

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.03.2015

CORAM

THE HONOURABLE MS.JUSTICE R.MALA

Crl.A.No.304 of 2007

Date of Reserving the Judgment 25.03.2015	Date of Pronouncing the Judgment 30.03.2015
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Anbumani ... Appellant/accused

...Vs...

The State

Rep. by Inspector of Police,
Bommidi Police Station
Dharmapuri District.
Crime No.555 of 1998

... Respondent/Complainant

Prayer:- Appeal filed under Section 374(2) of Cr.P.C. against the Judgment of conviction and sentence dated 01.03.2007 in S.C.No.121 of 2002 on the file of the Additional Sessions Court (Fast Track Court), Dharmapuri.

For Appellant : Mr.C.H.Vinobha Gandhi

For Respondent : Mr.V.Arul
Government Advocate (Crl.side)

JUDGMENT

This Criminal appeal arises out of the Judgment of conviction and sentence dated 01.03.2007 in S.C.No.121 of 2002 on the file of the Additional Sessions Court (Fast Track Court), Dharmapuri, whereby the appellant/accused was convicted and sentenced as follows:

offence under Section	Sentence
376 IPC	To undergo seven years rigorous imprisonment and to pay a fine of Rs.1,000/- in default in payment to undergo three months simple imprisonment.
417 IPC	To undergo one year rigorous imprisonment.
The sentences are ordered to be run concurrently.	

2.The case of the prosecution is as follows:

(i)On the side of the prosecution, P.W.1 to P.W.8 were examined and Exs.P1 to P15 were marked.

(ii)P.W.2/Lourdumary/victim girl is a resident of Lourdupuram. P.W.4/Prakasam is her father. P.W.2 is used to go to work in the field. At that time, she used to speak with the accused, due to which, the accused and P.W.2 visit each other's house. Then the accused had sexual intercourse with P.W.2 by promising her that he would marry her. When the victim girl became pregnant, she informed the same to the accused, at that time, the accused promised to marry her. Then, parents of P.W.2 came to know that P.W.2 is pregnant. Therefore, the matter was reported to Panchayat. After the accused accepting his guilt and promising to marry P.W.2, the Panchayat imposed fine on P.W.2's father for Rs.150/- and Rs.300/- on father of accused. The fine amount was given to the Church Priest namely, Arulraj. Since P.W.2 is under aged, the Priest asked P.W.4/father of P.W.2 to obtain birth certificate. P.W.4 wanted 10 days time and went to Andhra and obtained her birth certificate. Likewise, birth certificate of the accused was given to the priest. Accused told that marriage will be performed within ten days. But the marriage was not performed. Since the accused is not willing to marry P.W.2, P.W.2 has lodged Ex.P3 complaint before Bommidi police station.

(iii)P.W.7/Muniappan, Investigating Officer received Ex.P3 complaint from P.W.2 and registered a case in Crime No.555 of 1998 for offences under Sections 376 and 420 IPC and printed F.I.R. was marked as Ex.P8. He took up the case for investigation, went to the scene of occurrence, prepared Ex.P7 observation mahazar and drew Ex.P9 rough sketch. P.W.7 examined the witnesses and recorded their statements. Then he sent Ex.P10 requisition for conducting medical test to the victim girl. On 03.10.1998, at about 9.00 a.m., P.W.7 arrested the accused near Pallipatti bus stop and sent him to judicial custody. He also sent Ex.P11 requisition for conducting medical test to the accused.

(iv)P.W.1/Dr.Surabi, Medical Officer, Government Hospital, Dharmapuri examined P.W.2 and issued Ex.P2 medical certificate. She opined that P.W.2 subjected to sexual intercourse and she was pregnant and the fetus is aged about 26 to 28 weeks. Further she opined that age of P.W.2 is between 15 to 18.

(v)Learned Judicial Magistrate No.II, Dharmapuri sent Ex.P4 requisition to conduct medical examination on the accused. On receipt of the same, P.W.3/Dr.Sampath examined the accused and issued Ex.P5 medical certificate to the accused. He opined that the accused is capable of having sexual intercourse and his opinion was marked as Ex.P6.

(vi)P.W.8/Suresh Kumar, Inspector of Police, took up the matter for further investigation. He sent Ex.P12 requisition to the learned Judicial Magistrate No.II, Dharmapuri to send the seized material objects for chemical examination. Ex.P13 is the requisition sent by

the learned Judicial Magistrate No.II, Dharmapuri and the serological report was marked as Ex.P14 and chemical report was marked as Ex.P15. After completing investigation, he laid charge sheet against the accused for offences under Sections 376 and 417 IPC.

3.The Trial Court placed the incriminating evidence before the accused under Section 313(1)(b) of Cr.P.C. and the accused denied the same in toto. On the side of the defence, no oral and documentary evidence were let in. After considering the oral and documentary evidence on the side of the prosecution, the trial Court convicted and sentenced the accused as stated above.

4.Challenging the conviction and sentence passed by the trial Court, the learned counsel for the appellant/accused raised the following points:

(i) As per the evidence of P.W.2/victim girl, she was completed 18 years at the time of occurrence and hence, she is a consenting party to have sexual intercourse. So the offence under Section 376 IPC is not made out.

(ii) Since P.W.2 is a consenting party to have sexual intercourse, offence under Section 417 IPC is also not made out.

(iii) Non examination of the Priest Arulraj, who is alleged to be performed the marriage of P.W.2 and appellant and mother of P.W.2 are fatal to the case of prosecution.

(iv) Even though the accused has disputed the paternity of the child, the prosecution has not taken any steps for D.N.A.test to prove the paternity of the child.

(v) Consent given by P.W.2 is not hit by Section 90 IPC. But the trial Court has not considered all the above aspects and erroneously convicted the appellant/accused. Hence, he prayed for allowing the appeal. To substantiate his arguments, he relied upon the following decisions:

(i) 1984 Cri.L.J.1535 (1) (Jayanti Rani Panda v. State of West Bengal and another);

(ii) 2003 (4) SCC 46 (Uday v. State of Karnataka);

(iii) 2011 SAR (Criminal) 367 SC (K.P.Thimmappa Gowda v. State of Karnataka);

5.Resisting the same, learned Government Advocate (Crl.side) submits that the trial Court has considered the evidence of P.W.1 to P.W.8 and Exs.P1 to P15 and came to the correct conclusion that the appellant/accused has given false promise to marry P.W.2 and obtained consent by misconception of fact and the accused obtained such consent knew or had reason to believe that the consent was given in consequence of such misconception. So the offence under Section 376 IPC was made out. Furthermore, a child was also born to P.W.2. The trial Court has rightly considering the above aspect, convicted and sentenced the appellant/accused. Therefore, he prayed for dismissal of the appeal.

6. Considered the rival submissions made on both sides and perused the materials available on record.

7. The case of the prosecution is that the appellant/accused has given false promise to marry P.W.2 and had sexual intercourse. After she became pregnant, the accused refused to marry her. It is the duty of the prosecution to prove that whether the appellant/accused had committed rape on the victim girl/P.W.2 and whether he obtained consent from P.W.1 by giving false promise to marry her?

8. P.W.2/prosecutrix in her evidence deposed that she was completed 18 years at the time of occurrence. Since she is an illiterate, she is not in a position to give birth certificate.

9. P.W.1/Dr.Surabi in her evidence deposed that age of victim girl/P.W.2 is between 15 and 18. In her cross-examination, she deposed that P.W.2 is 18 years old. She gave Ex.P2 medical certificate of victim girl. P.W.3/Dr.Sampath issued Ex.P5 medical certificate of accused stating that he is capable of having sexual intercourse. As per Ex.P2, it is clear that P.W.2 is above 16 years old.

10. It is an admitted fact that P.W.2 gave birth to a child. According to the case of prosecution, appellant herein has given false promise to marry P.W.2 and had sexual intercourse. After became pregnant, P.W.2 requested the accused to marry her. At that time, the accused promised to marry her. After that, it came to the knowledge of the parents of P.W.2. Thereafter, Panchayat was held and in the Panchayat, the appellant/accused agreed to marry her and the Panchayat imposed fine of Rs.150/- on P.W.2's father and Rs.300/- on father of accused.

11. It is well settled dictum of the Apex Court that in the case of sexual assault, corroboration is not necessary and the evidence of prosecutrix is sufficient provided it must be inspire confidence of the Court.

12. It is pertinent to note that P.W.2 is an illiterate and she is hailing from rustic village at Dharmapuri District and she is doing an agricultural work. So this Court has to consider the above aspect while considering her evidence. On perusal of chief and cross-examination of P.W.2, it reveals that no suggestion was posed to her that as to why she has given a false complaint against the accused. Considering the chief and cross-examination of P.W.2, I am of the view, there is no reason for discarding her evidence and her evidence is natural, cogent and trustworthy and it is reliable. Her evidence is also corroborated by the evidence of P.W.5/Chinnappan, who is one of the Panchayathars. In his cross-examination, he deposed that he does not know whether the accused and P.W.2 is having illicit intimacy. On 22.09.1998, it was agreed to perform their marriage.

Since the accused has not come to perform marriage, complaint was lodged by P.W.2. So the evidence of P.W.5 has clearly proved that the appellant/accused agreed to marry P.W.2 and subsequently, he turned down.

13. Furthermore, considering the evidence of P.W.4/Prakasam, father of P.W.2/victim girl, there is no reason for discarding his evidence.

14. Learned counsel for the appellant/accused raised a point that non examination of mother of P.W.2 and Priest Arulraj is fatal to the case of prosecution. Since Priest Arulraj and Mother of P.W.2 are not eye witnesses, non examination of Priest Arulraj and Mother of P.W.2 is not fatal to the case of prosecution. Further, P.W.5/Chinnappan, Panchayatar, who is an independent witness was examined to corroborate the evidence of P.W.2. In such circumstances, non examination of Priest Arulraj is not fatal to the case of prosecution.

15. According to the learned counsel for the appellant/accused, the appellant is ready for D.N.A. test. It is to be noted that the alleged occurrence was taken place in the year 1998, but till now he has not taken any steps for D.N.A. test to prove the paternity of the child born to P.W.2. That factum was rightly considered by the trial Court.

16. Considering the aforestated circumstances of the case, I am of the view, P.W.2/victim girl has proved that the appellant/accused alone is having sexual intercourse with her by exploiting P.W.2, who is an illiterate girl and hailing from rustic village at Dharmapuri District.

17. Now this Court has to decide whether the consent given by P.W.2 is hit by Section 90 IPC? Before that, it is appropriate to consider the following decisions relied upon by the learned counsel for the appellant/accused:

(i) In 1984 Cri.L.J.1535 (1) (Jayanti Rani Panda v. State of West Bengal and another), in para-7, it was held that if a full grown girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not an act induced by misconception of fact. Section 90 IPC cannot be called in aid in such a case to pardon the act of the girl and fasten criminal liability on the other, unless the Court can be assured that from the very inception the accused never really intended to marry her.

(ii) The above decision has been followed in 2003 (4) SCC 46 (Uday v. State of Karnataka) and in para-16, it is held as follows:

"16. The High Court of Calcutta has also consistently taken the view that the failure to keep the promise on a future uncertain date does not always

amount to misconception of fact at the inception of the act itself. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. In *Jayanti Rani Panda vs. State of West Bengal* (1984 CrL. L.J.1535) the facts were somewhat similar. The accused was a teacher of the local village school and used to visit the residence of the prosecutrix. One day during the absence of the parents of the prosecutrix he expressed his love for her and his desire to marry her. The prosecutrix was also willing and the accused promised to marry her once he obtained the consent of his parents. Acting on such assurance the prosecutrix started cohabiting with the accused and this continued for several months during which period the accused spent several nights with her. Eventually when she conceived and insisted that the marriage should be performed as quickly as possible, the accused suggested an abortion and agreed to marry her later. Since the proposal was not acceptable to the prosecutrix, the accused disowned the promise and stopped visiting her house. A Division Bench of the Calcutta High Court noticed the provisions of Section 90 of the Indian Penal Code and concluded :-

"The failure to keep the promise at a future uncertain date due to reasons not very clear on the evidence does not always amount to a misconception of fact at the inception of the act itself. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. The matter would have been different if the consent was obtained by creating a belief that they were already married. In such a case the consent could be said to result from a misconception of fact. But here the fact alleged is a promise to marry we do not know when. If a full grown girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not an act induced by misconception of fact. S. 90 IPC cannot be called in aid in such a case to pardon the act of the girl and fasten criminal liability on the other, unless the Court can be assured that from the very inception the accused never really intended to marry her." "

(iii) In 2011 SAR (Criminal) 367 SC (*K.P.Thimmappa Gowda v. State of Karnataka*), in para-13, it is held as follows:

"13. In the present case, the facts are that Rathnamma herself stated in her evidence that she had sex with the appellant on several occasions. It is also an admitted fact that the FIR against the appellant was lodged just a few days before the birth of Rathnamma's

child, which means there is delay of over 8 months in lodging the FIR. The finding of the trial court, which has not been disturbed by the High Court, is that Rathnamma was about 18 years of age at the relevant time. On these facts a view is reasonably possible that Rathnamma had sex with the appellant with her consent and hence there was no offence under Section 376 IPC because sex with a woman above 16 years of age with her consent is not rape."

But the above decisions are not applicable to the facts of the present case. It is not the case of the appellant/accused that P.W.2 has given a free consent to have sexual intercourse. But the appellant has denied that he had sexual intercourse with P.W.2. Furthermore, the prosecution has proved that after P.W.2 became pregnant, Panchayat has been convened and in the Panchayat, the appellant agreed to marry P.W.2 and fine was imposed and the fine amount was given to Priest Arulraj for performing marriage. At that time, Priest asked P.W.2's father to bring birth certificate of P.W.2. Since P.W.2 born at Andhra, her father P.W.4 has gone to Andhra and obtained birth certificate. After that only, the appellant has refused to marry her. That factum was corroborated by P.W.5/Chinnappan, who is an independent witness. So it is clear that the appellant/accused with an intention to cheat P.W.2 has given a false promise to marry her and committed rape on her, which amounts to offence under Section 376 IPC. In such circumstances, the trial Court has rightly convicted the appellant/accused for offence under Section 376 IPC and therefore, the conviction and sentence passed by the trial Court in respect of offence under Section 376 IPC is hereby confirmed.

18.As already stated supra, the appellant/accused with an intention to cheat P.W.2 by giving false promise to marry her and had sexual intercourse. Now it is appropriate to incorporate Section 415 IPC, which runs as follows:

"415. Cheating - Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

From the above extract, it is clear that ingredients of Section 415 IPC "by deceiving P.W.2 to harm the person in body, which amounts to cheat" have been made out. Therefore, the trial Court has rightly convicted the appellant/accused for offence under Section 417 IPC.

The conviction and sentence passed by the trial Court in respect of 417 IPC is hereby confirmed.

19.Considering the aforestated circumstances of the case, I am of the view, the prosecution has proved that the appellant/accused is guilty for offence under Sections 376 and 417 IPC beyond reasonable doubt. The trial Court has considered all the aspects in proper perspective and rightly convicted and sentence the appellant/accused as stated above. So the judgment of conviction and sentence passed by the trial Court does not warrant any interference and it is hereby confirmed and this appeal is dismissed as devoid of merits.

20.In fine,

- This Criminal Appeal is dismissed, confirming the Judgment of conviction and sentence dated 01.03.2007 in S.C.No.121 of 2002 on the file of the Additional Sessions Court (Fast Track Court), Dharmapuri.
- Bail bond if any executed by the appellant/accused shall stand cancelled.
- The trial Court is directed to secure the appellant/accused to undergo the remaining period of sentence.
- Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar

True Copy

Sub Assistant Registrar

To

1.The Additional Sessions Court
(Fast Track Court), Dharmapuri.

2.Inspector of Police,
Bommidi Police Station
Dharmapuri District.

3.The Public Prosecutor, High Court, Chennai.

4. The Record Keeper, Criminal Section,
High Court, Chennai.

+1 cc to Mr.C.H.Vinobha Gandhi, Advocate,sR.5296.

ctk(co)
krd 16/4

Pre-delivery order made in
Crl.A.No.304 of 2007