IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

THURSDAY, THE 7TH DAY OF SEPTEMBER 2023 / 16TH BHADRA, 1945

CRL.A NO. 573 OF 2016

AGAINST THE JUDGMENT DATED 03.06.2016 IN SC 782/2010 OF ADDITIONAL DISTRICT COURT & SESSIONS COURT (ATROCITIES & SEXUAL VIOLENCE AGAINST WOMEN AND CHILDREN) THIRUVANANTHAPURAM

CP 6/2004 OF JUDICIAL MAGISTRATE OF FIRST CLASS ,KATTAKADA

APPELLANT/ACCUSED:

ANIL KUMAR
S/O.SAMUEL, RENT HOUSE AT
THOTTARIKATHUVEEDU,ASARIVILA, SIVAJI LANE, EDAKODE DESOM,PALLICHAL VILLAGE, FROM TC/ 42/354TH NUMBER,PARAMBIL VEEDU, NEAR MUKKOLAKKAL PARAMBIL KALUNKU,MUKKOLAKKAL, SREEVARDHOM WARD, MUTTATHARA VILLAGE.

BY ADVS.
SRI.SASTHAMANGALAM S. AJITHKUMAR
SRI.V.S.THOSHIN

RESPONDENT/COMPLAINANT:

STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM,
THROUGH THE DETECTIVE INSPECTOR,
CBCID, THIRUVANANTHAPURAM.

BY ADVS.
SMT.AMBIKA DEVI S, SPECIAL GOVERNMENT PLEADER FOR ATROCITIES AGAINST WOMEN & CHILDREN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 10.08.2023, THE COURT ON 07.09.2023 DELIVERED THE FOLLOWING:

"C.R"

A. BADHARUDEEN, J.

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Crl.Appeal No.573 of 2016

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Dated this the 7th day of September, 2023

J U D G M E N T

This appeal is at the instance of the sole accused in S.C.No.782/2010 on the files of the First Additional Sessions Court, Thiruvananthapuram and the respondent herein is the State of Kerala represented by the learned Public Prosecutor. The appellant herein impugns judgment in S.C.No.782/2010 dated 03.06.2016, whereby the learned Additional Sessions Judge convicted the accused /appellant herein for the offence punishable under Section 376(2)(f) of the Indian Penal Code (`IPC' for short) and he was sentenced to undergo rigorous imprisonment for 10 years and to pay fine of Rs.5 lakh for the said offence and in default of payment of fine, to undergo rigorous imprisonment for

one year. Fine was ordered to be paid as compensation to the victim as provided under Section 357(1)(b) of the Code of Criminal Procedure (for short `Cr.P.C' hereafter).

2. The case of the prosecution is that in between 7 a.m and 7.30 a.m on 01.04.2004, the accused herein committed rape against a minor girl while she was engaged in collecting cashew nuts from her property.

3. When the case was committed before the Sessions Court, the learned Sessions Judge made over the same to the Additional Sessions Court. The learned Additional Sessions Judge secured the presence of the accused for trial and tried the matter. During trial, PWs 1 to 18 were examined and Exts.P1 to P21 marked. M.O1 to M.O3 also were marked. Exts.D1 to D4 contradictions marked while examining the prosecution witnesses.

4. Thereafter the learned Additional Sessions Judge provided opportunity to the accused to adduce defence evidence

after questioning him under Section 313(1)(b) of Cr.P.C, but no defence evidence was adduced. The learned Additional Sessions Judge on appreciation of evidence, after hearing both sides, convicted and sentenced the accused as above.

5. While challenging the veracity of the judgment of the trial court, the learned counsel for the appellant argued 2 points. The first point argued by the learned counsel for the accused is that, in this matter, the identification of the accused as the culprit is not proved beyond reasonable doubts and, therefore, for the said reason alone the judgment of the trial court is liable to be interfered and accused is liable to be acquitted.

6. The second point argued by the learned counsel for the appellant is relying on the evidence of PW3, the doctor who examined the victim after the alleged occurrence. According to the learned counsel, in this matter, the doctor opined that the hymen appears to be intact and, therefore, there is no penetration. The

learned counsel also submitted that, even though, in cases, where there is elastic hymen, penetration is possible even without tearing of hymen for which convincing evidence is necessary to hold commission of offence of rape, and there is no convincing evidence in this case. Therefore, the prosecution failed to prove the offence of rape . Be it so, the accused is liable to be acquitted. He also argued further that, if otherwise, the offence made out is one under Section 354 of IPC and the conviction and sentence to be modified for the said lesser offence.

7. Whereas, the learned Public Prosecutor would submit that the identification of the accused is by the victim herself, when she found the accused at a public place one and a half months after the occurrence and such identification by the victim, who faced sexual assault at the volition of the accused, after having made an imprint of the face and features of the accused in mind, was given reliance by the trial court to identify the accused as the culprit and

as such, the identification of the accused is well established and challenge on the ground of identification of the accused must fail.

8. It is also submitted by the learned Public Prosecutor that, the learned Additional Sessions Judge relied on 3 decisions of the Apex Court reported in [(2006) 8 SCC 560], ***Tarakeswar Sahu v. State of Bihar***, [1998 KHC 1588], ***Ranjit Hazarika v. State of Assam*** and [2010 KHC 6059], ***Vahidkhan v. State of Madhyapradesh*** and found that partial or slightest penetration could be enough, in order to constitute an offence under Section 375 of I.P.C, and non rupture of hymen or absence of injury on victim's private parts would not lead to an inference that there was no sexual intercourse. Further, a slightest penetration, not so as to injure the hymen also of course would constitute a crime of rape and, therefore, proof of rupture of hymen is not necessary to prove the offence of rape. That apart, non rupture or absence of injury on victim's private parts did not lead to an inference that there was no

sexual intercourse. Moreover, the observations of the Doctor that hymen was found intact is of no serious consequence if the evidence of prosecutrix is convincing and reliable as to forceful sexual intercourse. Therefore, acting on the evidence of PW5, supported by other evidence including the evidence of PW3 and Ext.P3 and Ext.P4, the offence alleged by the prosecution stands proved beyond reasonable doubts and in view of the matter, the conviction as well as the sentence do not require any interference and the appeal is liable to be dismissed.

9. First of all, adverting to the contentions based on the arguments mooted by the learned counsel for the appellant as well as the learned Public Prosecutor, on the question of identity of the accused, the legal questions emerge are:

(i) what is the best evidence to prove the identification of an accused before a court ?

(ii) In what circumstances, test identification parade shall

be insisted as corroborative piece of evidence to act upon the identification of the accused by the occurrence witness(es) ?

10. In this connection, it is pertinent to refer the observations of the Apex Court, in the decision in ***Malkhansingh & Ors. v. State of M.P*** reported in [2003 (5) SCC 746], while dealing with Section 9 of the Indian Evidence Act, positing the necessity of test identification parade and the aftermath in consequence thereof. While dealing with question of identification of the accused the Apex Court held in paragraphs 7, 10 and 16 as under:

> *The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier*

identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. It is no doubt true that much evidentiary value cannot be attached to the identification of the accused in court where identifying witness is a total stranger who had just a fleeting glimpse of the person identified or who had no particular reason to remember the person concerned, if the identification is made for the first time in court.

But failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The identification parades belong to the stage of investigation, and there is no provision in the Cr.P.C which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. These parades do not constitute substantive evidence. The substantive evidence is the evidence of identification in court and the test identification parade provides corroboration to the identification of the witness in court, if required. However, what weight must be attached to the evidence of identification in court, which is not preceded by a test identification parade, is a matter for the courts of fact to examine. In appropriate cases, it may accept the evidence of identification even without insisting on corroboration.

11. In this connection, a recent decision of the Apex Court reported in [(2022) 9 SCC 402], ***Amrik Singh v. State of Punjab*** is also relevant, where the Apex Court considered the consequence of

non holding of test identification parade and held as u*n*der:

> *As per prosecution, appellants came on a scooter and after thworing red chilli powder into the eyes of the complainant and killing the deceased by firing shot at him, took away their scooter and cash amounting Rs.5 lakhs lying in the dicky of the scooter – In the FIR, the complainant merely stated that the accused were three young persons out of which two were clean shaven and the one Sikh (sardar)who had tied a thathi having the age of 30-32 yrs – Complaint also not stated in his first version that he had seen the accused earlier and that he will be able to identify the accused.*
>
> *-- While identifying the appellants in court, complainant tried to improve the case by deposing that he had seen the accused in the city on one or two occasions and he specifically and categorically admitted in the cross-examination that it is incorrect that the accused were known to him earlier -- Hence, non-conducting of TIP, held, fatal in the present case and the conviction based solely on identification of the appellants by the complainant for the first time in court, held not sustainable and set aside.*"

12. Alluding the questions posed, the legal position is no more *res integra* on the point that the identification of the accused person at the dock during trial, in cases of direct evidence, for the first time, from its very nature is inherently of a weak piece of

evidence. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. Thus test identification parade (TIP) is considered as a safe rule of prudence generally to look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, not as a rule of evidence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony, it can safely rely, without such or other corroboration. At the same time, much evidentiary value cannot be attached to the identification of the accused in court where identifying witness is a total stranger who had just a fleeting glance of the person identified or who had no particular reason to remember the person concerned, if the identification is made for the first time in court.

13. No doubt, failure to hold a test identification parade

would not make inadmissible the evidence of identification in court, if such identification is wholly reliable. Indubitably, identification parades as a rule of prudence to be resorted to at the stage of investigation, and there is no provision in the Cr.P.C which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. Test identification parades do not constitute substantive evidence. The substantive evidence is the evidence of identification in court and the test identification parade provides corroboration to the identification of the witness in court, if required. However, what weight must be attached to the evidence of identification in court, which is not preceded by a test identification parade, is a matter for the courts of fact to examine. In appropriate cases, it may accept the evidence of identification, even without insisting on corroboration.

14. Further, while identifying the accused in court, if the witness says that he had seen the accused on one or two occasions

prior to the occurrence or the witness had occasion to identify the accused at the time of occurrence with certainty, without giving such a statement to police, the same is a serious omission to be read as contradiction to disbelieve the identification of the accused at the dock. The same is to be read as a vital and material improvement made by the witness/witnesses in Court, which would attract less probative value. In such cases, non-conduct of test identification parade (TIP), to be held as fatal and the conviction based solely on identification of the accused by the occurrence witness/witnesses for the first time in court is not sufficient.

15. Coming back to the evidence regarding the identity of the accused/appellant in this case, PW5, the victim of crime given evidence that, about 1½ months, after the occurrence, while she was about to visit another house along with her mother, she found the accused who was sitting in an autorickshaw and on seeing her, the accused moved towards the backside of the auto rickshaw and

covered his face. Thus, PW5 identified the accused as the person who sexually molested her. Soon PW5 informed the same to her mother; the mother informed the same to the father; in turn the father informed the matter to the police and the accused was caught by the police on 19.05.2004 (on the same date).

16. Applying the principles governing the identification in this case, the evidence of PW5 further is that, at about 7 a.m and 7.30 a.m on 01.04.2004 when she went to her property for nature's call and engaged in picking up cashew nuts, the accused came there from behind and covered her mouth. When she made noise, the accused threatened her and said that waste could be put on her mouth, if she would continue the noise. Then he bit on her lips and had forceful sexual intercourse with her by putting his penis into her vagina. Her evidence further is that, at the time of the occurrence, she was studying in 7th standard and her date of birth was `10.01.1993'. PW5 also given evidence that after committing

forceful sexual intercourse, the accused again bit on her lips and threatened her that she did not disclose the incident to anybody, and left. Thus it appears that PW5 had enough time to have an imprint of the face and features of the accused, who had subjected her to sexual intercourse, despite her resistance and later identified the accused as the culprit while he was sitting in an autorickshaw, by chance, and later identified him at the dock also. In such a case, there is no reason to disbelieve the identity, as argued by the learned counsel for the appellant, and the said contention is found to be unsustainable.

17. As far as the second challenge raised by the learned counsel for the appellant is concerned, as I have already pointed out, PW5 had given evidence regarding the occurrence and forceful sexual intercourse against her will at the instance of the accused while she was a minor. Though she was cross examined with a view to shake her version, nothing extracted to disbelieve the

evidence of PW5 in the matter of occurrence.

18. In this case, there is no eyewitness and the victim of the crime PW5 given evidence in support of the occurrence, and the said evidence failed to be shaken by way of cross examination. In the judgment of the trial court, decisions of the Apex Court reported in (2013) 4 SCC 643 [***Lillu @ Rajesh and Another v. State of Haryana***] and the decision reported in AIR 2005 SC 1248 [***State of UP v. Pappu***] were relied on to hold that a *prosecutrix complaining having been a victim in an offence of rape is an accomplice after the crime and there is no rule of law that her testimony cannot be accepted without corroboration in material particulars, for the reason, that she stands on a much higher pedestal than an injured witness.*

19. It is true that PW3, the doctor, who examined PW5, given evidence that she had examined PW5 and she noted the following injuries:

"There was complaint of pain during walking. Following are the general injuries:

"Three curvi linear abrasions 0.3 cm X 0.1 cm each intervened by normal areas 0.2 cm on inner aspects of left side lower lip, convexity of abrasions directed inwards.

2. Curvi linear abrasion with convexity downwards 0.4 cm X 0.1 cm on left check 2 cm lateral to angle of mouth. No injuries were noted on the breast. Pubic hair was absent. Hymen appears intact. Redness present around the introitus. Superficial laceration. 0.3 cm X 0.1 cm involving the fourchette. No bleeding tenderness present per-vaginal examination was not done as she was a child. Vaginal swab and smear were taken. There was no sign of any infection or other venerial deceases. Opinion is, there is evidence of general bodily injuries, there is evidence of genital injuries and final opinion can be given only after getting the chemical analysis report."

20. Accordingly, Ext.P3 wound certificate has been tendered in evidence through PW3. During re-examination of PW3, Ext.P4 chemical analysis report also was marked and as per Ext.P4 it was opined that human semen and spermetozova were detected in the vaginal smears and vaginal swabs. That apart, in support of Ext.P4, PW14, the Assistant Chemical Examiner, Thiruvananthapuram was examined and he had given the evidence that he had examined vaginal smear and swab forwarded by the investigating officer, and on

examination he found presence of human semen and spermetozova in the vaginal smear and vaginal swab. Thus it appears that Ext.P4 would also support the evidence of PW5 as to the occurrence.

21. The next question to be considered is, what are the ingredients to constitute an offence of rape prior to 03.02.2013?

22. While addressing the ingredients to constitute an offence punishable under Section 375 of IPC, prior to the amendment of IPC w.e.f 03.02.2013, decision of the Apex Court reported in [(1994) 6 SCC 29], ***State of U.P. v. Babulnath*** is relevant, where the Apex Court considered necessity of penetration of penis into the private parts of the victim/prosecutrix and held that to constitute the offence of rape neither Section 375 of IPC nor the explanation attached thereto require that there should necessarily be complete penetration of the penis into the private part of the victim/prosecutrix. In other words, to constitute the offence of rape, it is not necessary that there should be

complete penetration of the male organ with emission of semen and rupture of hymen. Even partial or slightest penetration of the male organ in the labia majora or the vulva or pudenda with or without any emission of semen and even an attempt of penetration into the private parts of the victim would be quite enough for the purpose of sections 375 and 376, I.P.C. That being so, it is quite possible to commit legally the offence of rape even without causing any injury to the genitals or leaving any seminal stains.

23. In the decision reported in [AIR 2004 SC 1497 : (2004) 4 SCC 379: 2004 Cr LJ 1399], ***Aman Kumar v. State of Haryana***, the Apex Court held that to constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape. The depth of penetration is immaterial in an offence punishable

under section 376 of I.P.C. In the decision reported in [(2010 KHC 6059)], ***Wahid Khan v. State of Madhya Pradesh*** also the Apex Court affirmed the said view.

24. Therefore, in order to establish commission of an offence under Section 379 of IPC made punishable under Section 376 of IPC, it is not necessary that there should be complete penetration of penis, emission of semen and rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without emission of semen or even an attempted penetration is quiet sufficient for the purpose of law. It is therefore, quiet possible to commit legally, the offence of rape without producing any injury to the genitals or leaving any seminal stains. Thus absolute penetration of penis to the vagina is not a mandate to commit an offence punishable under Section 376 of IPC and even partial or slightest penetration of the male organ in the labia majora or the vulva or pudenda with or without any emission

of semen and even an attempt of penetration into the private parts of the victim would be quite enough for the purpose of sections 375 and 376, I.P.Code. Be it so, it is possible to commit legally the offence of rape even without causing any injury to the genitals or leaving any seminal stains.

25. In this case, there is no eyewitness to the occurrence and the evidence of occurrence is that of PW5 which is not shaken. In the decision of the Apex Court reported in [AIR 2005 SC 1248], ***State of UP v. Pappu***, it was held that a prosecutrix complaining having been a victim in an offence of rape is an accomplice after the crime and there is no rule of law that her testimony cannot be accepted without corroboration in material particulars, for the reason, that she stands on a much higher pedestal than an injured witness.

26. In another decision of the Apex Court reported in [2012 KHC 4323], ***Narender Kumar v. State (NCT of Delhi)***, it is

observed that *it is a settled legal proposition that once the statement of prosecutrix inspires confidence and is accepted by the Court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the Court for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case. A prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. Her testimony has to be appreciated on the principle of probabilites just as the testimony of another witness; a high degree of probability having been shown to exist in view of the subject matter being a high degree of probability having been*

shown to exist in view of the subject matter being a criminal charge. However, if the Court finds it difficult to accept the version of the prosecutrix on its face value, it any search for evidence, direct or substantial, which may lend assurance to her testimony. (Vide : ***Vimal Suresh Kamble v. Chaluverapinake Apal S.P. and Another****, AIR 2003 SC 818; and* ***Vishnu v. State of Maharashtra****, AIR 2006 SC 508).*

27. In [2002 KHC 1407: AIR 2002 SC 1963: (2002) 9 SCC 86: 2002 CriLJ 2642], ***State of Orissa v. Thakara Besra and another***, after referring the decision reported in [1996(2) SCC 384], ***State of Punjab v. Gurmit Sing***, it was held by the Apex Court that rape is not mere a physical assault. rather it often distracts the whole personality of the victim. Murder destroys the physical body of the victim and a rapist degrades the very soul of the helpless female and, therefore, the testimony of the prosecutrix must be appreciated in the background of the entire case and in

such cases, non-examination of other witnesses may not be a serious infirmity, particularly where the other witnesses had not seen the commission of the crime.

28. In [1993 KHC 1229: (1993) 2 SCC 622: (1993) SCC (Cri) 674 1993 (2) ALT (Cr) 286: 1993 (2) Crimes 887], ***State of Himachal Pradesh v. Raghubir Singh***, the Apex Court held that there is no legal compulsion to look for any other evidence to corroborate the evidence of the prosecutrix before recording an order of conviction Evidence has to be weighed and not counted. Conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate against her veracity.

29. Coming to the other evidence in this case the date of birth of the victim is established by Ext.P8, the date of birth extract proved through PW7. PW8, the then Head Constable of Malayinkeezhu Police Station given evidence in support of Ext.P6

F.I statement and Ext.P10 FIR registered by him. PW11 examined in this case is the mother of the victim and she deposed that soon after the occurrence, the victim divulged the occurrence before her and also identification of the accused by PW5 after 1 ½ months. PW12 is the investigating officer and he supported the investigation. He deposed about the preparation of Ext.P11 scene mahazar, Ext.P12 mahazar relating to the recovery of the dress worn by PW5 at the time of occurrence and forwarding MOs 1 to 3 for FSL examination. PW13, who also conducted part of the investigation, supported the prosecution. PW17 also supported the prosecution case stating that he is familiar with the accused, who is selling clothes by instalments by visiting houses and also he was the person identified later by PW5.

30. Be on the fact in issue as to whether the penetration succeded in establishing commission of offence of rape punishable under Section 376 of IPC, the evidence available, when re-

appreciated within the ambit of the settled law, it has to be held that there is forceful sexual intercourse at the instance of the accused against the victim, a minor aged eleven years, which resulted in emission of semen and as such the prosecution successfully established commission of offence of rape punishable under Section 376 of IPC, by the accused. Therefore, the contention raised by the learned counsel for the appellant that the evidence is insufficient to find commission of offence punishable under Section 376 IPC and the offence would attract even otherwise in the facts of the given case is one under Section 354 of IPC cannot be countenanced. It is also to be held that the evidence also does not justify the offence as something less coming under Section 511 of 376 of IPC.

31. Thus it appears that the offence of rape, as alleged by the prosecution, is well established and the trial court rightly appreciated the evidence and entered into conviction. Therefore,

the conviction is confirmed.

32. Regarding the sentence, the same also appears to be reasonable. Therefore, this appeal is liable to be dismissed. In the result, this appeal stands dismissed.

33. The order suspending sentence and granting bail to the appellant shall stand vacated and the bail bond executed by the appellant/accused stands cancelled. The appellant/accused is directed to surrender before the trial court and to undergo the sentence within seven days from today, failing which, the trial court shall execute the sentence without fail.

Registry is directed to forward a copy of this judgment to the trial court concerned for information and compliance.

Sd/-

(A. BADHARUDEEN, JUDGE)

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