

Bail Slip
Crl A.171/2007

That the Appellant herein/Accused riz M.Theerthagiri, was directed to be released an bail as per the order of this Court dated 13.06.2007 and made in Mp.No.2/2007 in Crl.A.No.171/2007

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 13-10-2015

CORAM:

THE HONOURABLE MR. JUSTICE A. SELVAM

Criminal Appeal No.171 of 2007

1. Theerthagiri
2. K. Mariappan
3. K. DuraiAppellants/Accused 1 to 3

Vs.

State
rep. by the Inspector of Police,
All Women Police Station
Harur,Lr.No.12/2004Respondent/Complainant

Criminal Appeal under Section 374, Cr.P.C., against the judgment of conviction and sentence imposed upon them by the learned Additional Sessions Judge (Fast Track Court) Dharmapuri made in S.C.No.139 of 2005 dated 19-01-2007.

For appellant :: Mr. A.K. Kumarasamy for
Mr. P. Vishnu

For respondent :: Mr. P. Govindarajan,
Additional Public Prosecutor

JUDGMENT

In the present case, an inamorato, after a long span of time, has been brought under penumbra of law and forced to face a criminal trial.

2. The contraction of the case of the prosecution is, both the prosecutrix and first accused are living in Ellapudaiyampatti Village. In the year 2002, on Chithra Pournami day (Full Moon day in the Tamil month of Chithirai (in the month of April and May)) at about 9:00p.m., the first accused has directed the prosecutrix to come to a Mango grove and uttered attractive words and thereby, promised to marry her and subsequently, without her consent, has deflowered her. Due to his overt acts, the prosecutrix has become pregnant. The first accused has firmly refused to marry her. On 01-05-2004, at about 7:30 p.m., in the same Village, near Mariamman Temple, the accused Nos.2 and 3 have threatened the prosecutrix by way of saying that they would abort her pregnancy. On the same day, the prosecutrix has given a complaint to the Inspector of Police, registered in Crime No.12 of 2004. The complaint given by the prosecutrix has been marked in Ex-P4.

3. On receipt of Ex-P4, the Investigating Officer viz., P.W.9 has taken up investigation, examined connected witnesses and also made arrangements to conduct potential test to the first accused and accordingly, Dr.Ravishankar (P.W.4) has conducted the same; the prosecutrix has been examined by Dr. Malarvizhi (P.W.1). After completing investigation, P.W.9 has laid a final report on the file of the Judicial Magistrate, Harur and the same has been taken on file in P.R.C.No.8 of 2005.

4. The Judicial Magistrate, Harur after considering the facts that the offences alleged to have been committed by all the accused are triable by the Sessions Court, has committed the case to the Sessions Court and the same has been taken on file in Sessions Case No.139 of 2005 and subsequently, made over to the Trial Court viz., Additional District and Sessions Court/Fast Track Court, Dharmapuri.

5. The Trial Court after hearing arguments of both sides and upon perusing the relevant documents, has framed first charge against the first accused under Section 376, second charge against him under Section 417 and third charge against accused Nos.2 and 3 under Section 506(i), IPC and the same had been read over and explained to them. The accused have denied the charges and claimed to be tried.

6. On the side of the prosecution, P.Ws.1 to 9 have been examined and Exs-P1 to P12 have been marked.

7. When the accused have been questioned under Section 313, Cr.P.C., as respects the incriminating materials available in evidence against them, they denied their complicity in the crime. No oral and documentary evidence

have been let in on the side of the accused.

8. The Trial Court after hearing arguments of both sides and upon perusing the relevant evidence available on record has found the first accused guilty under Section 376, IPC and sentenced him to undergo seven years' RI and also imposed a fine of Rs.1000/- with usual default clause and he has been also found guilty under Section 417, IPC and sentenced to undergo one year RI. The accused Nos.2 and 3 are sentenced to undergo one year RI under Section 506(i), IPC. Against the convictions and sentences passed by the Trial Court, the present criminal appeal has been filed at the instance of the accused, as appellant.

9. The sum and substance of the case of the prosecution is that both the prosecutrix and first accused are living in a Village by name Ellapudaiyampatti. In the year 2002, on the Full Moon day of April at about 9:00p.m., the first accused has directed the prosecutrix to come to a Mango grove and made false promise of marrying her and without her consent, he deflowered her and due to his overt acts, she has become pregnant and subsequently, refused to marry her. On 01-05-2004, at about 7:30p.m., in the same Village near Mariamman Temple, the accused Nos.2 and 3 have threatened the prosecutrix that they would abort her pregnancy.

10. The linchpin of the case of the prosecution is the complaint alleged to have been given by the prosecutrix and the same have been marked as Ex-P4. In Ex-P4, the entire episode which has had happened betwixt the prosecutrix and first accused has been narrated. The prosecutrix has been examined as P.W.3. The concerned Doctor, who examined the prosecutrix has been examined as P.W.1 and the Doctor, who conducted potential test to the first accused is examined as P.W.4. The Trial Court after believing the evidence given by the prosecutrix coupled with Ex-P4, and also evidence given by P.Ws.1 and 4 have found the first accused guilty under Sections 376 and 417, IPC and found the accused Nos.2 and 3 guilty under Section 506(i), IPC and imposed sentences as mentioned supra.

11. The learned counsel appearing for the appellants has meticulously contended that in the instant case, the prosecutrix and first accused have loved each other and only due to their love they have had frequent sexual intercourse and due to that, the prosecutrix has become pregnant and in spite of best efforts made by the first accused, he has not been able to marry the prosecutrix. Under the said circumstances, Sections 376 and 417, IPC cannot be invoked against the first accused and since the said Sections cannot be invoked against the first accused, the charge framed

against the accused Nos.2 and 3 is also false and the Trial Court without assessing the available evidence properly has erroneously invited convictions and sentences against the appellants/accused and the same are liable to be set aside.

12. In order to remonstrate the contentions put forth on the side of the appellants/accused, the learned Additional Public Prosecutor has also equally contended that in the instant case, in the year 2002 during Full Moon day of April, the prosecutrix has been forced to come to a Mango grove by the first accused and by way of giving false promise of marrying her, without her consent, he deflowered her and due to his overt acts, the prosecutrix has become pregnant and subsequently, refused to marry her and on 01-05-2004, the accused Nos.2 and 3 have threatened the prosecutrix by way of saying that they would abort her pregnancy and for the purpose of proving the charges levelled against all the accused, the prosecutrix has been examined as P.W.3 and her father has been examined as P.W.5 and the concerned Doctors have given clear medical evidence. The Trial Court after considering the plentitude of evidence available on the side of the prosecution has rightly found the first accused guilty under Sections 376 and 417, IPC and also rightly found the accused Nos.2 and 3 guilty under Section 506(i), IPC and therefore, the convictions and sentences passed by the Trial Court do not warrant interference.

13. On the basis of divergent submissions made on either side, the Court has to analyse the following aspects:

(a) Whether the prosecutrix and first accused have loved each other ?

(b) Whether the first accused has given a promise of marrying the prosecutrix ? and

(c) Whether the first accused has committed offences of rape and cheating ?

For analysing the above aspects, the Court has to carefully and dispassionately look into the evidence given by the prosecutrix with utmost circumspection.

14. The prosecutrix has been examined as P.W.3. Even during the course of chief examination, she would say that on 26-04-2002, during evening hours, the first accused has directed her to come to a Mango grove, which belongs to Venkatesan and accordingly, she has gone there at about 9 p.m., and the first accused has promised to marry her by way of placing his hand on her head and subsequently, both of them have had carnal copulation. Further, she has stated that on one occasion some relatives of her have seen the first accused and her in a compromising position and they warned her and evenafter their warning, both of them have done the same thing. Further, during the course of cross-examination, she

would say that even from inception she knows very well that her marriage with first accused would not be possible and due to that, she has not divulged her relationship with him to anybody.

15. The specific case of the prosecution is that in the year 2002, during the Full Moon day of April, at about 9:00 p.m., in a Mango grove, the first accused by way of giving false promise of marrying the prosecutrix, has deflowered her and due to that, she has become pregnant and subsequently, the first accused has refused to marry her. But the evidence given by the prosecutrix is otherwise. Even at the risk of repetition, the Court would like to say that only with the consent of the prosecutrix both of them have had carnal copulation on so many occasions. Further, the prosecutrix knows very well even from inception that her marriage with the first accused would not be possible. Under the said circumstances, the Court could very well come to a conclusion that the prosecutrix has not given proper/trustworthy evidence so as to attract penal provisions of Section 376 and 417, IPC.

16. It is seen from the evidence that due to illicit intimacy of the prosecutrix with the first accused, she has become pregnant and subsequently given birth to a child. From a close reading of her entire evidence it is pellucid that she has had sexual intercourse with the first accused out of her own volition. Since very often she has had coition with the first accused on her own will and pleasure, the first accused cannot be muttered with liability.

17. It is true that due to illicit conduct of the prosecutrix with the first accused, she has been forced to deliver a child. Since the prosecutrix has also lent her mind for having sexual intercourse, all of a sudden, the first accused cannot be brought under law. In fact, due to illicit conduct of the prosecutrix with the first accused, as stated earlier, she has given birth to a child and that itself has created a permanent scar or impudicity in her life and due to that, the first accused cannot be punished under the charges mentioned supra.

18. The gnome is that, "if a person has done anything improvidently without thinking about eventuality or aftermath he or she has to repent for it and he/she cannot take shelter under law."

19. The learned counsel appearing for the appellant/accused has befittingly drawn the attention of the Court to the following decisions:

(a) In 2005 SCC (Cri) 253 (Deelip Singh Vs. State of Bihar), the Honourable Supreme Court has held that consent

given by a women believing the man's promise to marry her would fall within the expression "without her consent" only if it is established that from the very inception the man never really intended to marry her and the promise was a mere hoax.

(b) In AIR 2003 SC 1639 (Uday Vs. State of Karnataka), the Honourable Supreme Court has held that the accused expressed love and promise to marry prosecutrix. On a later date, the prosecutrix became aware of the fact that they belonged to different castes and proposal of their marriage will be opposed by their family members. Yet, prosecutrix started cohabiting with the accused consciously and becomes pregnant. Consent given by the prosecutrix to sexual intercourse cannot be said to have been given under misconception of fact i.e., promise to marry, but because she also desired for it; False promise is not a fact.

20. In the instant case, as narrated earlier, the specific evidence given by the prosecutrix is that from inception she knows very well that her marriage with the first accused would not be possible. Therefore, her mind is very clear with regard to the said aspect. Even though her mind is clear, only for the purpose of quenching lust, she has had coition with the first accused and consequently, become pregnant and thereafter, delivered a child. Therefore, it is quite clear that the prosecutrix is also a consenting party for having sexual intercourse with the first accused and further in one place, she would say that with an utmost willingness and ambition, she has had carnal copulation with him. Therefore, the dictum given by the Honourable Supreme Court in AIR 2003 SC 1613(cited supra)is squarely applicable to the facts and circumstances of the present case.

21. At this juncture, an inept attempt has been made by the learned Additional Public Prosecutor by way of quoting the decision reported in 2015 (42) SCD 316(Vinod Kumar Vs. State of Punjab) wherein the Honourable Supreme Court has held that,

" We make it abundantly clear that if a witness is present in court he must be examined on that day. The court must know that most of the witnesses could attend the court only at heavy cost to them, after keeping aside their own avocation...."

In the instant case, the prosecutrix has been examined in chief, on 12-12-2006 and subsequently, she has been cross-examined on 19-12-2006. The fatuous attempt made by the learned Additional Public Prosecutor is that after giving chief examination, the prosecutrix might have been gained over by the accused and due to that, she has given favourable evidence in cross-examination.

22. As adverted to earlier, this Court has carefully analysed the entire evidence given by the prosecutrix and ultimately, found that even during the course of chief-examination, she has given favourable evidence to the accused in so many places. It is not an adulation to say that her chief examination itself would be sufficient to reject the entire case of the prosecution. Therefore, the mere attempt made on the side of the prosecution cannot be accepted, whereas the contentions put forth on the side of the appellants/accused with regard to the alleged offences punishable under Sections 376 and 417, IPC are really having acceptable force.

23. Now, the Court has to look into the offence alleged to have been committed by the accused Nos.2 and 3. The specific evidence of the prosecution that on 01-05-2004, in Ellapudaiyampatti Village, during evening hours, near Mariamma Temple, the accused Nos.2 and 3 have threatened the prosecutrix by way of saying that they would abort her pregnancy. The episode in between the prosecutrix and first accused has become started even in the year 2002 and continued for a long time. Ex-P4 has been given on 01-05-2004. It is true that for the purpose of proving the said charge, the prosecutrix and her father have given such kind of evidence. Since after a long gap of two years, Ex-P4 has come into existence, the Court can come to a conclusion that a third charge framed against the accused Nos.2 and 3 is nothing but farce and the same cannot be accepted.

24. It has already been pointed out that even as per the evidence given by the prosecutrix, in chief examination, the Court can easily come to a conclusion that only for quenching lust, the prosecutrix has had frequent sexual intercourse with the first accused and due to that, she has become pregnant and subsequently, given birth to a child. Under the said circumstances, the first accused cannot be punished under Sections 376 and 417, IPC.

25. The Trial Court without perpendig the evidence given by the prosecutrix has erroneously found the first accused guilty under Sections 376 and 417, IPC and likewise, without considering the unexplained delay of giving Ex-P4, the Trial Court has erroneously found the accused Nos.2 and 3 guilty under Section 506(i), IPC. Therefore, viewing from any angle, the convictions and sentences passed by the Trial Court are not factually and legally sustainable and the same are liable to be set aside.

In fine, the criminal appeal is allowed. The convictions and sentences passed by the Trial Court in S.C.No. 139 of 2005 are set aside. The appellants/accused are acquitted. Bail

bonds, if any, executed by them shall stand cancelled. Fine amount, if any, paid by the first accused is ordered to be refunded forthwith.

sd/-

ASSISTANT REGISTRAR (CS-II)

/ TRUE COPY /

SUB-ASSISTANT REGISTRAR

glp

To

1. The Inspector of Police,
All Women Police Station, Harur
2. The Additional Sessions Judge (Fast Track Court)
Dharmapuri .
3. -do thro The Principal Sessions Judge, Dharmapuri
4. The Judicial Magistrate, Harur
5. -do thro The Chief Judicial Magistrate, Dharmapuri @
Krishnagiri
6. The Superintendent ,
Central prison, Vellore
7. The District Collector, Dharmapuri @ Krishnagiri
8. The Public Prosecutor
High Court, Madras
9. The Director General of Police, Chennai

+3CC to M/S.N.Narayanaswamy Advocate. Sr.NO.56225

Criminal Appeal No.171 of 2007

CO-UG

JD 20/10/2015