IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

THURSDAY, THE 24TH NOVEMBER 2005 / 3RD AGRAHAYANA 1927

CRL.A.No. 556 of 1999()

SC.47/1998 of ADDL.ASSISTANT SESSIONS COURT, PALAKKAD

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APPELLANT:

VINOD KUMAR,
CONVICT NO.6246,
CENTRAL PRISON, KANNUR.

BY ADV. SRI.NIDHI BALACHANDRAN

RESPONDENTS:

STATE OF KERALA.

BY PUBLIC PROSECUTOR SMT.P.DEEPTHI.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 24.11.2005, THE COURT ON 24/11/2005 DELIVERED THE FOLLOWING:

K.HEMA, J.

CRL.A.NO.556 of 1999

Dated this the 24th November, 2005

JUDGMENT

A 12 year old girl, while returning from the school at about 4.30 p.m. on 20.10.1997, was alleged to be raped by the accused. She was forcibly removed to the bush nearby, ignoring the resistance by keeping her moth closed and punching on her abdomen. The girl cried out and on hearing the sound of a pedestrian coming along the way, the accused leaft PW1 and ran away. Later, he was traced out by the uncle of the victim and the people of the locality, on the same day and the police was informed and he was apprehended. He was taken to the police station along with the victim and her grand-mother. First information statement was recorded from PW1 and a crime was registered and investigated into and a charge sheet was laid against the appellant under Section 376 IPC. The prosecution examined PWs 1 to 12 and marked Exhibits P1 to P10 and MOs 1 and 9. The accused did not adduce any evidence. He pleaded innocence. The court below, after analysing the case in detail found that the testimony of PW1 is corroborated by medical evidence to hold that rape was committed on PW1. Plea of denial by the accused was rejected and he was found to be guilty of offence under Section 376 IPC and he was sentenced to undergo seven years rigorous imprisonment and a fine of Rs.10,000/-, in default of which, to undergo simple imprisonment for eighteen months more. The amount was ordered to be paid to the victim as compensation, if realised. The said conviction and sentence are challenged in this appeal.

2. To prove the prosecution case the prosecution has examined mainly PW1, the alleged victim, medical evidence etc. were placed before the court. PW1 gave evidence that on 20.10.1997 at about 4.30 p.m. the incident occurred at a place called, Cherumkadu. She was studying in VIIIth standard at that time and she was proceeding to her house after the school while the accused came from the back side and closed her mouth and beat her on her stomach. Though he wriggled out, he took her to the bushes, removed her panties and lied on top on her and did something and she cried aloud. She said that she was raped and a person was coming on that way and on seeing him the accused left her. She went to her house running and her grand-mother was present there. Both of them came to the place of occurrence. While she found her uncle coming, she disclosed the incident to the uncle. Her uncle and other people searched for the accused and they got him and the police was informed. PW1, her grand-mother and the accused were taken in a police jeep to the police station. Her statement was recorded from there and it is marked as Exhibit P1. She also stated that she had sustained injuries by the act committed by the accused. She entrusted her dresses with her grand-mother which were given to the police. MOs 1 and 2 were identified as the dress which the accused had allegedly removed MO2 dress worn by the accused.

3. Though PW1 was cross-examined, nothing was brought out to discredit her evidence. She specifically stated that she had sustained injuries in the course of the incident. A suggestion was put to her that the accused was drunk on that day and that she had teased him and hence the accused beat her and both of them fell down and that is how she sustained injuries. This suggestion was denied by the victim. An attempt was also made to convince the court that

PW2 was improving her version at the time of examination. It was brought out from her evidence that the fact that the specific allegation made by her regarding the rape and penetration was an omission in her statement to the police. It was admitted by PW1 that she told the police in the first information statement that the accused did what is "forbidden" and she did not specifically stated about penetration. A suggestion was made that no incident had taken place and that she had an injury earlier and it was not from the accused.

4. It is true that the alleged victim did not specifically state in Exhibit P1 first information statement with respect to penetration. The victim was aged only 12 years at the time of giving first information statement. She was studying in VIIIth standard. The embarrassment of a girl of her age, immediately after the incident within about two hours of the incident has to be understood while assessing the worth of her evidence. She was taken to a police station and she was made to give a statement to the Sub Inspector of Police. A girl of her age and for that matter, even a woman will find it extremely difficult to disclose in clear terms about the meticulous details about rape and specify the actual act of penetration. In the above circumstances, I am of view that the mere fact that a victim of rape did not speak specifically about penetration, cannot be made a ground to hold that no rape was commited.

5. In my view, it is not necessary that the victim be forced to speak regarding the actual act, with reference to the male or female organ, penetratin etc. It has to be borne in mind that there are cases where even without examining the victim, especially in cases where there is rape and murder, the guilt can be proved by the prosecution even without examination of the alleged victim. It is not possible in

such cases to get the specific version regarding penetration and the details of rape from the mouth of the alleged victim. The state of affairs being so, it will be harsh and rude to make a victim of rape to speak in minute details about penetration etc. which she may find it embarrassing to speak in a court in the presence of strangers. It is sufficient, therefore, if on the materials placed before the court can take a decision whether a rape was committed or not. If the court can infer from the evidence and circumstances, that it is a case of sexual assault which involves penetration and sexual intercourse as defined in Section 375 of IPC it wouold suffice to hold a person guilt of an offence of rape. Only because the alleged victim did not speak regardeing the minute aspects with respect to the sexual act to the police in the first information statement, I am not inclined to discard the evidence of the victim.

6. I am not inclined to disbelieve PW1 or hold that she gave an improved version before the court at the time of evidence with respect to the sexual act. The records reveal the most natural conduct of a girl aged 12 years. She has stated in Exhibit P1 that she was forcibly taken to bush nearby by the accused, she had forcibly removed her panties, he had also removed his pants and shirt, she was made to lie and thereafter he also lied on top of her and he did what is "forbidden" .

7. PW1 has deposed that the incident happened at about 4.30 p.m. on 20.10.1997 and on the same day at 6.30 p.m. the first information statement was recorded from her which is marked as Exhibit P1. Such statement is seen to have been received in court on the next day at 3 p.m. The earliest version of the incident was before the court within a few hours of the incident. The said version has been spoken to by PW1 while she was examined in court also. To

corroborate her evidence and to test the veracity of her evidence, medical evidence is also available in court. PW3 is the doctor who has examined her. She has deposed that she was working as Civil Surgeon at District Hospital, Palakkad on 20.10.1997. She had examined the victim at 9.30 p.m. on that day. She has recorded the allegation given by her that she was raped. The evidence of the doctor shows that the girl had not even attained puberty. The doctor examined the victim and issued Exhibit P2 certificate. The details of the examination are as follows:

> "Nail wounds and abrasions present over both cheeks, upper and lower lips, chin and neck. Cloths sailed by mud. Lenian abrasions and nail wounds present over breast and chest. Public hair not developed. Blood stains present over penninium and inner aspect of thigh Linnean abrasions over inner aspect of thigh and over both knees. Unilia intact. Hymen torn off. There is a tear in the 5 `O' clock position involving vagina and penninium and slight bleed present. Clots present over vagina. Vaginal tear present in 5 `O' clock position. Canton over penninum present. Pen vaginal examination painful."

8. PW4 deposed that evidence of violence was present and there was signs of recent penetration. It was also deposed that tear in the hymen and vagina could be caused by forceful penetration. In the cross-examination the doctor asserted that the nail wounds cannot be caused by fall. The doctor was not cross-examined to make out that it was not a case of rape. The evidence of PW4 fully corroborates the evidence of PW1 in all material aspects. PW1 had a specific case that she was forcibly taken away by keeping her mouth shut and violence was used against her by the accused. There was mark of violence including nail mark which could not be caused by a fall. She had also stated that she had pain in the private parts

and injuries were also sustained by her which are all evidence from the wound certificate as well as the version given by the doctor. There is absolutely no reason to disbelieve her evidence. I am fully satisfied from the evidence of PW1 and the doctor that the victim was raped by force.

9. Learned counsel for appellant submitted that there is no evidence to establish that the appellant was the offender and that he was the person who had committed the act against the victim. While questioning under Section 313 Cr.P.C., the accused stated that he was going through the way, after drinking liquor while 15 to 20 persons were standing near a bush. They made enquiries when he disclosed that he belonged to Bihar and that he was working in Surya Industry. The persons then told him that Hindi speaking persons were creating nuisance to women and stating this, they destroyed his watch and took away Rs.460/- from his pocket and he was entrusted to the police from where he was taken to the police station.

10. The question is whether the plea of innocence can be believed or not. First of all, this is not a case where the accused could not be apprehended immediately after the incident. As per the evidence adduced in this case, the victim's uncle and people of the locality caught hold of the accused and he was handed over to the police immediately after the incident. PW1, the victim was also present when he was handed over. PW1 identified the accused from the witness box. The victim had sufficient opportunity to see the accused and identify him. The incident happened in broad day light. There was sufficient opportunity for the alleged victim to see the features of the accused and identify him correctly. In fact she had given evidence that the person who assaulted her sexually was a

Hindi speaking person and when she cried aloud, he was stating something in Hindi. If as a matter of fact an innocent person had been caught hold by the people of the locality, she would have definitely brought to their notice about the mistake. But there is no such case for PW1. There is absolutely nothing to disbelieve PW1 in respect of her evidence in identifying him at the time of occurrence and immediately after the occurrence and thereafter at the Police Station and from the court also.

11. In addition to this, there is evidence of the police official who had arrested the accused from around the scene of occurrence. PW11 deposed that he was working as Sub Inspector of Police during the relevant time and when at about 5.30 p.m. on 20.10.1997 he got information that a girl studying in the school near N.S.S. College was raped and that a person was apprehended by the people of the locality and on getting such information, he proceeded to the spot. On reaching there, he saw the victim, her grand-mother and also a person who was speaking Hindi who was detained by the people of the locality. On making enquiries, he was satisfied that rape was committed and immediately the accused, PW1 and her grand-mother were taken to the Police Station in a jeep, from where the statement of PW1 was recorded. The evidence of PW1 also fully corroborates the evidence of PW11. There is absolutely no reason to discard the evidence of PW11. Though PW11 is a police official, nothing is brought out in his evidence to show that he had any motive to falsely implicate the accused in this case. It is not brought out in evidence in this case that any person was interested in implicating an innocent person and for securing a conviction for the accused. In such circumstances, I do not find any reason to hold that the version given by the accused that he was not the person involved.

12. However, learned counsel for the appellant submitted that absence of injury has to be considered as a circumstance to hold that the accused was not guilty of offence. It is true that the doctor, PW4, gave evidence that he had examined the accused on the same day of the incident at 9.15 p.m. He had not stated anything with respect to any injury on the private part of the accused. Exhibit P3 is the wound certificate. But it does not contain any observation regarding the injuries. The doctor has given evidence that there is nothing to suggest that he is incapable of performing sexual act. However, it is not brought out from the medical evidence whether injuries are likely if a rape of this nature is committed by force on the victim. If, as a matter of fact it is possible that injury could be sustained in a rape as alleged, this fact could have been brought out from the doctors who are examined in this case. It is not understood why such questions were not put to the doctors, while examination in court. For the mere reason that no injury was found on the private parts of the accused, I cannot presume that no rape was committed. If a finding is entered on the basis of the argument advanced, I will be entering a finding on surmises and guesses. This court cannot make such conclusions without any evidence. In the absence of this, I am not inclined to conclude that because of the absence of injury, the accused has not committed the offence.

13. It was also strongly contended by the defence counsel that a material witness was not examined and hence there is no conclusive proof that the accused was involved in the offence. The evidence of PW1 shows that her uncle and people of the locality had gone in search of the accused and they had caught hold of the accused. None of the witnesses of the locality were examined to speak with respect to the actual manner in which the accused was

caught. But the evidence of PW11 is overwhelming on this aspect. Immediately after the incident PW11 had gone to the spot and he had deposed that the accused was entrusted to him by the people of the locality. PW1 was also present at the scene and both of them were taken to the Police Station. In the above circumstances, the non-examination of any person from the locality to speak about the circumstances under what the accused is taken into custody is not fatal. It cannot lead to adverse inference. It is only in cases where the court is satisfied that a witness is withheld or kept away from examination in the court deliberately that an adverse inference can be drawn against the prosecution. In this case there is nothing to show that the uncle of the victim was not examined by the prosecution fearing that he would speak against the prosecution. It cannot be said that any of the witnesses were held back by the prosecution with any ulterior motive. In such circumstances, the mere non-examination of material witness and further material will not affect the prosecution case adversely.

14. I am satisfied that the court below has rightly convicted the accused for offence under Section 376 IPC and the sentence awarded is not at all excessive. I am not inclined to interfere with the sentence passed.

The appeal is dismissed.

K.HEMA, JUDGE

vgs

K.HEMA, J.

CRL.A.NO.556 OF 1999

JUDGMENT

24.11.2005