



Crl.A.No.790 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.04.2023

CORAM :

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

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Saravanan

... Appellant

Versus

State by
The Deputy Superintendent of Police,
Pennagaram Police Station,
Dharmapuri District.
(Cr.No.387 of 2013)

... Respondent

Prayer : Criminal Appeal filed under Section 374(2) Cr.P.C, praying to set aside the conviction and sentence imposed on the appellant herein in S.No.75 of 2015 by judgement dated 01.11.2016 passed by the learned District Sessions Judge, Dharmapuri, Dharmapuri District and acquit the appellant from all charges.

For Appellant : Mr.M.R.Jothimanian
For Respondents : Mr.J.Subbaiah
Government Advocate (Crl.Side)

JUDGMENT

This Criminal Appeal has been filed to set aside the conviction and sentence imposed on the appellant herein in S.No.75 of 2015 vide judgement



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Dharmapuri District and acquit the appellant from all charges.

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2.On 22.12.2013, when P.W.12 was on duty at Pennagaram Police Station, Dharmapuri District, P.W.1 appeared before her and lodged a complaint to the effect that she is a staff nurse working in a hospital. She got acquainted with the accused. On 20.11.2013, her parents have gone away and on the said night, the accused came to her home and promised to marry her and against her will by forcing her had physical intercourse. Thereafter, the accused went to Hosur for employment promising to return back after a month, but he did not come back and upon contacting him by phone, he refused to marry her. Hence, the complaint.

3.On the strength of the said complaint, a case in Crime No.387 of 2013 was registered for the offences under Sections 417, 376 IPC read with Section 3(1) (xii) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 (hereinafter referred to as 'the SC/ST Act' in short). P.W.14, thereafter took up the case for investigation and laid a charge sheet proposing the accused guilty of the offences under Sections 417, 376 IPC and 3(1) (xii) of the SC/ST Act. The case was taken on file as P.R.C.No.8 of 2015 by the learned District Munsif Cum Judicial Magistrate, Pennagaram. After appearance of the accused

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and furnishing of copies, the case was committed to the learned District and



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Sessions Judge, Dharmapuri, where upon the matter was taken on file as S.C.No.75 of 2015. On 10.08.2015, three charges as mentioned above under Section 417, 376 IPC and Section 3(1) (xii) of the SC/ST Act were framed and upon being questioned, the accused denied the charges and stood trial.

4. So as to bring home the charges, the prosecution examined the victim / prosecutrix as P.W.1, father of the victim as P.W.2, mother of the victim as P.W.3, one Lakshmi, Mala and Jayaraman who are the residents of Pennagaram as P.W.4 to P.W.6, the Village Administrative Officer who was a witness to the confession as P.W.7, the doctor who examined the accused and issued potency certificate as P.W.8, the doctor who examined and treated P.W.1 as P.W.9, the Forensic Expert as P.W.10, the official from the Taluk Office for issuance of community certificate to P.W.1 as P.W.11, the Sub Inspector of Police who registered the F.I.R as P.W.12, the official from the concerned Taluk Office, where the community certificate was issued to the accused as P.W.13, the Investigating Officer as P.W.14.

5. On behalf of the prosecution, the complaint lodged by P.W.1 was marked as Ex.P1, the observation mahazar as Ex.P2, the admissible portion of the confession statement as Ex.P3, the seizure mahazar as Ex.P4, the potency report of the accused as Ex.P5, the accident register copy for examination of the victim



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as Ex.P6, the forensic report as Ex.P7, the community certificate of the victim as Ex.P8, the First Information Report as Ex.P9, the community certificate of the accused as Ex.P10, the rough sketch as Ex.P11. There upon, the accused was questioned under Section 313 of the Code of Criminal Procedure on the material circumstances and adverse evidence on record and the accused denied the same as false. Thereafter, no further evidence was let in on behalf of the defence.

6.The trial Court, therefore proceeded to hear the learned Public Prosecutor on behalf of the prosecution and the learned counsel for the accused and by a judgement dated 01.11.2016, agreeing with the prosecutrix, and finding that the medical evidence corroborated her version and that the accused had refused to marry P.W.1, found the accused guilty of all the offences i.e under Section 417, 376 IPC and Section 3(1) (xii) of the SC/ST Act and for the offence under Section 417 IPC imposed rigorous imprisonment for a period of one year and for the offence under Section 376 IPC imposed rigorous imprisonment for a period of seven years and a fine of Rs.5,000/- in default of payment of fine to undergo rigorous imprisonment for six months and for the offence under Section 3(1) (xii) of the SC/ST Act imposed a sentence of one year rigorous imprisonment and a fine of Rs.1,000/- and in default to undergo one month rigorous imprisonment. Aggrieved by the same, the present appeal is laid before this Court.



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7. Heard Mr.M.R.Jothimanian, the learned counsel for the appellant and Mr.J.Subbaiah, the learned Government Advocate (Crl.Side) appearing on behalf of the prosecution.

8.Mr.M.R.Jothimanian taking this Court through the evidence of the prosecutrix, P.W.1 would contend that as per her chief examination as well as the earliest complaint lodged by her, she has categorically mentioned that in view of the promise of marriage and fixing of the date of the marriage, on the date of occurrence i.e 20.11.2013, she did not object to the physical relationship. But however, when she was taken to the doctor, she had categorically informed him that they have had intercourses multiple times. Coupled with the said admission and also the finding of the doctor and her admission in the cross examination that they were in a relationship for about a year or so, it can be seen that the version of the prosecutrix as if the marriage date was fixed and only on the promise and the misconception that the accused would marry her, she had not resisted the intercourse is disproved. Once it is disproved that the consent was not under any misconception and it was due to the mutual relationship between the parties, the same would not amount to an offence under Section 376 IPC. In support of his submissions, the learned counsel relied upon judgments of the Hon'ble Supreme Court of India in *Uday vs. State of Karnataka*, reported in (2003) 4 SCC 46,



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(2019) 9 SCC 608, Dr.Dhruvaram Murlidhar Sonar vs. State of Maharashtra and Others, reported in (2019) 18 SCC 191, Maheshwar Tigga vs. State of Jharkhand, reported in (2020) 10 SCC 108, Parkash Chand vs. State of Himachal Pradesh, reported in (2019) 5 SCC 628, Mandar Deepak Pawar vs. The State of Maharashtra and Another (Criminal Appeal No(s).442 of 2022, Judgement dated 27.07.2022). He also relied upon the judgment of this Court in Madhalaimuthu and Another vs. State rep. by the Inspector of Police, reported in (2022) 2 MLJ (Crl) 192.

9.On the same strength of submissions, the learned counsel would submit that when two consenting adults namely the accused aged about 23 years and the victim aged about 22 years were in a relationship and in the said context, if they also indulged in a physical relationship, the offence under Section 417 IPC is also not made out. The learned counsel would submit that once the other offences are not made out, absolutely there is no question of any offence under Section 3(1) (xii) of the SC/ST Act. In any event, the offence is charged without even any alteration report being filed on the file of the prosecution and without following the Rule 7 of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Rules, 1995. Therefore, he would submit that the appeal deserves to be allowed.



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10.Per contra, Mr.J.Subbaiah, the learned Government Advocate (Crl.Side)

would submit that it is clear from the evidence of P.W.1 that she consented to the act only on a promise that the accused would marry her. The same is clear in the complaint lodged by her as well as in her chief examination. Even in the cross examination, she stood to her ground. Her evidence is also corroborated by her own family members, P.W.2 and P.W.3 and the others residing in the locality. It must be seen in the instant case that the defence of the accused is that a false case is foisted on him because of the other dispute between the father of the victim girl and the family of the accused. The said fact is falsified by examining P.W.4 to P.W.6, the independent witnesses who were residents of the locality and who have seen the accused visiting the house of the victim. Therefore, in this case, when the defence taken is one of absolute false case and when the prosecution has proved by examining the victim and by the corroborating evidence of independent witnesses coupled with the medical evidence on record by which it is established that on examination, it is found that the girl had physical intercourse, then the contentions of the learned counsel for the appellant is liable to be rejected. In any event, only on the promise to marry, the victim allowed the present act and therefore, it was only on the misconception that the accused would marry her and therefore, it cannot be treated as a consent within the definition of Section 90 IPC. He would submit that on a cumulative reading of all



indulged in the same only because the victim belongs to Scheduled Caste and therefore, the other offence under Section 3 (1)(xii) of the SC/ST Act is also made out and therefore, he prays for dismissal of the appeal.

11. I have considered the rival submissions made on either side and perused the materials records of the case.

12. Before proceeding to the facts of this case, since the learned counsel for the appellant had cited the above judgments in his favour to generally argue that whenever two eligible adults are in a relationship and that they have intercourse during the course of the relationship and that when they belong to different castes, knowing fully well that there will be resistance to their marriage and if the intercourse is still made, that would not amount to an offence of rape. In this connection, even though in the cases cited by the learned counsel for the appellant on some occasions when belatedly the issue was raised the F.I.R is quashed and the accused are acquitted, in my opinion, the law on the point has been laid down by the Hon'ble Supreme Court of India in categorical terms by considering Section 90 IPC, Section 375 IPC and all the earlier judgments in the judgment in ***Uday vs. State of Karnataka*** cited supra. It is essential to extract Paragraph 21 which reads as hereunder:



"21.It is therefore appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no straitjacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the courts provide at best guidance to the judicial mind while considering a question of consent, but the court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was volunatry, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fat that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them."

13. Therefore, it can be seen that the Hon'ble Supreme Court of India has categorically laid down that irrespective of whether there is a love affair or relationship or a promise to marriage, the courts have to consider the facts and



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circumstances of each case and to objectively decide whether the consent on the facts of the case was under misconception or not. If the consent is under misconception, then it would not be a valid consent as per Section 90 IPC and in that scenario, would amount to an offence under Section 376 IPC. That being the law on the position, the other observations are all only on the facts and circumstances of the case that there was opposition on account of caste differences etc., Merely because there is a caste difference, this Court cannot come to a conclusion that the girl cannot reasonably expect the person to marry. It is to be seen that the said observation is made with reference to the said incident happened in the year 1992 and presently, there are many parents who accept intercaste marriages and it cannot be laid down as a general proposition that whenever there is a caste difference, the girl should be aware that the marriage was not possible or that there will be opposition for the marriage.

14. Now applying the ratio of the said judgment to the facts of the case, this Court has to decide on two issues: (i) Whether the prosecutrix namely P.W.1 was reasonably under a misconception of the fact that the accused was genuinely intending to marry her and; (ii) the person doing the act namely the accused who should also at the material time should have reason to believe that only on such misconception created by him, the victim is consenting to the act. In this case, the

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entire original complaint reads as hereunder:



"நான் அண்ணாநகரில் என தாய் தந்தையாருடன் குடியிருந்து வருகிறேன். எனக்கு 20 வயது ஆகியது. ஆதிதிராவிடர் வகுப்பைச் சேர்ந்தவர் நான் நாசிங் முடித்துவிட்டு தருமபுரி தங்கம் மருத்துவமனையில் 5 மாதமாக நான் வேலை செய்து வருகிறேன். ஏர்கோல்பட்டியை சேர்ந்த கோவிந்தராஜ் மகன் சரவணன் வன்னியர் வகுப்பைச் சேர்ந்தவர். நாங்கள் இருவரும் பார்த்து பேசிக் கொள்வோம். 20.11.2013-ம் தேதி என அப்பா, அம்மா ஊருக்கு சென்றுவிட்டார்கள். அன்று இரவு சரவணன் எங்கள் வீட்டிற்கு வந்து திருமணம் செய்து கொள்வதாக ஆசை வார்த்தை கூறி என விருப்பத்திற்கு மாறாக கட்டாயப்படுத்தி உடலுறவு கொண்டான் ஓசூருக்கு வேலைக்கு போய்விட்டு ஒரு மாதத்தில் வருகிறேன் என்று சொல்லி சென்றவன் வரவில்லை மேற்படி சரவணனுக்கு போன் மூலம் தொடர்பு கொண்டு திருமணம் செய்து கொள்ளும்படி கேட்டதற்கு மறுத்துவிட்டான். எனக்கு திருமணம் செய்து கொள்கிறேன் என்று ஆசை வார்த்தை கூறி விருப்பத்திற்கு மாறாக கட்டாயப்படுத்தி உடலுறவு கொண்ட சரவணன் மீது நடவடிக்கை எடுக்கும்படி கேட்டுக்கொள்கிறேன்."

15. In the chief examination, the victim has deposed as hereunder:

"நான் தற்போது பென்னாகரத்தில் வசித்து வருகிறேன். நாசிங் படித்து வருகிறேன். ஆஜர் எதிரியை தெரியும். தங்கம் மருத்துவமனையில் நான் பணிபுரிந்தபோது எதிரிக்கும், எனக்கும் பழக்கம் ஏற்பட்டு என்னை திருமணம் செய்து கொள்வதாக ஒருவருடமாக சொல்லியிருந்தார். எதிரியின் அப்பாவுக்கும் இது சம்மந்தமாக தெரியும், என்னுடைய வீட்டிற்கும் தெரியும். எதிரியின் தாய்மாமாவை எங்கள் வீட்டிற்கு கூட்டி வந்தார், எதிரியின் வீட்டிற்கு தெரியாமல் திருமணம் செய்து வைப்பதாக சொன்னார்."



ஆஜர் எதிரியும், அவரது தாய்மாமாவும் ஒரு தேதியை குறிப்பிட்டு திருமணம் செய்து வைப்பதாக கூறினார்கள். 20.11.13 அன்று என் வீட்டில் என் பெற்றோர் இல்லாத சமயத்தில் மாலை என் வீட்டிற்கு வந்து என்னுடன் அங்கேயே தங்கி உடலுறவு கொண்டார். விடியற்காலை சொல்லாமலேயே சென்று விட்டார். அன்று என் வீட்டில் தங்கியிருந்தபோது ஆஜர் எதிரியுடன் என் அக்கா, நான் எல்லோரும் எடுத்துக்கொண்ட போட்டோக்களை அழித்து விட்டு சென்று விட்டார். நான் மாறுநாள் பார்த்து விட்டு போன் செய்தபோது போன் எடுக்கவில்லை. அதற்கு அடுத்த நாள் நான் போன் செய்து கேட்டபோது திருமணம் செய்து கொள்ள முடியாது என்றும், தன் சொந்தத்திலேயே பெண் இருப்பதாகவும், தன் பெற்றோர் திருமணம் செய்து வைக்க போவதாக சொன்னார்கள் என்று சொன்னார்."

16. But, however when she was taken for a medical examination, she had divulged and it is recorded by the doctor as below:

"Nature of injury and treatment: Alleged to have sexual contacts 4-5 times previously no H/o pain or discharge PV."

17. In an offence of this nature, this Court has to go only by the version of the prosecutrix. If the prosecutrix evidence is consistent, the same has to be believed and the accused will be liable for punishment. But, however in this case, while the version of the P.W.1 itself is not clear and categorical as to when the alleged incident happened and whether it happened once or more than once and

when in the complaint and in the chief examination, it is deposed that only



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20.11.2013 on the strength of the promise of the marriage, a tentative date being

fixed, under misconception she consented to the act, factually she does not stand up to her version and a different account is given to the doctor. As a matter of fact, the medical evidence is also consistent to the version given before the doctor of having had physical intercourse on more than one occasion. In that view of the matter, it cannot be without reasonable doubt concluded on the facts of the instant case that the alleged non resistance was only because of the misconception created by the accused on the particular date by promising to marry the victim. In the absence of the same, when the act was consensual in nature, the act of the victim amounted to consent under Section 90 IPC and as such, I am of the view that the offence under Section 376 IPC would not be made out in the facts and circumstances of the instant case. As a matter of fact, these aspects were though noted by the trial Court in the Paragraphs recording the gist of evidence and the arguments of the learned counsel for the accused but are not specifically considered and answered by the trial Court. Therefore, the judgment of the trial inasmuch as it finds the accused guilty for the offence under Section 376 IPC is unsustainable.

18. For the same findings, the offence under Section 417 IPC will not also be made out as there is no clear and categorical evidence on record to come to the conclusion as to whether at the earliest point of time when they started having



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physical relationship, a promise was made and if so, whether the promise was knowingly as a false promise or a promise which could not be kept at a later point of time. Therefore, the judgment of the trial Court in respect of the offence under Section 417 IPC is also unsustainable. Since both the other offences are not made out, for the selfsame reason, it cannot be concluded that the accused was in a position to dominate the will of the prosecutrix and that he used his position to exploit her sexually. The purport of pre-amended Section 3(1) (xii) of the SC/ST Act was itself is in context of the persons holding a position and using that position to sexually exploit the Scheduled Caste women, which will not even be applicable to the conspectus of the facts of the present case. Therefore, the finding of guilt even in respect of Section 3(1) (xii) of the SC/ST Act is also unsustainable.

19.In the result, this Criminal Appeal stands allowed. The conviction and sentence imposed by judgment dated 01.11.2016 in S.C.No.75 of 2015 by the learned Principal Sessions Judge, Dharmapuri stands set aside and the fine amount if any paid by the appellant shall be refunded.

26.04.2023

Index : yes/no

Speaking order/Non-speaking order

Neutral Citation: Yes

Anu

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To

1.The District Sessions Judge, Dharmapuri, Dharmapuri District

2.The Deputy Superintendent of Police,
Pennagaram Police Station,
Dharmapuri District.

3.The Public Prosecutor,
Madras High Court.



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D.BHARATHA CHAKRAVARTHY, J.

Anu

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