

**IN THE HIGH COURT OF KARNATAKA  
CIRCUIT BENCH AT DHARWAD**

Dated this the 9<sup>th</sup> Day of April 2013

Present

**THE HON'BLE MR.JUSTICE B.V.PINTO**

And

**THE HON'BLE MR.JUSTICE H.S.KEMPANNA**

Criminal Appeal No.2856/2011

Between:

Basavaraj @ Basu,  
S/o Madivalappa Kademani,  
Age: 35 years, Occ: Agriculture,  
R/o. Kallapur Oni, Garag,  
Tal. & Dist. Dharwad. ... Appellant

(By Shri. Srinand A.Pachhapure, Advocate)

A n d :

The State of Karnataka,  
Rep. by Garag P.S.,  
Rep. By State Public Prosecutor,  
Circuit Bench, Dharwad. ...Respondent

(By Shri. Y.V.Raviraj, Addl. Government Advocate)

This criminal appeal is filed under Section 374(2) of Cr.P.C. seeking to set aside the conviction and sentence dated 12.08.2011 passed by the Principal District & Sessions Judge, Dharwad, in S.C.No.91/2010 and acquit the appellant/accused of the charges levelled against him.

This criminal appeal coming on for Hearing this day, **B.V.Pinto, J.**, delivered the following:

### **JUDGMENT**

This appeal is filed by the accused challenging the judgment dated 12.08.2011 passed by the Principal District and Sessions Judge, Dharwad, in S.C.No.91/2010, convicting him for the offences under Sections 376 and 302 IPC and sentencing him to undergo rigorous imprisonment for seven years and to pay fine of Rs.5,000/-, in default to suffer simple imprisonment for one year for the offence under Section 376 IPC and further sentencing him to undergo life imprisonment and to pay fine of Rs.10,000/-, in default to undergo simple imprisonment for a period of 3 years for the offence under Section 302 IPC.

2. It is the case of the prosecution that, on 10.03.2010 at about 1.30 a.m., the accused committed

forcible sexual intercourse on the victim-Smt. Riyana, wife of Shoukath Ali Mullannavar, by asking her to come near the Urdu School situated in Garag Village of Dharwad Taluk and thereafter, throttled her due to which she sustained injury and succumbed to the same on 21.03.2010 while undergoing treatment at KIMS Hospital, Hubli, thereby he is alleged to have committed the offences under Section 376 and 302 IPC.

3. The complaint in this case came to be filed by the deceased which was recorded while she was undergoing treatment in the KIMS Hospital. In the said complaint, which is marked as Ex.P.16, it is stated by her that, she is residing in Garag and that she is married about 10 years prior to the date of the incident to Shoukath Ali Mullannavar (P.W.3) and they have begotten three male children out of the said wedlock. Since about eight years prior to the incident, they had come to Garag and were residing there eking out their

livelihood by working as coolies. The accused Basavaraj Kademani was known to them and he was often visiting their house. On 09.03.2010, her husband had gone to the thrashing floor of jowar at about 10.00 p.m. and thereafter, she slept along with her children in the house. In the midnight, at about 1.00 a.m., somebody knocked the door of her house and when she questioned, he told that his name is Kademani Basavaraj and that he further informed her that her husband is calling her to the thrashing floor. She believed him and went along with him and when they came near the Urdu School in Garag, the accused took her under the neem tree, held her tightly and informing her that he has got interest in her, felled her down and thereafter, by undressing her committed rape on her. Though she pleaded that she is a married woman and that she has got children, the accused did not allow her and had forcible sexual intercourse with her. Thereafter, he threatened her not to inform about the incident to

her husband or to any other person, and when she told that she would tell this fact to the villagers, the accused throttled her by his hands. At that time, she extricated herself and fell down and the accused thereafter left her and went away. It was about 1.30 a.m. She has stated in her complaint that there is an injury on her neck and thereafter she went to her mother's house. It is stated in the complaint that, she had been raped by Kademani Basavaraj and he attempted to commit her murder. The PSI (P.W.19) of Garag Police Station, on receiving the intimation from the KIMS Hospital went to the said hospital and recorded the statement at about 13.15 hours on 10.03.2010 and after coming back to the police station registered the said complaint for the offences under Section 376 and 307 IPC in Crime No.50/2010 and transmitted the FIR to the jurisdictional Magistrate and thereafter handed over investigation to P.W.20. Thereafter P.W.20 visited the victim in the KIMS, Hospital. There, P.W.20 having

learnt that P.W.19 has already recorded the statement of the victim and after taking into custody of the case papers, instructed P.W.19 to trace the accused. It is further the case of the prosecution that while undergoing treatment in the said hospital, the injured- Smt. Riyana succumbed to the injuries on 21.03.2010 and thereafter, the offence under Section 307 IPC was converted into one under Section 302 IPC and the investigation was continued.

4. P.W.19, thereafter, visited the scene of occurrence and in the presence of witnesses C.Ws.11 and 13 conducted the spot panchanama between 3.00 p.m. and 4.00 p.m. on 10.03.2010. Ex.P.9 is the spot panchanama. He got the photograph of the scene of occurrence taken as per Ex.P.10 and got prepared the sketch as per Ex.P.21. P.W.20 thereafter recorded the statement of P.W.6-Muzammil, son of the deceased. P.W.19 arrested the accused on the same day who was

subjected to medical examination before P.W.7-Dr.Beena Surpali. After completion of the medical examination of the accused, he was produced before the Court. Thereafter he was remanded to judicial custody. P.W.20 thereafter seized the articles produced by P.C. NO.556 which were taken into custody by him as were handed over by the Medical Officer. The said articles were subjected to examination by the Medical Examiner by sending the same to the Regional Forensic Science Laboratory, Belgaum. P.W.20 thereafter again visited the KIMS Hospital on 11.03.2010 and recorded the statements of P.Ws.3 and 4 who are the husband and mother of the deceased. He visited the hospital at Dharwad and took possession of the materials from the Medical Officer at Dharwad Hospital in respect of the accused. On 15.03.2010, P.W.20 sent all the ten materials to the RFSL, Belguam through P.C.No.491. On 21.03.2010, on receipt of the intimation that the victim-Riyana had succumbed to the injuries, P.W.20

requested P.W.19 to attend to the case and conduct inquest proceedings on the dead body as he was otherwise engaged in bandobast duty. P.W.19, thereafter sent an intimation to the Court requesting to add Section 302 to the earlier offence and after receipt of the inquest panchanama, P.W.20 recorded the further statement of P.W.6-Muzammil i.e., son of the deceased. The Investigating Officer, thereafter, received the report from the RFSL, Belgaum, and further requested the stomach wash of the deceased to be handed over to him and after taking the same from the KIMS Hospital, it was forwarded to RFSL, Belgaum, for examination. The statement of the police who handed over the materials to RFSL, Belgaum, is recorded. On receipt of the report from the RFSL, Belgaum, P.W.20 again went and approached the Medical Officer seeking for the opinion from the doctor viz., P.W.8 regarding the cause of death and obtained the post-mortem examination report as per Ex.P.5. P.W.20, thereafter

secured the medical certificate in respect of the examination of the accused as per Ex.P.2 and after the receipt of report from RFSL, Belgaum, filed a charge sheet against the accused for the offences under Sections 302 and 376 IPC.

5. P.W.1-Mehaboobsab Ali is the brother-in-law of the deceased. He is a signatory to Ex.P.1, which is the panchanama of the inquest proceedings conducted on the dead body of the deceased. P.W.2-Akbar is also another witness to the inquest proceedings.

6. P.W.3-Shoukat Ali Mullannavar is the husband of the deceased. He has stated that, on the night of the date of the incident, he had been to the thrashing floor to lay watch on the crop. His wife i.e., the victim and three children were in the house. At about 4.00 a.m., his uncle came and woke him up and informed him that his wife is not able to speak. Thereafter, he came to the house immediately and went to the house of his mother-

in-law i.e., P.W.4. His wife was not in a position to talk as her throat had spoiled. When he enquired her, she told that accused had squeezed her neck and also defamed her. Thereafter, he took her to the private clinic of Dr.Bhandari, where the doctor refused to give any treatment. Thereafter, he took the victim to the District Hospital, Dharwad. The doctor treated her at the Hospital. He has stated that police had come to the Hospital and his wife had narrated the incident to the police. Thereafter, the victim was shifted to KIMS Hospital, Hubli. He has stated that his wife was alive for 12 more days and on the 13<sup>th</sup> day, she died. It was suggested to P.W.3 that he was deposing falsely since had taken loan of Rs.15,000/- from the accused. However, P.W.3 has admitted that he had taken loan of Rs.10,000/-, but the same had been returned by him. He has further admitted that when the loan was taken by him from the accused, he had taken some time for returning the same. However, to the suggestion that in

respect of the said loan there was a quarrel between him and the accused, P.W.3 has replied in the negative.

7. P.W.4-Noorjahan is the mother of the victim. She has stated that on the date of the incident, P.W.3, her son-in-law, had gone to sleep in the thrashing floor and the victim was sleeping in the house along with her three children. In between 3.00 to 4.00 a.m., in the night, her daughter came to her house by crawling since she was not able to walk. When she asked, her daughter stated that she has been cheated and when further questioned, she told her that the accused had raped her and squeezed her neck. Thereafter, she was taken to the private clinic of Dr.Bhandari and when the doctor refused to give any treatment, they took her to the District Hospital, Dharwad, where she was treated by the Medical Officer. When questioned by the Medical Officer, victim had stated that accused had raped her and also squeezed her neck. The Medical Officer there

suggested them to remove the victim to the KIMS Hospital, Hubli and accordingly, victim was sent to KIMS Hospital, Hubli, where the victim was alive for 13 days and thereafter she died in the hospital. In the cross-examination of P.W.4, it is suggested that there was some dispute regarding cultivation of the land and that the accused was cultivating the land for sometime along with her and thereafter the land was left and at that time there was quarrel between them. However, she has denied any such ill-will between accused and herself or her son-in-law. P.W.4 also admitted regarding taking of loan of Rs.10,000/- from the accused. However, she has also stated that the said amount of loan had been returned to the accused by her son-in-law i.e., P.W.3. It is also suggested that there was quarrel in respect of the loan but the said suggestion has been denied by P.W.4. It is also elicited in the evidence of P.W.4 that she has not informed any of her neighbours about the incident since the same had

happened in the night and since they had shifted the victim to the Hospital before sunrise. It is stated that they reached the Hospital at Dharwad by 5.00 a.m. and by about 6.00 a.m. they reached KIMS Hospital, Hubli. She has stated that police came to the KIMS Hospital, Hubli. So also they had come to Dharwad Hospital and about one hour after the admission of her daughter to the Hospital, police had come and took her statement.

8. P.W.5-Firozkhan is the Constable of Garag Police Station who transmitted the FIR to the Court on 10.03.2010 and delivered the same to the jurisdictional Magistrate at 4.50 p.m.

9. P.W.6-Muzammil is the son of the victim who is a child witness. In his evidence, it is elicited that he knew the accused and the said accused hailed from Garag. He has stated that accused had assaulted her mother under the neem tree near the Urdu School. His father had gone to thrashing floor on the said night. His

brothers, mother and himself slept in the house. However, his mother did not return. Thereafter, his mother was taken to the Hospital in an ambulance.

10. P.W.7-Dr. Beena Surpali is the Medical Officer at the Urban Health Center, Dharwad, who had examined the accused on 10.03.2010 at about 6.15 p.m. and issued certificate as per Ex.P.2. P.W.7 had identified the accused in the Court and, according to her opinion, on examination of the person of the accused, there was nothing to suggest, that he was incapable of performing sexual act. The extract of medico-legal case register in which the particulars of Ex.P.2 are noted is marked as Ex.P.3.

11. P.W.8-Dr.Kotrabsappa Shivappa Itagi is the Medical Officer and Lecturer in Forensic Medicine, KIMS Hospital, Hubli. He has stated that on 22.03.2010 on the request of PSI, Garag, he conducted the post-mortem examination on the dead body of Smt.Riyana –

the victim. He has stated that the victim had sustained the following external injuries:-

“ 3. External injuries.

- i. A healed, hypopigmented scar present across front of neck with dark brown scabs at margins and centre, two hypopiognouted similunar scars present in it; one is in upper aspect and other one is in lower aspect. The scar is of size 11 c.m. length, 4 c.m. in breadth at centre, placed 3 c.m. below mid-point of let jaw; 4 c.m. below chin, 4 c.m. below right ear lobule.
- ii. A scratch abrasion covered with dark brown scab present on left side of neck of length 4 c.m. horizontal.
- iii. Another scratch abrasion of 1.5 c.m. present on left side of the neck horizontal placed 6 c.m. below left angle of jaw, covered with dark brown scab.

2. On dissection of the body dissection of the scalp reveals extravasation of blood in left occipital area. The skull and vertebrae are intact. Membrane and the brain were intact and congested.”

He has given the final opinion regarding cause of death as death is due to complications of throttling as per Ex.P.5 after receiving the report of RFSL, Belgaum, regarding stomach contents which excluded poisoning the victim.

12. P.W.9 Ulavappa Shankrappa Ulavannavar and P.W.10-Basavanneppa Madivalappa Ulavannavar are the witnesses to the seizure mahazars. But, both of them have not supported the case of the prosecution and have been treated hostile.

13. P.Ws.10 and 13 are the witnesses to Ex.P.9 which is the spot panchanama. P.W.12 is the police constable who carried the dead body to the KIMS Hospital, Hubli and after post-mortem examination, the

dead body was handed over to the relatives of the deceased.

14. P.W.14-Nasheeruddin is the head constable who carried the materials to the RFSL, Belgaum as directed by P.W.19.

15. P.W.15-Dr. Kavita is the Assistant Professor in KIMS Hospital, Hubli. She has stated that on 10.03.2010 at 9.30 a.m., when she was on duty, the victim was produced before her. She has stated that victim was drowsy and history was given by her mother stating that when the victim-Riyana was sleeping in her house alone at Garag, in the midnight, at 12.00 a.m., on the night of 09.03.2010 some person knocked the door and throttled her and after that she went to her mother's house who stayed in the neighbourhood. On physical examination of the victim, P.W.15 opined that the patient was used to act as that of intercourse and that there was evidence suggestive of recent intercourse

in the body of the victim. P.W.15 has given the certificate as per Ex.P.11. She has also spoken regarding report of the FSL. It is elicited in the cross-examination that there were no seminal stains found on the clothes of the victim nor any other materials collected from the person of the victim. It is also elicited that there were no external injury on the person of the victim in order to hold that there was violent sexual assault on the victim. It is also however elicited that victim was not in a position to speak due to drowsiness. It is further elicited that police did not record any statement of the victim in her presence.

15. P.W.16 is the Scientific Officer, RFSL, Belgaum, who has stated that ten articles were sent to her for examination and, on examination - both chemical and serological purpose, she has issued certificate as per Ex.P.12. In the said certificate, it is

stated that seminal stains were not found on the vaginal swab and in other articles sent for examination.

17. P.W.17-Praveen is the Scientific Officer, RFSL Belgaum. He has stated that, on examination of the stomach contents of the victim, no poison was detected and he has issued certificate as per Ex.P.6.

18. P.W.18-Uluvayya is a signatory to Ex.P.7. However, he has turned hostile to the case of the prosecution.

19. P.W.19-Kuber is the Sub-Inspector of Police and P.W.20-Amaresh is the Investigating Officer, being the Circle Inspector of Police, Rural Circle, Dharwad, whose evidence has already been discussed above. It is on the basis of the above oral and documentary evidence that the learned Sessions Judge has convicted the accused for offences under Sections 376 and 302 I.P.C.

20. Heard Sri Srinand Pachchapure, learned counsel appearing for the appellant and Sri Y.V.Raviraj, learned Addl. Government Advocate for the respondent/State.

21. Learned counsel appearing for the appellant submits that, according to the case of the prosecution, the victim was first produced before Dr.Bhandari and in view of his refusal to give any treatment to the victim, she was taken to the Civil Hospital, Dharwad. No documents are produced from the Civil Hospital, Dharwad, nor any doctor has been examined to show that treatment was given to the victim in the Civil Hospital, Dharwad. PW.15-Dr.Kavita, the Medical Officer in KIMS Hospital, Hubli, on examination of the victim has not found any external injuries on the person of victim. However PW.8-Dr.Itagi who has conducted postmortem examination on

the dead body of the deceased has found certain external injuries. No clarification has been given as to how the said injuries were found by PW.8. He further submits that, in view of the fact that PW.15 is the first doctor to treat the victim and that she having not found any external injuries on the victim, more particularly on the neck, the entire prosecution case that the victim was subjected either to forcible sexual intercourse or to throttling is ruled out and that the accused is therefore entitled for an order of acquittal. He further submits that the entire records from the Dharwad Civil Hospital have been suppressed by the prosecution. It is his further submission that PW.15 has categorically stated that victim was not in a position to give any statement and therefore she has enquired the mother of the victim PW.4 regarding the history of assault, whereas it is the case of the prosecution that the

police PW.19 questioned the victim and recorded her statement, which is treated as complaint and it is the basis for FIR. He therefore submits that the entire complaint Ex.P.16 is doubtful and therefore no reliance can be placed on Ex.P.16 to record a conviction. Further it is submitted by him that, PW.4 has informed the doctor PW.15 at the first instance that the victim was raped inside her house, whereas the case of the prosecution is that the victim was called outside and near the Urdu School under the neem tree she was raped and throttled. Therefore it is his submission that the entire case of the prosecution is full of contradictory statements and the same cannot be relied upon for basing a conviction. Under the circumstances he submits that the accused is entitled for an order of acquittal.

22. On the other hand, the learned Addl. Government Advocate submits that the evidence of the prosecution witnesses elicited through PW.15 Dr.Kavita and also PW.4 Noorjahan regarding the act of accused in committing forcible sexual intercourse on the victim is clearly made out. He further submits that PW.19 has come to the hospital and recorded the statement of the victim on the basis of which the FIR has been registered. It is his further submission that PW.3 husband of the deceased and PW.4 Noorjahan, mother of the victim, so also PW.6 the son of the victim have supported the case of the prosecution and corroborated the version of the victim regarding the sexual assault on her and also throttling of neck of the deceased, which has resulted in her death. Therefore it is his submission that the order of conviction passed by the learned Sessions Judge is based on the

evidence on record and does not call for interference in this appeal and hence he submits that the appeal may be dismissed.

23. PW.15-Dr.Kavita is the first Medical Officer who has examined the victim on 10.3.2010, at about 9.15 a.m. PW.15 has given the evidence before the Court and also given certificate as per Ex.P.11 indicating therein that there were no external injuries on the person of the victim. The history given to PW.15 by PW.4, the mother of the victim is to the effect that Riyana was sleeping in her house alone at Garag; in the midnight around 1.00 a.m. some persons knocked the door and throttled her neck. This history given by PW.4 to the doctor is the first statement regarding the incident given to a person in authority and the said statement nowhere contains mention about commission of

rape on the victim. PW.4 being the mother of the victim would not have left mentioning the fact of rape on her daughter while mentioning the history to the doctor. She claims in her evidence before the Court that when questioning her daughter, her daughter told her that she was raped by the accused and thereafter the accused throttled her. In view of the above discrepancy in the evidence of PW.15 to whom the information was given by PW.4, the very fact of forcible sexual intercourse by the accused is not informed by PW.4 to PW.15 at the first instance when PW.4 was questioned by the Medical Officer. It is the case of the prosecution that the police PW.19 came to the hospital and recorded the statement of the victim as per Ex.P.16. PW.15 in her evidence clearly states that the patient was drowsing and that she was not in a position to speak due to drowsiness. It is also in the evidence

of PW.15 that the police did not record the statement of the victim in her presence, whereas PW.19 claims that he has recorded Ex.P.16 in KIMS Hospital. On a perusal of Ex.P.16 itself it is seen that the said document does not contain either seal of the hospital or signature of the doctor in whose presence the said statement was recorded. Under the circumstances in view of the evidence of PW.15 that the victim was not in a position to give statement Ex.P.16 which is said to be the complaint of victim Riyana/dying declaration loses its value both so far as its authenticity of making it before PW.19 and also the contents thereof. Under the circumstances we are of the considered opinion that no reliance can be placed on Ex.P.16 the statement said to have been recorded from the victim Riyana.

24. Further, on a careful consideration of the contents of Ex.P.16, the same are quite contrary to the statement of PW.4 Noorjahan to whom the victim had first disclosed about the occurrence. Both the statement of PW.4 and Ex.P.16 are contrary to each other and cannot be formed as a basis for conviction of the accused, since they suffer from inbuilt discrepancies. Further the evidence of PWs.16 and 17 who are the Scientific Officers of Forensic Science Laboratory indicates that there are no seminal stains found on the clothes of the accused to show that there was any sexual intercourse committed by the accused. So far as the seminal stains of the victim is concerned, admittedly she is a married woman and PW.3 is her husband, who lived together as husband and wife. The presence of seminal stains in a married woman's clothes or on her private body cannot be a ground

for holding that the accused has committed sexual intercourse with her unless it is proved that the accused had in his clothes seminal stains which according to PW.16 and 17 tallies with the seminal stains found on MOs.1 and 2, the clothes of the victim. In the circumstances, even on this ground the accused cannot be found to be involved in sexual intercourse with the victim.

25. The evidence of PW.6 also does not come to the aid of the prosecution, since PW.6 has not stated that either the act of rape or the act of throttling has been committed in his presence. All that he says before the Court is that accused had assaulted his mother, without giving any description of the acts as alleged by the victim or PW.4 and his evidence that he went on the date of incident in the midnight from his house near

Urdu School and saw the incident is also doubtful, having regard to his being a child witness.

26. On a careful consideration of the entire materials on record, we are of the opinion that the judgment of the trial Court is not based on the evidence on record and is perverse. Even the evidence of DWs.1 and 2, in our view, does not help the accused. However the evidence as adduced by the prosecution regarding the commission of offence is not sufficient to hold the accused guilty of the offence either of rape or of murder and he is entitled for an order of acquittal. Therefore the following order is passed:

**ORDER**

- (i) The appeal is allowed.
- (ii) The judgment of conviction dated 12.8.2011 and order of sentence dated

16.8.2011 recorded by the learned Pri. District and Sessions Judge, Dharwad, in S.C.No.91/2010 are hereby set aside and the accused is acquitted of the offences charged against him.

- (iii) The accused is in custody. He is directed to be set at liberty forthwith, if not required to be detained in any other case.

**SD/-  
JUDGE**

**SD/-  
JUDGE**

Kms/Mrk