

BAIL SLIP

That the Appellant/Accused namely Oomaidurai, S/o.Murugesan was directed to be released on bail as per the Order of this Court dated 20.07.2007 and made in M.P.No.1 of 2007 in Crl.A.No.192 of 2007.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31.08.2015

CORAM:

THE HONOURABLE MR.JUSTICE A.SELVAM

Criminal Appeal No.192 of 2007
and Crl.M.P.No.1 of 2007

Oomaidurai

... Appellant/Accused

vs.

State represented by
Inspector of Police
Arumbavur Circle
Kaikalathur Police Station
Perambalur District
Crime No.126/2003

...Respondent

Criminal Appeal filed under Section 374 of Criminal Procedure Code, 1973 against the judgment in S.C.No.139 of 2005 on the file of Sessions Judge, Mahila Court, Perambalur District, dated 16th day of February, 2007.

For appellant : Mr.C.Selvaraju, Senior Counsel
for M/s.C.S.Associates

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

JUDGMENT

The convictions and sentences dated 16th day of February, 2007 passed in Sessions Case No.139 of 2005 by the Mahila Court, Perambalur are being challenged in the present Criminal Appeal.

2. The case of the prosecution is that the accused is closely related to the family of prosecutrix and he used to make frequent visit to her house and prior to one year from 17.06.2003, while the prosecutrix has been in her house, the accused has suddenly entered into the house of the prosecutrix, hugged her and after some time, gagged her mouth and raped her by way of giving false promise of marry her. The accused has failed to keep up his promise. The prosecutrix has become pregnant. After such occurrence, the

prosecutrix has given a complaint and the same has been registered in Crime No.126 of 2003. The complaint alleged to have been given by the prosecutrix has been marked as Ex.P.1.

3. On receipt of Ex.P.1, the Investigating Officer-P.W.11 has taken up investigation. He examined the connected witnesses, also made arrangements to conduct medical examination to the prosecutrix as well as the accused. After his transfer, his successor in Office, viz., P.W.13 has continued investigation and after completing the same, laid a final report on the file of Judicial Magistrate Court, Perambalur and the same has been taken on file in P.R.C.No.7/2005.

4. The Judicial Magistrate, Perambalur, after considering the facts that the offences alleged to have been committed by the accused are triable by the Sessions Court has committed the case to the trial court and the same has been taken on file in Sessions Case No.139 of 2005.

5. The trial court, after hearing both sides and upon perusing the relevant records has framed a first charge against the accused under Section 376 of Indian Penal Code, second charge against him under Section 417 of the Indian Penal Code (hereinafter called as "IPC") and the same have been read over and explained to him. The accused has denied charges and claimed to be tried.

6. On the side of the prosecution, Prosecution Witnesses 1 to 14 have been examined and Exhibits P.1 to P.13 have been marked.

7. When the accused has been questioned under Section 313 of the Code of Criminal Procedure, 1973 as respects the incriminating materials available in evidence against him, he denied his complicity in the crime.

8. On the side of the accused, Defence side witness viz., D.W.1 has been examined.

9. The trial court, after pondering the evidence available on record has found the accused guilty under Section 376 of the IPC and sentenced him to undergo 7 years rigorous imprisonment and also imposed a fine of Rs.1000/- with usual default clause; he has also been found guilty under Section 417 of the IPC and sentenced to undergo 6 months rigorous imprisonment and also imposed a fine of Rs.200/- with usual default clause. Against the convictions and sentences passed by the trial court, the present criminal appeal has been preferred at the instance of the appellant as accused.

10. The learned Senior counsel appearing for the appellant/accused has vehemently contended that the prosecutrix has got birth on 06.06.1986 and Ex.P.1 has come into existence on 17.06.2003 and both the prosecutrix as well as the accused are closely related to each other and only with her consent, the accused

has had coition with the prosecutrix and subsequently the accused has failed to marry the prosecutrix due to various reasons and since the alleged coition has taken place with the consent of the prosecutrix, the accused cannot be mulcted with liability either under Section 376 or under Section 417 of the IPC and the trial court, without considering the nature of defence taken on the side of the appellant/accused has erroneously found him guilty under the said sections and therefore, the convictions and sentences passed by the trial court are liable to be interfered with.

11. In support of the contentions put forth on the side of the appellant/accused, the following decisions are relied upon:-

(i) In the decision reported in AIR 2003 Supreme Court 1639 [Uday Vs. State of Karnataka], the Hon'ble Supreme Court has observed as follows:-

"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. There is no strait jacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. 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 voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the 1980 Pat 242 (FB) in view of two decisions of this Court in Gowali Charan Vs. Surendra Kumar Khandani and others (1987 Suppl SCC 578) and Satyanarain Kandu Vs. Smt. Hemlata and others (1996 PLR 110 SC) both by two-Judge Bench and as such has referred the matter to a Bench of three learned Judges. It is in this way, this matter has come up before us. Learned counsel for the appellant urged that view taken by the High Court is in conflict with the two decisions of this Court and, therefore, the judgment under challenge deserved to be set aside. We do not find any merit in the argument for the reasons stated hereinafter."

(ii) In the case of Deepak Gulati Vs. State of Haryana [Criminal Appeal No.2322 of 2010] dated 20th May, 2013, the Hon'ble Supreme Court has held as follows:-

" 16. came to the conclusion that in the event that the accused's promise is not false and has not been made with the sole intention to seduce the

prosecutrix to indulge in sexual acts, such an act(s) would not amount to rape. Thus, the same would only hold that where the prosecutrix, under a misconception of fact to the extent that the accused is likely to marry her, submits to the lust of the accused, such a fraudulent act cannot be said to be consensual, so far as the offence of the accused is concerned."

(iii) In 2010 (2) CTC 723 [Swami @ Ramakrishnan Vs. State by Inspector of Police, G2 Puthumanthu Police Station, Nilgiris District], this Court has held that if a prosecutrix has attained the age of 17 to 18 years, consent has been given for having sexual intercourse, the act of the accused would not come within the purview of Section 376 of the IPC.

(iv) In the case of Jagan @ Jagannathan Vs. The State, Rep. By the Inspector of Police, Uthiramerur Police Station, Kancheepuram District [Crl.Appeal No.1119 of 2004, order dated 14.02.2011], this Court has taken a view that the prosecutrix has attained the age of 18 to 19 years; consent has been given for having sexual intercourse and therefore, the act of the accused would not come within the Section of 376 of the IPC.

12. In order to supplant the contention put forth on the side of the appellant/accused, the learned Additional Public Prosecutor has meticulously contended that the prosecutrix has got birth on 06.06.1986 and further she has given clear evidence to the effect that at the time of occurrence, she has attained only 15 years of age; under the said circumstances, as per Section 375 of the IPC, the act of the accused would come within the contour of Section 376 of the IPC and further as per Section 90 of the IPC, the consent of the prosecutrix has been obtained under misconception and the trial court, after considering the overwhelming evidence available on the side of the prosecution has rightly found the appellant/accused guilty under Sections 376 and 417 of the IPC and therefore, the convictions and sentences passed by the trial court do not warrant interference.

13. On the basis of the diverging submissions made on either side, the court has to analyse as to whether the accused has had coitus with the prosecutrix with her consent and the same would not come within the purview of Section 376 of the IPC.

14. On the side of the prosecution, the School Transfer Certificate of the prosecutrix has been marked as Ex.P.11, wherein, it has been candidly stated that the prosecutrix has got birth on 06.06.1986. The prosecutrix has been examined as P.W.1 and her specific evidence is that she studied upto 5th Standard and at the time of occurrence, she has attained only 15 years of age.

15. At this juncture, it would be more useful to look into the

evidence given by P.W.8-Dr.Prem Sakunthala. The specific evidence given by P.W.8 is that on 17.06.2003, she physically examined the prosecutrix and she opined that her age is 16 to 17 years.

16. From the cumulative reading of the evidence given by the prosecutrix as well as P.W.8, the court can unflinchingly come to a conclusion that the prosecutrix has not attained the age of 16 at the time of occurrence.

17. The specific case put forth on the side of the prosecution is that prior to one year from 17.06.2003, the accused has suddenly barged into the house of the prosecutrix, gagged her mouth and deflowered her.

18. Considering the fact that on the date of occurrence, the prosecutrix has not attained the age of 16, even she has given her consent, the act of the accused would come within the purview of Section 376 of the IPC.

19. It is also seen from the records that that due to coition, the prosecutrix has become pregnant and subsequently given birth to a child.

20. As pointed out earlier, in all the decisions cited by the learned counsel appearing for the appellant/accused, the concerned prosecutrix has attained 17 years of age. Under the said circumstances, the Hon'ble Supreme Court and this Court have come to a definite conclusion that if consent is there on the side of the concerned prosecutrix, the act of the accused would not come within the purview of Section 376 of the IPC.

21. Whereas, the position in the present case is totally inverse. It has already been pointed out that at the time of occurrence, the prosecutrix has not attained the age of 16 and therefore, the act of the accused would come within the purview of Section 376 of the IPC. Therefore, viewing from any angle, the contentions put forth on the side of the appellant/accused cannot be accepted.

22. The trial court, after considering the primordial evidence available on record has rightly found the accused guilty under Section 376 and 417 of the IPC.

23. In view of the discussion made earlier, this Court has not found any acceptable force in the contention put forth on the side of the appellant/accused.

24. The learned counsel appearing for the appellant/accused has advanced his residual argument to the effect that considering the age of the appellant/accused, some leniency can be shown in awarding sentence.

25. Considering the heinous nature of crime, no leniency can be given to the appellant/accused.

In fine, this Criminal Appeal deserves to be dismissed and accordingly, the same is dismissed. The convictions and sentences passed in Sessions Case No.139 of 2005 by the Mahila Court, Perambalur are confirmed.

It is seen from the records that the appellant/accused is at large and therefore, the trial court is directed to take appropriate steps so as to immure him in prison to serve out the remaining period of sentence. Consequently, connected MP is closed.

Sd/-

Assistant Registrar

True Copy

Sub Assistant Registrar

nvsri

To

1.The Inspector of Police
Arumbavur Circle
Kaikalathur Police Station
Perambalur District
Crime No.126/2003

2.The Sessions Judge, Mahila Court,
Perambalur District.

3.The Judicial Magistrate, Perambalur.

4.The Addl.Public Prosecutor, High Court, Madras.

5. The Chief Judicial Magistrate, Perambalur.

6. The Superintendent, Central Prison, Trichy.

1 cc to M/s.C.S.Associates , Advocate Sr.No.46418

Crl.A.No.192 of 2007

SVI (CO)
PMK.28.9.2015

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