Abdul Salam Vs State Of Kerala

Court: High Court Of Kerala

Date of Decision: Jan. 7, 2025

Acts Referred: Code of Criminal Procedure, 1973 â€" Section 161, 313(1)(b), 374(2)
Indian Penal Code, 1860 â€" Section 376
Evidence Act, 1872 â€" Section 114(b), 118

Hon'ble Judges: P.G. Ajithkumar, J

Bench: Single Bench

Advocate: Babu S. Nair, Smitha Babu, C N Prabhakaran

Final Decision: Dismissed

Judgement

P.G. Ajithkumar, J.

1. The accused in S.C.No.436 of 2010 on the files of the Sessions Court, Manjeri is the appellant. He was convicted as per the impugned judgment for

an offence punishable under Section 376 of the Indian Penal Code, 1860 (IPC). He was sentenced to undergo rigorous imprisonment for a period of

seven years and to pay a fine of Rs.10,000/-.

2. The prosecution was initiated with the following allegations:

At about 10.00 p.m. on 08.09.2008 the accused committed rape on his daughter, PW1, aged 13 years at the house of his elder brother situated at

Edapatta. He repeated committing rape on her at their house having door No.III/35 of Ponmala panchayat. It recurred till the last week of February

2009. Consequently, PW1 became pregnant and delivered a girl child at the Medical College Hospital, Kozhikode on 03.05.2009.

3. On the appellant denying the charge, the prosecution has examined PWs.1 to 7 and proved Exts.P1 to P14. MOs.1 to 4 were identified. When

questioned under Section 313(1)(b) of the Code of Criminal Procedure, 1973 (Code), the appellant denied the incriminating circumstances. He filed a

statement setting out his defence. He stated that he was unaware about the pregnancy of the victim, even when she was taken to the Medical College

Hospital. He alleged that Mujeeb, son of PW5 was responsible for the pregnancy of PW1 and in order to save him, the appellant was implicated by

PW1 under the persuasion of her mother, PW5. No evidence except Ext.D1, a contradiction in the former statement of PW1, was let in.

4. The trial court, after analysing the evidence in detail, concluded that PW1 was a reliable witness and her evidence coupled with the oral testimonies

of PW4, the Doctor and PW5, the mother, proved the guilt of the appellant beyond doubt. The said finding and the reasons thereof are assailed in this

appeal filed under Section 374(2) of the Code.

5. Heard the learned counsel for the appellant and the learned Senior Public Prosecutor.

6. PW1 is the victim. She was aged 13 years at the time of occurrence. The appellant is her father and PW5 is her mother. PW1 was residing along

with her siblings, the appellant and her mother (PW5). Her brother, Mujeed was born to PW5 in her first marriage. In her second wedlock of PW5

with the appellant, PW1 and her younger sister were born. All of them were residing together at their house at Ponmala.

7. The first incident of rape occurred at the house of the appellantÃ¢â‚¬â„¢s elder brother at Edapatta. Subsequently, on a few occasions she was

subjected to sexual abuse by the appellant at their house at Ponmala. She has narrated about such incidents. The appellant took PW1 and her younger

sister to the house of his elder brother, stating that his younger brother was coming home from abroad. On that day his elder brother was absent and

his sister-in-law alone was there.

8. PW1 deposed that she and her sister slept in a room. After her sister went asleep, the appellant subjected her to sexual intercourse despite her

residence. She deposed further that on subsequent occasions while they were at their house at Ponmala, she was subjected to sexual intercourse by

the appellant on a few occasions during Ramadan season.

9. PW1 got impregnated. On noticing her swollen abdomen, PW5 along with the appellant took PW1 to a Doctor at Ponmala who noticed her to be

pregnant, and instructed to take her to the Medical College Hospital, Kozhikode. After examination, PW4, a professor in Obstetrics and Gynaecology

at the Medical College, confirmed pregnancy. Age of the fetus was found to be above six months. Owing to her tender age, PW1 was retained in that

hospital and a child was delivered by her.

10. PW5 deposed that she along with the appellant took PW1 on 09.03.2009 to the Doctor on noticing her abdominal distension. After confirmation of

the pregnancy by the Doctor, PW1 told that the appellant was responsible. It is her further version that the appellant suggested to take PW1 to some

hospitals and to do the necessary. Accordingly, PW1 was taken to the Medical College Hospital, Kozhikode.

11. PW4 was the Professor in Obstetrics and Gynecology at the Government Medical College, Kozhikode. She deposed that on 11.03.2009 she

examined PW1 and at that time PW1 was carrying a fetus of 26 weeks of age. She was told by PW1 that her father was responsible for the

pregnancy. PW4 proceeded to depose that being a case of teenage pregnancy, PW1 was retained in the hospital, and she gave birth to a child on

30.05.2009. She was discharged from the hospital on 03.06.2009. Ext.P5 is the certificate issued by PW4.

12. The F.I.statement, Ext.P1 was recorded from PW1 on 13.03.2009. Based on Ext.P1, the crime was registered. Ext.P6 is the FIR. PW7, Circle

inspector of Police has conducted the investigation and laid the charge. A potency test of the appellant was conducted by PW3 and the certificate in

that regard is Ext.P3. In the opinion of PW3, there was nothing to suggest that the appellant was incapable of doing sexual acts.

13. The proof or not of the charge against the appellant depends on the reliability of PW1. It was on 09.03.2009 she was examined by the Doctor and

confirmed the pregnancy. On 11.03.2009 she was examined by PW4 at the Medical College Hospital, Kozhikode. On 13.03.2009 she gave Ext.P1

statement. Going by the oral evidence, immediately on revealing the pregnancy, PW1 told PW5 that the appellant was responsible. PW1 claimed to

have stated that fact to the Doctor at Orchid Hospital, Malappuram, where she was scanned and examined. That Doctor was not examined. But

PW4, who examined PW1 on 11.03.2009 stated in court that PW1 revealed the appellant as the person responsible and that version repeated in

Ext.P1 that was given on 13.03.2009. Thus, from the very beginning, the version of PW1 regarding the person responsible for her pregnancy has been

consistent.

14. The learned counsel would submit that PW1 accused the appellant in order to save Mujeeb, the son of PW5 in her first marriage. Various

circumstances have been pointed out by the learned counsel for the appellant and it is submitted that since the only evidence available to implicate the

appellant with the crime is the oral testimony of PW1, any doubt appeared in her evidence has to go in favour of the appellant. It is submitted, only if

PW1 can be termed as a witness of sterling quality, there can be conviction. In that regard, the learned counsel placed reliance on the decision of this

Court in Christopher v. State of Kerala [2024 KHC 7137] and a line of decisions referred to therein.

15. Inconsistencies in the evidence of PW1 highlighted by the learned counsel for the appellant are essentially a few improbabilities. Regarding the

first incident, the narration by PW1 was that while sleeping along with her younger sister it occurred. That and the way in which she was allegedly

abused are said to be improbable. The incidents allegedly occurred at their house at Ponmala were in the wee hours during Ramzan days. All were

sleeping together. PW5 used to go to kitchen at or around 4.00 p.m. It was at that time PW1 was sexually misused. PW1 admitted her interaction with

Mujeeb which was to the dislike of the appellant. He even warned PW5 against it. Although it was suggested that PW1 lied along with Mujeeb and

she was therefore scolded by the appellant, it was denied by her.

16. It appears from the evidence that the appellant did not like PW1 interacting with Mujeeb closely. Along with that the version of PW5 to the effect

that it was Mujeeb and not the appellant who was looking after the house hold affairs is highlighted. Those matters were relied in support of the

defence plea that in order to save Mujeeb, the appellant was falsely implicated. Yet another aspect pointed out is that no scientific test like DNA

examination was conducted and it was with an oblique motive of screening Mujeeb from the prosecution.

17. The aforementioned contentions are strongly refuted by the learned Public Prosecutor. It is submitted that the evidence of PW1 is blemish free.

She being the daughter, it cannot be expected that she falsely implicate the appellant. Except suggestions by the appellant, there is no evidence or

circumstance to even remotely probabilise the defence plea. Accordingly, the learned Senior Public Prosecutor would submit that the findings of the

trial court are quite convincing and devoid of any infirmity.

18. Decisions of the Apex Court which dealt with the question concerning reliability of the victim of a sexual offence have been encapsulated by a

Division Bench of this Court in the judgment in Christopher (supra). The relevant part of that judgment is extracted below:

Ã¢â‚¬Å“26. In Nirmal Premkumar and another v. State, represented by Inspector of Police [(2024) SCC OnLine SC 260], the Apex Court while elucidating the principles that

are to be borne in mind while appreciating oral testimony, it was observed as under in paragraph No. 11 of the judgment:

Ã¢â‚¬Å“11. Law is well settled that generally speaking, oral testimony may be classified into three categories, viz. : (i) wholly reliable; (ii) wholly unreliable; (iii) neither

wholly reliable nor wholly unreliable. The first two category of cases may not pose serious difficulty for the Court in arriving at its conclusion(s). However, in the

third category of cases, the Court has to be circumspect and look for corroboration of any material particulars by reliable testimony, direct or circumstantial, as a

requirement of the rule of prudence.Ã¢â‚¬â€‹

27. In State of H.P. v. Raghubir Singh [(1993) 2 SCC 622] , 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.

28. In Rai Sandeep v. State (NCT of Delhi) [(2012) 8 SCC 21], under what circumstances can a witness be categorized as a sterling witness, the Apex Court had held as

under:

22. In our considered opinion, the Ã¢â‚¬Å“sterling witnessÃ¢â‚¬ should be of a very high quality and calibre whose version should, therefore, be unassailable. The court

considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status

of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be

the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the

court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness.

The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give

room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and

every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert

opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the

case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against

him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called

as a Ã¢â‚¬Å“sterling witnessÃ¢â‚¬ whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more

precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and

material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other

supporting materials for holding the offender guilty of the charge alleged.

29. In State of Maharashtra v. Chandraprakash Kewalchand Jain [(1990) 1 SCC 550], the Apex Court held that a woman, who is the victim of sexual assault, is not an

accomplice to the crime but is a victim of another person's lust and, therefore, her evidence need not be tested with the same amount of suspicion as that of an

accomplice. The Court observed as under in paragraph No.16:

Ã¢â‚¬Å“16. A prosecutrix of a sex offence cannot be put on a par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her

evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must

receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence

as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with

the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the

evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for

corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance

to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix

must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a

conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case

disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her

evidence.Ã¢â‚¬â€¹

30. In State of Punjab v. Gurmit Singh[(1996) 2 SCC 384], the Apex Court held that in cases involving sexual harassment, molestation etc., the court is duty-bound to

deal with such cases with utmost sensitivity. Minor contradictions or insignificant discrepancies in the statement of a prosecutrix should not be a ground for

throwing out an otherwise reliable prosecution case. Evidence of the victim of sexual assault is enough for conviction and it does not require any corroboration

unless there are compelling reasons for seeking corroboration. The court may look for some assurances of her statement to satisfy judicial conscience. The statement

of the prosecutrix is more reliable than that of an injured witness as she is not an accomplice. The Court further held that the delay in filing FIR for sexual offence may

not be even properly explained, but if found natural, the accused cannot be given any benefit thereof. The Court went on to observe as under in paragraph Nos. 8 &

21:

Ã¢â‚¬Å“8. Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦.. The court overlooked the situation in which a poor helpless minor girl had found herself in the company of three desperate young men who

were threatening her and preventing her from raising any alarm. Again, if the investigating officer did not conduct the investigation properly or was negligent in not

being able to trace out the driver or the car, how can that become a ground to discredit the testimony of the prosecutrix? The prosecutrix had no control over the

investigating agency and the negligence of an investigating officer could not affect the credibility of the statement of the prosecutrix. Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦... The

courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a

humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations

which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies

are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦ Seeking corroboration of her

statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦..Ã¢â‚¬Â¦ Corroboration as a condition for

judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances.

xxxxx xxxxx xxxxxx

21. Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦.Ã¢â‚¬Â¦ The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies

in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires

confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit

reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The

testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while

dealing with cases involving sexual molestations.Ã¢â‚¬â€‹

31. In State of Orissa v. Thakara Besra [(2002) 9 SCC 86], the Apex Court held that rape is not mere physical assault, rather it often destroys the whole personality of

the victim. The 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 even of other witnesses may not be a serious infirmity in the prosecution case, particularly where the witnesses had

not seen the commission of the offence.

32. In Krishan Kumar Malik (supra), the Apex Court emphasized the duty of the court to differentiate between genuine cases from frivolous and concocted ones. It

was held that the role of courts in such cases is to see whether the evidence available before the court is enough and cogent to prove the guilt of the accused. It was

held as follows in paragraphs Nos. 31 and 32 of the judgment:

31. No doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of the prosecutrix is sufficient provided the same

inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality. But, in the case in hand, the evidence of the

prosecutrix, showing several lacunae, which have already been projected hereinabove, would go to show that her evidence does not fall in that category and cannot

be relied upon to hold the appellant guilty of the said offences.

32. Indeed there are several significant variations in material facts in her Section 164 statement, Section 161 statement (CrPC), FIR and deposition in court. Thus, it

was necessary to get her evidence corroborated independently, which they could have done either by examination of Ritu, her sister or Bimla Devi, who were present

in the house at the time of her alleged abduction. The record shows that Bimla Devi though cited as a witness was not examined and later given up by the public

prosecutor on the ground that she has been won over by the appellant.

33. After evaluating all the past precedents, the Apex Court in Nirmal Premkumar (supra) held that in cases where witnesses are neither wholly reliable nor wholly

unreliable, the Court should strive to find out the true genesis of the incident. The Court can rely on the victim as a Ã¢â‚¬Å“sterling witnessÃ¢â‚¬ without further

corroboration, but the quality and credibility must be exceptionally high. The statement of the prosecutrix ought to be consistent from the beginning to the end

(minor inconsistencies excepted), from the initial statement to the oral testimony, without creating any doubt qua the prosecution's case. While a victim's testimony is

usually enough for sexual offence cases, an unreliable or insufficient account from the prosecutrix, marked by identified flaws and gaps, could make it difficult for a

conviction to be recorded.Ã¢â‚¬â€‹ (emphasis supplied)

19. Evidence of PW1 has to be approached in the light of the propositions of law laid down in the aforesaid decisions. As stated, the version of PW1

from the very beginning has been that the appellant was responsible for her pregnancy. The inconsistencies pointed out by the learned counsel with

respect to the place and circumstances in which the sexual abuse occurred are not very significant and cannot have the effect of discrediting PW2

altogether. What PW5 stated about the reaction of the appellant while telling him about the pregnancy is quite relevant. He wanted to take her to

some hospital and do the needful, obviously abortion of the fetus. The appellant being the father, his concern can be inferred. But, if he was innocent,

he would have immediately informed the matter in police. He did not.

20. He came with a case that in order to save Mujeeb, he was falsely implicated, but it is not supported by any evidence or circumstance. The

suggestions to PW1 and PW5 about the close interaction of PW1 with Mujeeb and the possibility of Mujeeb having sexual contact with PW1 are not

supported by even remote probability. When the same is the nature of evidence of PWs 1 and 5 and their evidence gets corroboration from Ext.P1

and the evidence of PW4, the inevitable conclusion shall be that PW1 is a witness of sterling quality. On an analysis of the evidence tendered by the

prosecution in the light of the law laid down in the aforementioned decisions, it cannot be said that the findings of the trial court leading to the

conviction of the appellant are incorrect or infirm. Interference to the judgment of conviction is therefore not warranted.

21. Minimum sentences alone are imposed. Having considered the facts and circumstances of this case, I find no reason to interfere with the

sentence. In the result, the appeal is dismissed.