



IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

MONDAY, THE 20TH DAY OF JANUARY 2025 / 30TH POUSHA, 1946

CRL.A NO. 64 OF 2014

AGAINST THE COMMON JUDGMENT DATED 08.01.2014 IN SC
NO.251 OF 2012 ON THE FILE OF THE COURT OF SESSION, MANJERI.

APPELLANT/ACCUSED:

ABDUL SALAM,
S/O. KHALID, VALAPPARAMBIL HOUSE,
THODUKUTHU PARAMBU,
MATTATHUR, OTHUKKUNGAL,
MALAPPURAM DISTRICT.

BY ADVS.
SRI.BABU S. NAIR
SRI.K.RAKESH

RESPONDENT/STATE:

THE STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM, KOCHI - 682 031.

BY ADV.SRI.VIPIN NARAYAN, SENIOR PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
14.01.2025, ALONG WITH CRL.A.139/2014, THE COURT ON 20.01.2025
DELIVERED THE FOLLOWING:



IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

MONDAY, THE 20TH DAY OF JANUARY 2025 / 30TH POUSHA, 1946

CRL.A NO. 139 OF 2014

CRIME NO.209/2010 OF MALAPPURAM POLICE STATION, MALAPPURAM.

AGAINST THE COMMON JUDGMENT DATED 08.01.2014 IN SC
NO.291 OF 2011 ON THE FILE OF THE COURT OF SESSION, MANJERI.

APPELLANT/1ST ACCUSED:

SUBAIR,
S/O.KUNHU MUHAMMED,
KAVUNKAL HOUSE,
THODAKKUTHU PARAMBA, MATTATHOOR.

BY ADV SRI.ESM.KABEER

RESPONDENT/COMPLAINANT/STATE:

STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM-682 031.
(REPRESENTED THROUGH SUB INSPECTOR OF POLICE,
MALAPPURAM DISTRICT)

BY ADV.SMT.SHEEBA THOMAS, PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
14.01.2025, ALONG WITH CRL.A.64/2014, THE COURT ON 20.01.2025
DELIVERED THE FOLLOWING:



C.S.SUDHA, J.

Criminal Appeal Nos.64 and 139 of 2014

Dated this the 20th day of January 2025

J U D G M E N T

In this appeal filed under Section 374(2) Cr.P.C. the appellants who are accused nos.1 and 2 in S.C.No.291/2011 and S.C. No. 251/2012 on the file of the Court of Session, Manjeri challenges the conviction entered and sentence passed against them for the offence punishable under Section 377 IPC.

2. The prosecution case is that the accused persons two in number in furtherance of their common intention to commit carnal intercourse against the order of nature, on 19/05/2010 at 01:45 p.m. took PW5, a boy aged 16 years in their car, forcibly made him drink alcohol, took him to a desolate place and had carnal intercourse against the order of nature. Hence, the accused persons as per the final report/charge sheet are alleged to have committed the offences punishable under Sections 363 and 377 read with Section 34



IPC.

3. Crime no.209/2010, Malappuram police station, that is, Ext.P7 FIR was registered by PW8, Sub Inspector, Malappuram police station based on Ext.P4 FIS of PW5, the victim boy, which statement was recorded by PW6, Sub Inspector, Malappuram police station. The case was investigated by PW8, who completed the investigation and submitted the final report/charge sheet against the accused alleging the commission of the offences punishable under the above-mentioned Sections.

4. On appearance of the accused persons, the jurisdictional magistrate, after complying with all the necessary formalities contemplated under Section 209 Cr.P.C., committed the case to the Court of Session, Manjeri. The case was taken on file as S.C.No.291/2011 and S.C.No. 251/2012. On 01/07/2013, the trial court framed a charge for the offences punishable under Sections 366 and 377 read with Section 34 IPC, which was read over and explained to the accused persons to which they pleaded not guilty.

5. On behalf of the prosecution, PW1 to PW8 were examined and Exts.P1 to P14 and M.O.1 to M.O.10 were got marked



in support of the case. After the close of the prosecution evidence, the accused persons were questioned under Section 313(1)(b) Cr.P.C. regarding the incriminating circumstances appearing against them in the evidence of the prosecution. The accused persons denied all those circumstances and maintained their innocence.

6. As the trial court did not find it a fit case to acquit the accused under Section 232 Cr.P.C., they were asked to enter on their defence and adduce evidence in support thereof. No oral evidence was adduced by the accused persons. Ext.D1 was marked on behalf of the accused persons.

7. On a consideration of the oral and documentary evidence and after hearing both sides, the trial court by the impugned judgment acquitted the accused persons under Section 235(1) Cr.P.C. of the offence punishable under Section 363 IPC. However, they have been found guilty of the offence punishable under Section 377 IPC and hence have been sentenced to rigorous imprisonment for 3 years each and to a fine of ₹5,000/- each and in default to rigorous imprisonment for two months each. The fine amount, if realized, has been directed to be paid to PW5. Set off under Section 428 Cr.P.C.



has been allowed. Aggrieved, the accused persons have come up in appeal.

8. The only point that arises for consideration in this appeal is whether the conviction entered, and sentence passed against the accused persons/appellants by the trial court are sustainable or not.

9. Heard both sides.

10. It was argued on behalf of the accused persons that the evidence on record is totally unsatisfactory to establish the charge against the accused beyond reasonable doubt. To prove the offence under Section 377 IPC, there is only the sole testimony of PW5, the victim boy, which is not of sterling quality and hence the trial court ought not to have convicted the accused based on his testimony. The testimony of PW2 would show that there was yet another person inside the car at the time of the alleged incident. However, PW5 denied the same. Therefore, the testimony of the prosecution witnesses is inconsistent regarding the number of persons who were present inside the car at the time of the incident. In such circumstances, benefit of doubt ought to have been given to the



accused persons, goes the argument. In support of the arguments, reference was made to the dictum in **Manak Chand @ Mani v. State of Haryana, AIR 2023 SC 5600**. *Per contra*, it was submitted by the learned Public Prosecutor that the materials on record are more than sufficient to establish the charge against the accused persons. There is no reason why PW5 should make up such a false allegation against the accused persons.

11. In **Manak Chand @ Mani (Supra)**, the appellant therein aged 20 years, was alleged to have raped a girl who was stated to be under 16 years of age. However, there was no satisfactory evidence to show that the prosecutrix was under 16 years old at the time of the commission of the offence. The evidence was also unsatisfactory regarding the incident of rape as materials came on record to show that on the date of rape, the prosecutrix had attended School. There was also delay in the prosecutrix informing the incident to her parents. Evidence also came on record that the proposal for marriage put forward by the father of the prosecutrix was turned down by the family of the accused. When the marriage did not materialise, a complaint was made to the police based on



which the crime was registered. The materials on record probalised a consensual relationship. The accused was acquitted finding the evidence unsatisfactory as it was found that the incident was quite improbable and unlikely. The testimony of the prosecutrix was also not found to be creditworthy. Relying on this dictum, the argument advanced on behalf of the accused persons is that the testimony of PW5 is not of sterling quality and hence the accused are entitled to the benefit of doubt.

12. I make a brief reference to the testimony of the witnesses relied on by the prosecution to establish the charge against the accused persons. PW5, the victim boy, when examined deposed that the incident took place on 19/05/2010 on which date he along with his friend Uwais, left School in the afternoon and by about 01:45 p.m. they reached the place by name Alathurpadi junction. While Uwais went to a nearby shop to make some purchase, a car approached PW5 and stopped near him. Both the accused persons who were inside the car asked PW5 directions to a place. When PW1 was trying to explain the way to them, A1 Subair, who was sitting on the back seat of the car, opened the door of the car and pulled him



inside. When PW5 tried to cry out for help, A1 covered his mouth with the latter's palm. The car then sped off and after travelling some distance, A2 Abdul Salam, who was driving the car, stopped the car and came to the back seat. A2 mixed liquor with 7up and he was forcibly administered the same. He lost consciousness for some time. When he regained consciousness, he found the car parked in a deserted place. Both the accused persons took him out of the car to a grassy area, undressed him and sexually abused him. A1 thrust his penis between his thighs which act was repeated by A2 also. Thereafter, he again lost consciousness. When he regained consciousness, he was in the hospital. He was first taken to a hospital at Malappuram. Thereafter he was taken to the General hospital, Manjeri, from where he was taken to the Medical College hospital, Kozhikode. Ext.P4 is the FIS given by PW5 to the police.

12.1. PW2, Head Constable, Malappuram police station when examined deposed that on 19/05/2010 he was on patrol duty along with the Sub Inspector. When they reached the place called Korangode, Malappuram they saw a car parked by the side of the road. The Sub Inspector stopped the jeep and inspected the car. They



2025:KER:3727

found PW5 in a semi-conscious condition. Apart from PW5 there were three other people in the car. On questioning, the said persons were unable to give any satisfactory answers which aroused suspicion in their mind and hence the three persons in the car were taken into custody. PW5 the boy was taken to the Taluk Hospital, Malappuram for treatment. PW2 identified the accused persons as the two among the three persons present in the car. PW2 also deposed that the car was parked on the opposite side of a liquor shop. In the cross-examination PW2 deposed that PW5 was taken to a hospital at Malappuram. They had not taken PW5 to any other hospital. The boy was unable to give any statement at that time. PW2 denied the suggestion that PW5 was completely conscious when the police saw him. He also denied the suggestion that the present false case has been registered because the three people travelling in the car had an altercation with the police. PW2 further deposed that after the boy was taken to the hospital the accused persons were taken to the police station.

12.2. PW1, Medical Officer, Taluk Head Quarters Hospital, Malappuram deposed that on 19/05/2010 at 05:36 p.m. he



examined PW5 aged 16 years and had issued Ext.P1 certificate. On examination he found discolouration on the buttocks of the boy who was brought to the hospital in a semiconscious state. Pieces of grass were found on the buttocks area. There was smell of alcohol. PW1 also deposed that the boy had been brought to the hospital by the police.

12.3. PW6, Sub Inspector, Malappuram police station deposed that on 20/05/2010 he had recorded Ext.P4 FIS of PW5 at the Medical College Hospital, Kozhikode.

12.4. PW8, Sub Inspector, Malappuram police station deposed that based on Ext.P4 he had registered Ext.P7 FIR. He had conducted an investigation into the case. On 19/05/2010 he took both the accused persons into custody and their arrest was recorded on 20/05/2010. The accused persons were subjected to potency test. In the cross-examination PW8 deposed that till the crime was registered he did not have any information regarding the case. He admitted Ext.D1 report submitted by him to the effect that the car bearing registration no.KL-8V/3180 used by the accused was seized and a seizure mahazar had been prepared relating to the same. At the time



of seizure, a liquor bottle, the key of the car and the school bag of PW5 containing his books as well as the books of his friend Mohammed Uwais had been seized. However, by mistake the bag was omitted to be referred to in the seizure mahazar and hence Ext.D1 report. PW8 when asked whether in addition to the accused persons there was a person by name Salih inside the car, replied that he was unable recollect the same. PW8 admitted that he had not questioned Uwais, the friend of PW5. PW8 denied the suggestion that on the date of the incident there was a quarrel between the accused persons and the police and hence due to the said enmity, the present false crime had been registered against the accused persons.

13. It is true that PW2 has a case that apart from the accused persons and PW5 there was yet another person inside the car on the date of the incident. However, PW5 denied the existence of such a person in the car. PW8 the investigating officer, on the other hand, deposed that he does not remember whether a person by name Salih was also present inside the car. PW8 deposed that till the crime was registered he was unaware of the incident. This was pointed out as an aspect which would raise serious doubts about the case because



the testimony of PW2 is that PW5 was found in an unconscious stage while he was on patrol duty along with the Sub Inspector of Police. It is not clear whether it was PW6 or PW8 who was leading the patrol team because PW8 says he had registered the crime pursuant to the FIS recorded by PW6 being handed over to him. PW6 in his testimony described himself as Sub Inspector of Police, Malappuram. However, PW6 in the first page of his deposition, apart from giving his name and other details has given his '*calling*' as- '*Additional Sub Inspector*'. PW8 was the Sub Inspector of Malappuram police station during the said time. Neither side has clarified as to who was heading the patrol team in which PW2 was a member. It is true that PW2 says that another person was present in the car. However, no explanation is given either by PW2 or PW8 as to why the said person was not included or arrayed as an accused or why he was excluded from the case. But it is pertinent to note that PW5 has no case that any person other than the accused herein had sexually abused him. Going by the version of PW5, his friend Uwais, was not present in the car when the incident took place. I find no reason(s) to disbelieve his version regarding the same. Ext.D1 report does say that the school bag of



PW5 contained the books of his friend Uwais also. Admittedly, Uwais is a friend of PW5. Therefore, there is nothing unnatural in the books of his friend to be inside his bag, especially when the prosecution case is that PW5 and Uwais were together on the date of the incident before PW5 had been taken away in the car by the accused persons. It would certainly have been ideal for the prosecution to have examined Uwais as a witness in this case. However, evidence must be weighed and not counted.

14. It was submitted that the attempt of PW5 was to somehow save his face as he had consumed alcohol on the said day and therefore it was difficult for him to face his parents. In the light of his deviant character, his testimony is not reliable or safe, goes the argument. PW5 admitted that he used to smoke but not drink. Merely because PW5 admitted that he used to smoke, would not be a ground to conclude that he is of a deviant character. Youngsters are prone to commit mistakes/follies during their teens or young age for which they cannot be branded as deviant and wholly unreliable. The accused persons, when questioned under Section 313 Cr.P.C., denied the prosecution case and submitted statements in writing putting forth



their contentions. According to them, on the said day they were travelling in a car. The second accused was driving the car. They stopped the car at a place by name, Alathurpadi, where they saw their friend Uwais along with two youngsters standing by the roadside. They were told by Uwais that one among them was quite drunk and therefore requested a lift to Kottappadi, Malappuram. They acceded to the request of Uwais and his friends. When they reached the place called Munduparambu, a pedestrian abruptly crossed the road and the second accused, to avoid hitting him, swerved the car. This led to an altercation between the second accused and the said pedestrian at which time the Sub Inspector of Police arrived at the spot. They questioned the second accused. The police did not like the way the second accused answered them and so the accused persons were taken to the police station. PW5 admitted to the police that he had consumed liquor. As Uwais and the other person Salih had not consumed liquor, they were released by the police. The accused persons were kept in the lock-up for a day and on the next day, a false crime was registered, and they were remanded. The accused persons have no such case when PW2, PW6 or PW8 were in the box. No



such defence was put forward during the cross examination of the said witnesses. There is no reason to disbelieve PW5 who has clearly deposed regarding the overt acts of the accused. It is highly improbable and unlikely for PW5 to have fabricated such a false story against the accused persons especially when he has no motive or reason(s) to do so. No evidence or materials have been brought on record to show that the accused had any prior acquaintance with PW5 and that due to some enmity, a false allegation has been raised.

15. It was further pointed out that the medical evidence also does not support the prosecution case. No injuries have been noted on the private parts of PW5 by the doctor who examined him and hence this was pointed as yet another reason to doubt the prosecution case. According to PW5 the accused persons had abused him by thrusting their penis in between his thighs. That being the position there cannot be any injury on his private parts. PW1 the doctor has deposed that on examination he found discolouration on the buttocks of PW5 and pieces of grass on the buttocks area. This aspect substantiates the version of PW5 who deposed that the accused persons had taken him out of the car to a grassy area, undressed him



and then the accused one by one had abused him by thrusting their penis between his thighs. This explains the discolouration on his buttocks and pieces of grass on the buttocks. I find no reason(s) to disbelieve PW5 and hence I find no infirmity in the impugned judgment calling for an interference.

In the result, the appeals *sans* merit are dismissed.

Interlocutory applications, if any pending, shall stand closed.

Sd/-
C.S.SUDHA
JUDGE

ak