

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS. 1535-1560 of 2005

STATE OF KERALA & ORS.

Appellant (s)

VERSUS

JOSEPH @ BABY & ORS.

Respondent(s)

WITH

CRIMINAL APPEAL NO. 1561 of 2005

AND

CRIMINAL APPEAL NOS. 1562-1587 of 2005

ORDER

This batch of appeals arise out of a common judgment dated 20th January, 2005 passed by the Division Bench of the High Court of Kerala.

The facts relevant for disposal of these appeals very briefly are that for the occurrence of alleged kidnapping, wrongful confinement for 40 days, rape and gang rape of a minor girl, in all 40 accused were tried in Sessions Case No. 187 of 1999 and one accused was tried in Sessions Case No. 241 of 2001 before a Special Court. The Special Court delivered the judgment in Sessions Case No. 187 of 1999 convicting 35 of the accused under Sections 120B, 363, 365, 366-A, 368, 376(1) and 376(2)(g), I.P.C. and by a separate and subsequent judgment, the Special Court convicted the only accused in the Sessions Case No. 241 of 2001 under Sections 120B, 365, 363, 366-A, 368, 376(2)(g), 372 and 392, I.P.C. The respondents-accused filed separate Criminal Appeals before the High Court and the High Court, by the impugned common judgment, took into account the evidence adduced in Sessions Case No. 241 of 2001 in which only one accused was tried, and on that basis, set aside the conviction of not only that lone accused in Sessions Case No. 241 of 2001, but also the other 35 accused persons who were tried and convicted in Sessions Case No. 187 of 1999. This will be clear from paragraph 7 of the impugned judgment of the High Court which is quoted hereinbelow:

"When we scanned through the evidence, we could understand that several new materials could be brought out by the accused to strengthen their defence, in the second case. On going through

the said evidence we are also convinced that few of such pieces of evidence could be used by the accused in the first cases as well, for the purpose of their effective defence. Accordingly, in these cases the evidence in both the cases can be considered together for the purpose of finding the truth in this case. Whatever available in these cases in favour of the accused shall be made use of in their favour, irrespective of where it was let in, but not vice versa."

The High Court after considering the evidence in Sessions Case No. 241 of 2001, came to the conclusion that there is no convincing evidence to show that the Prosecutrix (PW 3 in Sessions Case No. 187 of 1999 and PW 1 in Sessions Case No. 241 of 2001) was not an unwilling partner for the sexual intercourse, and hence the claim of the accused to at least the benefit of doubt has to be considered and acquitted all the respondents-accused who had filed the appeals.

Learned counsel for the State of Kerala submitted that the High Court has not at all considered the evidence that was led in Sessions Case No. 187 of 1999 and has only considered the evidence adduced in Sessions Case No. 241 of 2001 and acquitted not only the sole accused in Sessions Case No. 241 of 2001, but also the 35 other accused persons who had been convicted in Sessions Case No. 187 of 1999. He brought to our notice the provisions of Sections 385(2) and 386 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C.") to show that the appellate Court can send for the "record of the case" and after perusing "such record", decide the appeal in one of the ways indicated in several clauses of Section 386, Cr.P.C.

Learned senior counsel for the respondents, on the other hand, submitted that on the evidence on record, the respondents were entitled to acquittal and hence this is not a fit case for remand to the High Court and this Court should decide the appeals on their own merits.

After hearing learned senior counsel appearing for the parties, we find a lot of force in the submission of the learned counsel for the State of Kerala. By the impugned common judgment, the High Court has acquitted the 35 respondents who had been convicted in Sessions Case No. 187 of 1999 only on the basis of evidence led in Sessions Case No. 241 of 2001 after arriving at a finding that the Prosecutrix may not have been an unwilling partner to the sexual intercourse with the accused and the High Court does not appear to have considered the evidence in Sessions Case No. 187 of 1999. What the High Court has failed to appreciate is that a Prosecutrix may be a willing partner in an intercourse with the one accused in Sessions Case No. 241 of 2001, but she may not be a willing partner in intercourse with the 35 other accused in Sessions Case No. 187 of 1999. Whether she consented to an intercourse will ultimately depend on the facts of each case. The High Court ought to have considered the facts of each case and decided the appeals in accordance with law and in the absence of such consideration by the High Court, it will not be proper for us to decide on the culpability of each of the respondents-accused in these appeals. We, therefore, set aside the impugned common judgment of the High Court and remand the matters back to the High Court for fresh disposal in accordance with law.

We find that the High Court, while allowing the appeals of the respondents and acquitting them, has discharged the bail bonds which were executed pursuant to the orders passed by the High Court granting bail to the respondents during the pendency of the appeals. Since the bail bonds stand discharged, it will be open for the respondents to make fresh prayers for bail before the High Court and if advised, the respondents may file such bail applications before the High Court within four weeks from today. If such bail applications are filed by the respondents, the High Court will consider the same on their own merits in accordance with law.

We make it clear that we have not expressed any opinion on the merits of these cases and any observations made by us in this Order will not influence the High Court in deciding the appeals afresh in accordance with law. We, however, request the High Court to expedite the hearing and disposal of the appeals within six months from today.

We further make it clear that if any appeal has abated on account of death of any accused, the State will bring that fact to the notice of the High Court and the High Court will pass appropriate orders.

The Appeals stand disposed of accordingly.

The Registry is directed to send back the Original Records to the High Court at the earliest.

.....J.
(A.K. PATNAIK)

.....J.
(GYAN SUDHA MISRA)

NEW DELHI,
JANUARY 31, 2013

ITEM NO.102

COURT NO.8

SECTION IIB

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

CRIMINAL APPEAL NO(s). 1535-1560 OF 2005

STATE OF KERALA & ORS.

Appellant (s)

VERSUS

JOSEPH @ BABY & ORS.

Respondent(s)

WITH APPEAL(CRL) NO. 1561 of 2005
(With office report)

APPEAL(CRL) NO. 1562-1587 of 2005
(With office report)

Date: 31/01/2013 These Appeals were called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE A.K. PATNAIK
HON'BLE MRS. JUSTICE GYAN SUDHA MISRA

For Appellant(s)

(in Crl.A.1535-1560/2005) Mr. K. Padmanabhan Nair, Sr. Adv.
Mr. Ramesh Babu M.R., Adv.
Mr. B.R. Mohan Kumar, Adv.

(in Crl.A.1562-1567,
1578-1586/2005) Mr. Chander Udai Singh, Sr. Adv.
Ms. Rukhsana Choudhury, Adv.
Ms. Anila George, Adv.
Mr. Ravindra S. Garia, Adv.
Ms. Charu Singhal, Adv.

(in Crl.A.1568-1569,1587,
1570-1571, 1573-1577/2005) Mr. Anand Grover, Sr. Adv.
Ms. Anila George, Adv.
Ms. Rukshana Choudhury, Adv.
Ms. Jhuma Sen, Adv.
Mr. Mihir Samson, Adv.

For Intervenor

Mr. V. Giri, Sr. Adv.
Mr. V.K. Biju, Adv.
Mr. Vipin Nair, Adv.
Mr. P.B. Suresh, Adv. for

M/S. Temple Law Firm, Advs.

For Respondent(s)

(in CrI.A.1535-1560/2005) Mr. Altaf Ahamed, Sr. Adv.
(CrI.A.1562-1587/2005) Dr. S. Gopakumaran Nair, Sr. Adv.
Mr. T.G. Narayanan Nair, Adv.
Mr. P. Parameswaran, Adv.
Mr. K.N. Madhusoodhanan, Adv.

Mr. Roy Abraham, Adv.
Ms. Reena Roy, Adv.
Ms. Seema Jain, Adv.

(in CrI.A.1535-1560/2005) Mr. Renjith B., Adv.
Ms. Lekshmi N. Kamal, Adv.
Mr. S.C.V. Vimal Pani, Adv.

Mr. Himinder Lal, Adv.

Mr. M.T. George, Adv.

Ms. Bina Madhavan, Adv. for
M/S. Lawyer'S Knit & Co, Advs.

UPON hearing counsel the Court made the following
O R D E R

We set aside the impugned common judgment of the High Court and remand the matters back to the High Court for fresh disposal in accordance with law.

We find that the High Court, while allowing the appeals of the respondents and acquitting them, has discharged the bail bonds which were executed pursuant to the orders passed by the High Court granting bail to the respondents during the pendency of the appeals. Since the bail bonds stand discharged, it will be open for the respondents to make fresh prayers for bail before the High Court and if advised, the respondents may file such bail applications before the High Court within four weeks from today. If such bail applications are filed by the respondents, the High Court will consider the same on their own merits in accordance with law.

We make it clear that we have not expressed any opinion on the merits of these cases and any observations made by us in this Order will not influence the High Court in deciding the appeals afresh in accordance with law. We, however, request the High Court to expedite the hearing and disposal of the appeals within six months from today.

We further make it clear that if any appeal has abated on account of death of any accused, the State will bring that fact to the notice of the High Court and the High Court will pass appropriate orders.

The Appeals stand disposed of accordingly.

The Registry is directed to send back the Original Records to the High Court at the earliest.

| (G. SUDHAKARA RAO)
| COURT MASTER

| | (KALYANI GUPTA)
| | COURT MASTER

(SIGNED ORDER IS PLACED ON THE FILE)