

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.UBAID

WEDNESDAY, THE 26TH DAY OF JULY 2017/4TH SRAVANA, 1939

CRL.A.No. 373 of 2011 ()

IN SC 211/2008 of ADDITIONAL SESSIONS COURT (SPL. COURT), KOTTAYAM
DATED 26-02-2011

APPELLANT(S)/ACCUSED:

SHAJAN, S/O. THOMAS,
NALUKODI KOLLAPURAMKULANGARA VEEDU,
PAIPPADU KARA, ,
PAIPPADU VILLAGE.

BY ADV. SRI.S.RAJEEV

RESPONDENT(S)/COMPLAINANT/STATE:

STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM,
(CRIME NO.98/2006 OF KIDANGOOR POLICE STATION),
KOTTAYAM.

BY PUBLIC PROSECUTOR SRI. ALEX M. THOMBRA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
26-07-2017, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ds

P.UBAID, J.

Crl.A.No. 373 of 2011

Dated this the 26th day of July, 2017

J U D G M E N T

The appellant herein challenges the conviction and sentence against him under Sections 376 and 493 of the Indian Penal Code, and under Section 3(1)(xii) of the Scheduled Castes/Scheduled Tribes (Prevention of Atrocities) Act (old Act) [for short “the SC/ST Act”], in S.C.No.211 of 2008 of the Special Court (for SC/ST cases), Kottayam.

2. The victim of offence in this case is a lady aged 24 years. She fell in love with the appellant herein, and they got married as per a registered agreement. In the said illicit relationship, the lady became pregnant. Only when they realized the fact of pregnancy, they got a marriage agreement registered, and even thereafter, they lived as man and wife for a short period. After the delivery, the accused vanished from the locality. Then the victim made a complaint alleging rape and other offences. She is a

member of scheduled caste. Her complaint is that the accused made her believe that she is the wife of the accused, due to which she happened to consent for sexual intercourse, she became pregnant in the said relationship, and after delivery, the accused vanished with the object of abandoning her for ever. On the said complaint, the Police registered FIR under Sections 493 and 376 of IPC. After investigation, the Police submitted final report under the said Sections, and also under Section 3(1)(xii) of the SC/ST Act (old Act).

3. On committal, the case came up before the learned Sessions Judge, Kottayam, as the Special Judge.

4. The accused appeared before the trial court, and pleaded not guilty to the charge framed against him under Sections 376 and 493 of IPC, and under Section 3(1)(xii) of the SC/ST Act. The prosecution examined 13 witnesses in the trial court including the defacto complainant, and proved Exts.P1 to P15 documents.

5. When examined under Section 313 Cr.P.C., the accused denied the incriminating circumstances, and projected a defence that everything that transpired in between him and the victim was consensual, and that he had no intention at all to exploit the complainant as a member of scheduled caste. The accused did not adduce any evidence in defence.

6. On an appreciation of the evidence, the trial court found the accused guilty. On conviction, he was sentenced to undergo rigorous imprisonment for five years, and to pay a fine of ₹15,000/- under Section 376 IPC, to undergo rigorous imprisonment for three years, and to pay a fine of ₹5,000/- under Section 493 IPC, and to undergo another term of rigorous imprisonment for six months, and to pay a fine of ₹2000/- under Section 3(1)(xii) of the SC/ST Act, by judgment dated 26.02.2011. Aggrieved by the judgment of conviction, the accused has come up in appeal.

7. On hearing both sides, and on a perusal of the entire materials, I find that the conviction in this case under Sections 376 and 493 IPC cannot be sustained. It stands proved that the victim of offence, examined as PW2, is a member of scheduled caste. The victim has given evidence that she and the accused had lived as man and wife for a few years. Her evidence is that they fell in love, and in this relationship, she became pregnant. This means that even without a legal marriage, they had sexual union on many occasions, and that they had even lived for a few years as man and wife. When she became pregnant, she felt the necessity of undergoing a process of marriage, for fear that the child would be bastardized by the society. In such a situation, the parties got a marriage agreement registered. Ext.P1 is the registered marriage agreement. This shows that the parties executed such an agreement with the full knowledge, that it will have no legal value, and that they will not become husband and wife. Thus, knowing

the legal consequences fully well, the parties got a marriage agreement registered, and continued their cohabitation as man and wife. After delivery, the accused vanished and abandoned the lady. In such a circumstance, she brought a complaint alleging rape.

8. The learned counsel for the appellant cited **Vinod Kumar v. State of Kerala** (2014 KHC 4226), and submitted that the allegations in this case would not, in any circumstance, make out the offence of rape under Section 376 of IPC.

9. I feel that a detailed discussion of evidence is not required in this case because, the issues as regards rape, and the other offence under Section 493 IPC can be decided on the basis of admitted facts. It is a fact that the victim and the appellant had lived for years as man and wife, and she became pregnant in the said relationship. On an appreciation of the evidence, I find that the appellant consented for a registered agreement of marriage with the

object of getting the pregnancy aborted by using his influence as husband. But his proposal for abortion was declined by the victim. When she thus declined the request, and resisted the attempts for abortion, the accused conveniently vanished from the locality and abandoned her. This is what is proved by the evidence and circumstances in this case. It is quite clear that the victim and the accused had sexual union on many occasions, and she consented for sex as the wife of the accused. They continued as man and wife for years with the full knowledge that their union or cohabitation will not have any legal sanctity. In such a circumstance, the lady cannot be heard to complain that her consent was vitiated by any false promise. She consented for sexual union with the appellant because the appellant was accepted by her as her husband, and not because he made her believe that he is her husband.

10. A prosecution under Section 493 IPC can be sustained only in cases where the accused falsely made the

victim believe that she is the wife of the accused. There is no such factual situation here. The victim in this case voluntarily and consciously accepted the accused as her husband, and cohabited with him for years, accepting him as her husband. So the conviction under Section 493 IPC is liable to be set aside. When evidence proves that everything happened with the consent of the victim, a conviction under Section 376 IPC also is not possible.

11. But, I find that a clear case under Section 3(1) (xii) of the SC/ST Act stands proved in this case. The victim is admittedly a member of scheduled caste, and the accused is not a member of scheduled caste. Evidence convinces the court that the accused was well aware of the fact that the lady belongs to scheduled caste. What I find from evidence is that the accused consented for executing a marriage agreement with the object of compelling or coercing the lady to undergo an abortion by exerting his influence as her husband.

12. What is punishable under Section 3(1)(xii) of the SC/ST Act is any act of subjecting a member of scheduled caste or scheduled tribe to any sort of sexual exploitation by dominating her will to facilitate such acts, or to obtain consent for such acts. I am well satisfied by evidence that the victim had been sexually exploited by the accused by cohabiting with her for years, and at last, he thought of compelling her to undergo an abortion. He even executed a marriage agreement, and got it registered with the object of influencing the lady as her husband, and thus, compelling her to undergo an abortion. When she did not consent, or when she resisted the proposal for abortion, the accused conveniently vanished from the locality, and abandoned her forever. No other evidence is required to find that the real object of the accused was just to exploit the lady as a member of scheduled caste. I find a clear case of exploitation of a member of scheduled caste in this case, punishable under Section 3(1)(xii) SC/ST Act. The sentence

imposed by the trial court under Section 3(1)(xii) of SC/ST Act is only the minimum prescribed under the law.

In the result, the appeal is allowed in part. The appellant is found not guilty of the offences under Sections 376 and 493 IPC, and accordingly, he is acquitted of those offences in appeal under Section 386(b)(i) Cr.P.C.. The conviction and sentence under those Sections will stand set aside. But the conviction and sentence against the appellant under Section 3(1)(xii) of the SC/ST Act is confirmed in appeal. He will get the benefit of set off as already ordered by the trial court.

Sd/-
P.UBAID
JUDGE

ds 27.07.2017

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P.A. to Judge