
(2011) 01 KL CK 0236

In the High Court Of Kerala

Case No : Criminal Revision No. 1875 of 2003

Karunan

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 04-01-2011

Acts Referred:

Evidence Act, 1872 — Section 114, 118, 8
Penal Code, 1860 (IPC) — Section 376

Citation : (2011) 3 Crimes 27

Hon'ble Judges : Thottathil B. Radhakrishnan, J

Bench : Single Bench

Advocate : B.V. Joy Sanker and Jacob Chacko, for the Appellant;

Final Decision : Dismissed

Judgement

Thottathil B. Radhakrishnan, J.—The revision Petitioner stands convicted and sentenced to undergo rigorous imprisonment for five years and to pay fine of Rs. 25,000 in default of which, to undergo simple imprisonment for a further period of two years, he having been found guilty of an offence punishable u/s 376 of the Indian Penal Code. Such conviction and sentence imposed by the Trial Court is confirmed in appeal. Hence this revision.

2. The allegation against the accused is that at about 7.45 p.m. on 18.11.1995, he raped the victim aged about 28 years then. The scene of occurrence is alleged to be the lane near a public road. The prosecution version is that, the victim, a maid servant in the house of PW4 was returning from a Temple; that she came to the shop of PW5 and enquired about the availability of bus and then went in the auto rickshaw of the accused, leading to her being raped by the accused. The accused then accompanied the victim to the residence of PW4, where the victim entered a toilet which is not attached to the house and bolted from inside; the accused informed the mother of the victim and few neighbors that the victim has locked herself up in the toilet; thereupon the neighbors forced the toilet open and found the victim unconscious; she was taken to the local hospital and from

there to the Medical College hospital where she was admitted and treated; the victim told the doctor who examined her that it was the accused who ravished, which led to the injuries that were recorded by the doctor. The name of the accused has been recorded in Ex.P1, the medical examination report prepared by PW1, the doctor who recorded having found to fresh tear to the victim's hymen.

3. After adverting to and considering the legal evidence on record, the trial Judge found the accused guilty. That has been confirmed in appeal. Examining the material evidence and the findings of the courts below, the question for consideration is as to whether those findings, conviction and sentence call for interference in revision.

4. During trial, the victim was called to tender evidence as PW 10. She could not speak anything. She was disoriented. CW1 Psychiatrist was examined in support of Ext.C1 report which showed the mental condition of the victim. She suffers from Schizophrenia and cannot remember past incidents. It is in this background that the evidence was considered by the courts below.

5. The continuous presence of the accused and his proved involvement even in attracting the attention of the neighbors, the mother and the sister of the victim to the toilet wherein the victim bolted herself and his accompanying the victim and Ors. to the hospital are pointed out by his Learned Counsel as strong circumstances which point to his innocence; for otherwise, he could have fled the scene of occurrence and had every chance of escaping even suspicion. His Learned Counsel further argued that the victim being a Schizophrenic, there is abundant chance of her having hallucinations and also fanciful thoughts, including about sex, and this would have led to the injury to her hymen. He pointed out that there is no evidence at all, or even any allegation, of any struggle and of the victim having suffered any injury on account of that. He heavily on the fact that the chemical examination of the undergarments of the victim, recovered from the toilet, did not contain any scientific evidence regarding the presence of semen though the first information statement proceeds as if there was completion of sexual intercourse, including ejaculation. Reliance was also placed on the fact that there was chemical examination of the vaginal smear of the victim.

6. The accused does not stand with any allegation against any of the witnesses including the mother and sister of the victim or even the victim, of having had any animosity towards him or any other reason for foisting the charge on him, who going by the materials, was a married man with two children aged around 11 and 6 years. He stood with a case of total denial of the allegations against him, but does not deny his presence as discernible from the material evidence.

7. PW4, for whom the victim worked as a maid, gave evidence about the victim proceeding to Parassinikadavu temple in the morning of the date of occurrence and the fact that there was no one in her house when the victim reached the toilet in that house and was found to have bolted herself therein. PW5 and PW6

testified of having seen the victim when she enquired in the shop of PW5 about the availability of bus. PW13 testified that he saw the victim in the company of the accused at about 7 p.m. in the lane near his house which is in the neighborhood of the residence of PW 4. It is not a matter of much dispute at the hands of the accused that he accompanied the victim to the house of PW 4. The evidence of the other witnesses from the neighborhood, as also the mother and sister of the victim, is to the effect that their attention was attracted and they came over to the residence of the PW4 on the basis of information given by the accused that the victim had bolted herself in the toilet and is not opening its door. The chain of events proved on the basis of the oral and circumstantial evidence till the opening of the bolted door of the toilet in PW 4's house is that on her return from the Temple, the victim boarded the auto rickshaw of the accused and was in his company till she locked herself in the toilet. The neighbors, the mother and the sister of the victim, on opening the toilet door found her unconscious. She was taken to the hospital. There is really no serious challenge to this chain of events as emanating on the basis of the legal evidence on record. Even the cross-examination does not proceed unfolding a more probable defense version.

8. Vaginal tear coupled with such bleeding that prompted the medical officer not to rule out a case of rape, is sufficient in such a case, to evidence the invasion to the victim's body, to sustain a charge u/s 376 I.P.C. unless that possibility is ruled out by cogent and more dependable legal evidence. The medical evidence on record does not, in any manner, indicate that the victim had induced the injury to the hymen of her own, though there is a suggestion put on behalf of the accused that the recorded injury could be the result of some foreign object. That suggestion does not, by itself, shake the credibility of the opinion of the expert that the injury was attributable to rape.

9. Equally, the absence of other injuries on the victim's body is also not decisive. Use of physical force to overcome any resistance by the victim may not always be necessary. See *State of Maharashtra Vs. Prakash and another*, ; *State of Maharashtra Vs. Priya Sharan Maharaj and Others*, More particularly so, when the victim's is a mentally challenged person. Even in this aspect, there cannot be any hard and fast approach either way. It would depend on the emotional status of the victim at the time of assault. A predominant sense of fear that the assailant, or the event by itself, may induce on the victim would be sufficient to incapacitate the victim from resisting to the onslaught to her person. Such a situation would not lead to any inference of consensual sex. At any rate, the accused does not have such, a defense version. His plea of total denial of the entire transaction and the bundle of allegations against him rules out any such probability.

10. The non-examination of the victim is not fatal to the prosecution, going by the proved situation of the victim. Ex. C1 corroborated by the testimony of CW1, the Psychiatrist, categorically established that the victim is Schizophrenic, has

such state of mind that prevents her from understanding the questions put to her and from giving rational answers to those questions, by reason of the disease of the mind. Coupled with that is the fact that the Trial Court had attempted to examine her as PW10, but found her incompetent to testify, being prevented from understanding the questions put to her. Therefore, in terms of Section 118 of the Evidence Act, she was incompetent to testify. No lacuna in the prosecution evidence can be thrust on account of non-examination of a person who is incompetent to testify.

11. That apart, non-examination of the prosecutor is by itself not fatal see *Mange Vs. State of Haryana*, dealing with the case of a deaf and dumb minor, who was not examined at trial.

12. With the aforesaid, what gains importance for consideration is the evidentiary value of the noting in Ex.P1 by PW1. The contents of Ex.P1 is corroborated by the testimony of its maker, namely, PW1. The cause of the injury to the hymen of the victim is recorded in Ex.P1 on the basis of the statement given by the victim to the doctor. That cause is not treated by the expert as improbable. There is a column prescribed in that official document for such entry. The reason for the injury could have also been mentioned to the doctor by the police or any other person. That has to be recorded separately. There is no such entry in the document in question. The maker of Ex P1 has in the document, attributed the statement regarding the assailant, to the victim. He is named therein. As already noticed, there is no circumstance pointed out, for the victim, her relatives or neighbors to attribute the allegations to the accused. When such statement is recorded by the doctor in the course of public business and as an official act, it carries with it the presumption that it has been regularly performed. Such presumption, in terms of illustration (e) u/s 114 of the Evidence Act, can be safely relied on and such presumption is not questionable in this case since the regularity of the official acts by the doctor in connection with the examination of the victim and the preparation of Ex. P1 is not in dispute.

13. Having found that in terms of Section 118 of the Evidence Act, the victim was incompetent to testify, the probative value of the statement made by her to PW1, the doctor who examined her needs to be considered. The victim's mother and neighbors found her unconscious inside the toilet. From there, she was removed to hospital and was examined in the Medical College. Even if it is assumed that she would have become conscious before reaching the Medical College, the emotional trauma of a 28 years old unwed female, going to the hospital with injury to her private parts, would have necessarily dissuaded her from making any immediate complaint before she reached hospital. In the setting of a hospital, the doctor who examined the victim is one on whom, in the common course of natural events and human conduct, the victim would repose confidence and make a complaint relating to the crime. The fact that she made such a complaint and that the terms of which the complaint was made are relevant along with the circumstances under which it was made. Such fact

become relevant in terms of Section 8 of the Evidence Act. See Illustration (j) there under. PW1 doctor is not familiar with the accused. The victim was accompanied by different persons including her mother and sister. The victim named the accused "Karunan" as having ravished her. This conduct of the victim and such complaint made by her, as recorded by PW1 doctor, are relevant facts in terms of Section 8 of the Evidence Act.

14. Having regard to the aforesaid, there is no illegality or error in the appreciation of evidence by the courts below. The finding of guilt and the conviction therefore stands.

15. On the question of sentence, the courts below had focused on the material aspects. As noted by the appellate Court, though the accused is a married person with a family, the victim is an unmarried rustic lady with a mentally challenged status. It was rightly observed by the appellate court that in view of the atrocity meted out to the unprotected victim and the relevant circumstances, the sentence imposed by the Trial Court warrants no interference. Rigorous imprisonment for five years and fine of Rs. 25,000 in default, to undergo simple imprisonment for a further period of two years, appears to be a just and reasonable balancing on the scales of justice, having regard to the interests of the victim, including her family, the accused and the society; the prime stakeholders in such a case.

16. For the aforesaid reasons, this revision fails.

In the result, the impugned conviction and sentence are confirmed and the revision is dismissed. There vision Petitioner is directed to appear before the court of first instance on 24.1.2011 to suffer sentence. Otherwise the court of first instance will take necessary steps to execute the sentence. The bail bond stands cancelled.

Revision dismissed.