It is also to be noted here that she never complained of any other pain to the Doctor, who examined her at Chittoor. If really, there was a fracture on rib bones, as found by the post mortem doctor, definitely she would have complained about the same to the Doctor who examined at the earliest point of time. As stated earlier, even in Ex.P9, only one lacerated injury was noticed on the lower lip, which fits in with the version of the victim.

14. Having regard to the above, we are of the opinion that the death could not have been caused due to the alleged incident on 29.06.2007, though the post mortem doctor states that the death was due to strangulation, but in our view the same have happened in the manner other than the prosecution case.

15. Hence, in the result, the Criminal Appeal is allowed in part. The conviction and sentence for the offence under Section 376 read with Section 511 of IPC awarded by the Special Sessions Judge – cum – IV Additional District and Sessions Judge, Chittoor at Tirupathi, is confirmed, while the conviction and sentence for the offence punishable under Section 302 of IPC awarded by the Special Sessions Judge – cum – IV Additional District and Sessions Judge, Chittoor at Tirupathi, against the petitioner/accused by name Dindivanam Venkatesulu, in S.C.No.145 of 2008, by judgment dated 28.01.2011, is set aside, and the same is altered to Section 324 of IPC, for causing lip injury with the stone which is a serious injury and he is sentenced to suffer rigorous imprisonment for one year. Both the sentences are directed to run concurrently. The

period of imprisonment undergone shall be given set-off under Section 428 of Cr.P.C.

C. PRAVEEN KUMAR, J

P.KESHAHA RAO, J

26.10.2017
vnb

