

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.02.2015

CORAM:

THE HONOURABLE MS. JUSTICE R. MALA

Criminal Appeal No.454 of 2007

Judgment reserved on: 16.02.2015

Judgment pronounced on: 23.02.2015

1.Prabhu @ Kulandaivelu

2.Chinnusamy ... Appellant/Accused Nos.1 & 2

vs.

State Rep. By
Inspector of Police
All Women Police station
Kondalampatti, Salem.
Cr.No.4 of 2005.

... Respondent/Complainant

Prayer: Criminal Appeal filed under Section 374 of Cr.P.C., against the judgment of conviction and sentence dated 17.04.2007 made in S.C.No.371 of 2005 on the file of the Mahila Court (Additional District Sessions Judge, FTC-II), Salem.

For Appellant : Mr.R.Margabandhu

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

सत्यमेव जयते
J U D G M E N T

This Criminal Appeal arises out of the judgment of conviction and sentence dated 17.04.2007 made in S.C.No.371 of 2005 on the file of the Mahila Court (Additional District Sessions Judge, FTC-II), Salem, whereby the m accused 1 and 2/the appellants herein was convicted and sentenced as follows:

offence under Section	Sentence
376 IPC	A1 to undergo ten years rigorous imprisonment and to pay a fine of Rs.1,000/- in default in payment to undergo three months simple imprisonment.
417 IPC	A1 to undergo one year rigorous imprisonment and to pay a fine of Rs.200/- in default in payment to undergo fifteen days simple imprisonment.
313 IPC	A1 to undergo ten years rigorous imprisonment and to pay a fine of Rs.1,000/- in default in payment to undergo three months simple imprisonment.
506(ii) IPC	A1 and A2 to pay a fine of Rs.500/- each in default in payment to undergo fifteen days simple imprisonment.
The sentences are ordered to be run concurrently.	

2.The case of the prosecution based on the prosecution witnesses is as follows:

(i)On the side of the prosecution, P.W.1 to P.W.10 were examined, Exs.P1 to P8 were marked.

(ii)P.W.1/Tamilselvi and her brother P.W.2/Baskar were the resident of Sivadhapuram Kudumbar Street. P.W.1/Tamilselvi is working as Tailor. Their mother died seven year ago. The first accused/first appellant is the aunt's son of P.W.1 and P.W.2. Second accused/second appellant is the father of first accused. Third accused is the aunt of P.W.1 and P.W.2. The first accused used to visit the house of P.W.1 every now and then from the year 2003. In the year 2004, one day at about 10.00 p.m, the first accused/first appellant gave a false promise to P.W.1 that he will marry her and had sexual intercourse with her. Then, he said that he will marry P.W.1 after six months. In the meantime, P.W.1 got pregnant. Thereafter, the first accused took P.W.1 to Rudhramoorthy Hospital and did medically termination by force. Then, the first accused promised P.W.1 that he will marry her after six months. Thereafter, the first accused married one Sampoorani on 11.02.2005. On 18.02.2005, P.W.1 went to the house of the first accused along with her brother/P.W.2 and asked how he can marry another girl by giving false promise to her. For which, A2 and A3, namely, father and mother of the first accused scolded them. Thereafter, again P.W.1 and P.W.2 went to the house of the accused and again A2 and A3 made criminal intimidation that if they reveal to anybody, they will

murder them. Then, P.W.1 lodged a complaint/Ex.P.1 against the accused.

(iii) P.W.10/Tmt.Vijayalakshmi, Inspector of Police, All Women Police Station, Kondalampatti received the complaint/Ex.P.1 from P.W.1/Tamilselvi and registered a case in Crime No.4/2005 under Sections 376, 313, 506(ii) IPC and prepared the printed FIR/Ex.P.7. On 28.02.2005 at about 10.00 a.m., she recorded the statement of the victim girl, P.W.1/Tamilselvi. Then, P.W.10 went to the place of occurrence and prepared observation mahazar/Ex.P.2 and drew rough sketch/Ex.P.8 in the presence of witnesses. Thereafter, she recorded the statements of P.W.2/Baskar, P.W.3/Annamalai, one Bagiyan, P.W.4/Muniyappan, P.W.1/Tamilselvi and P.W.6/Mahalakshmi. On the same day, at about 3.30 p.m., P.W.10 arrested the Accused Nos.2 and 3 near the Panankadu Bust Stop and sent them to judicial custody. Thereafter, on 01.03.2005, P.W.10 submitted requisition to the learned Judicial Magistrate to send P.W.1/Tamilselvi to Government Hospital, Salem for medical examination.

(iv) On 02.03.2005, one Subramani, Head Constable and Sakthi, Constable accompanied P.W.1 to Kumaramangalam Government Hospital, Salem. At about 2.30 p.m., P.W.7/Dr.Sujatha, examined the victim girl and found that her hymen was not in tact and vagina easily admits two finger. P.W.7 further sent the samples of smear for chemical analysis. In the chemical analysis report/Ex.P.4, it was stated that P.W.1 is not a virgin and she used to have sexual intercourse. P.W.7 issued medical report/Ex.P.3.

(v) On 24.03.2005, the first accused/first appellant, namely, Prabhu @ Kulandaivelu surrendered before the Court and he was remanded to judicial custody.

(vi) On 28.03.2005, P.W.10 submitted requisition for potency test to the first accused. On 30.03.2005, P.W.9/Dr.Kesavalingam, examined the first accused and issued Ex.P.6 Potency Certificate stating that the accused is not an impotent.

(vii) On 14.04.2005, P.W.10 examined P.W.8/Dr.Valli, Rudhramoorthy Hospital, who did medical termination to P.W.1. P.W.8/Dr.Valli has deposed that on 21.10.2004 at about 12.00 noon, P.W.1/Tamilselvi was admitted in the hospital with bleeding and lower abdominal pain and her husband, namely, Prabhu accompanied her. She further stated that on that day, P.W.1 was in a critical stage and to save her, she did medical termination and issued medical termination report/Ex.P.5.

(viii) P.W.10/Tmt.Vijayalakshmi, Inspector of Police examined all the witnesses and recorded their statements. After completing investigation, she filed charge sheet against the accused under Sections 376, 313 and 506(ii) 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, D.W.1/first accused was examined and Ex.D.1 was marked. After considering the oral and documentary evidence, the trial Court convicted the Accused for the offence under Section 376, 417, 313 and 506(ii) IPC and sentenced them as stated above. Aggrieved over the same, the first and second accused/appellants have preferred this appeal.

4.Challenging the conviction and sentence passed by the Trial Court, the learned counsel appearing for the appellants raised the following points:

1.P.W.1 and the first accused loved each other for nearly two years and P.W.1 consented for sexual intercourse. So, the ingredients of Section 375 IPC has not been made out and hence, the conviction under Section 376 IPC has to be set aside.

2.Even though the appellant was convicted for the offence under Section 313 IPC, the evidence of P.W.7/DoctorDr.Sujatha has not support the case of the prosecution.

3.Though the case of the prosecution is that the first accused has given false promise to marry P.W.1 and had sexual intercourse, P.W.1 is aged about 22 years and she is competent to give consent. So, the Trial Court has failed to consider this aspect.

4.If at all, the first accused was convicted under Section 417 IPC, already he is in prison for seven months but the maximum punishment under Section 417 IPC is one year. Further, the first accused is also ready to pay compensation to P.W.1.

5.In respect of conviction under Section 506(ii) IPC, it is submitted that there is no criminal intimidation.

6.He also relied upon the decision of the Hon'ble Apex Court reported in 2013 (3) CTC 567 (Deepak Gulati vs. State of Haryana), wherein it is stated that there is distinction between rape and consensual rape.

7.Hence, he prayed for setting aside the conviction and sentence passed by the Trial Court.

5.Resisting the same, the learned Government Advocate (Crl. Sie) would submit that P.W.1, in her cross-examination admitted that the first accused raped her against her will. Hence, the evidence of P.W.1 has proved the ingredients of Section 375 IPC. So, the Trial Court has correctly held that the appellant is guilty under Section 376 IPC. In respect of Section 313 IPC, the evidence of P.W.8/Dr.Dr.Valli has been corroborated by P.W.1, P.W.2 and their relatives by stating that P.W.1 was subjected to abortion. So, the Trial Court has rightly held that the appellant is guilty under

Section 313 IPC. He would further submitted that the Trial Court has considered the evidence of P.W.1 to P.W.10, D.W.1 and Ex.P.1 to Ex.P.7 and convicted the accused. Hence, he prayed for dismissal of the appeal.

6.Considered the rival submissions made on both sides and perused the typed set of papers.

7.The admitted fact is that P.W.1/Tamilselvi is the complainant and P.W.2 is the brother of P.W.1. A3 is the sister of P.W.1's father and P.W.3/Annamalai is the brother of A3. P.W.5 and P.W.6 are the close relatives of both the P.W.1 and the accused. It is true that in the offence against the women, that too, sexual assault, we shall not sought for corroboration by way of independent witness. The charges framed is that the first appellant is the aunt's son of P.W.1 and they loved each other and the first appellant gave a false promise to marry her and had sexual intercourse with P.W.1 without her consent and after that, since she got conceived, the first accused/first appellant herein aborted the child. When P.W.1/Tamilselvi forced to marry her, the second and third accused made criminal intimidation. So, the relationship is not disputed and the age of the P.W.1 is also not disputed and she is above 16 years.

8.Now, the only point to be decided is that whether the offence under Section 376 IPC has been made out?

9.It is appropriate to consider the complaint, wherein it was specifically mentioned that P.W.1 and her aunt's son, namely, Prabhu @ Kulandaivelu, the first appellant herein have loved each other and the first accused/first appellant gave a false promise to marry her and had sexual intercourse with her when she was alone in her house without her consent. After she got conceived, the first accused took her to Rudhramoorthy Hospital and aborted the child. Now, this Court has to decide whether the evidence of P.W.1 is reliable? On perusal of chief and cross-examination of P.W.1, I am of the view that the evidence of P.W.1 is natural, cogent and trustworthy. Hence, it is reliable.

10.As per the dictum of apex Court that a single related victim in the Indian setting, refusal to act on the testimony of the victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. She would be conscious of the danger of being

ostracised by society and when in the face of these factors the crime is brought to light, there is inbuilt assurance that the charge is genuine rather than fabricated.

11.It is settled law that the victim of sexual assault is not treated as accomplice and as such, her evidence does not require corroboration from any other evidence including the evidence of a doctor. In normal course a victim of sexual assault does not like to disclose such offence even before her family members much less before public or before the police. The Indian women has tendency to conceal such offence because it involves her prestige as well as prestige of her family. Only in few cases, the victim girl or the family members has courage to go before the police station and lodge a case. A rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault. It is often destructive of the whole personality of the victim. A murderer destroys the physical body of victim. A rapist degrades the very soul of the helpless female. The Court, therefore, shoulders a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out and otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. So, I am of the view that the evidence of P.W.1 is wholly reliable.

12.It is pertinent to note that the evidence of P.W.1 has been corroborated in another aspect by way of examination of P.W.2/Baskar, brother of P.W.1, P.W.3/Annamalai, P.W.5/Panneerselvam and P.W.6/Mahalakshmi. P.W.5 and P.W.6 were not only relatives of P.W.1 but also the relatives of the first appellant/first accused. Here, the first appellant examined himself as D.W.1 and in his evidence, he has stated that his mother/A3 compelled him to marry P.W.1, but he married one Sampoorani on 11.02.2005 and then only, complaint has been given. Further, the first accused/first appellant has denied that he has aborted the child nor made any criminal intimidation. He had further stated that on the basis of the false complaint, case has been registered. But, admittedly at the time of Section 313 Cr.P.C. questioning, A3/mother of first accused has stated that his son/first accused has entered the house of P.W.1 and raped her.

13.It is also pertinent to note that P.W.3/Annamalai is none other than brother of A3. P.W.4/Muniyappan is the adjacent house owner and P.W.5/Panneerselvam is residing near the house of P.W.1 and they are deposing about the medical termination. So, the evidence of P.W.1 itself has proved that the first accused/first appellant has given false promise to marry her and had sexual intercourse with her. It is true that P.W.1 has not given any complaint as soon as the first accused raped her for the first time without her consent. In cross-examination, P.W.1 herself admitted that she had sexual intercourse with the first appellant/first accused for four times. But, P.W.1 got pregnant and subsequently it was medically terminated when she was four months pregnant. In such circumstances, I am of the view that the factum that against her will the first accused has raped her is unacceptable. So, I am of the view that the first appellant herein is not guilty under Section 376 IPC since the ingredients of Section 375 IPC has not been made out. Hence, the conviction and sentence imposed by the Trial Court on the first accused under Section 376 IPC is hereby set aside.

14.Now, this Court has to decide whether the offence under Section 417 IPC has been made out? The evidence of P.W.1 to P.W.3 has clearly proved that the first appellant herein has given false promise to marry P.W.1 and had sexual intercourse with her. Subsequently, he refused to marry her and without the consent of his mother/A3, A1 married another girl, namely, Sampoorani, which shows that he fraudulently and dishonestly induced P.W.1 to submit herself for sexual intercourse. Hence, I am of the view that the Trial Court has rightly held that the first appellant is guilty under Section 417 IPC. Considering the attitude of the first appellant, the conviction and sentence imposed by the Trial Court against the first accused under Section 417 IPC is hereby confirmed.

15.Now, this Court has to decide whether the conviction and sentence passed under Section 313 IPC is sustainable? It is the case of the prosecution that the first appellant herein had sexual intercourse with P.W.1 after giving a false promise to marry her. When P.W.1 forced for marriage, the first accused/first appellant stated that he will marry her after six months. In the meanwhile, when she got pregnant, the first accused/first appellant took her to hospital and did medical termination. At this juncture, it is appropriate to Section 313 IPC, which reads as follows:

"313.Causing miscarriage without woman's consent:
Whoever commits the offence defined in the last preceding section without the consent of the woman, whether the woman is quick with child or not, shall be punished with imprisonment for life or with imprisonment

of either description for a term which may extend to ten years, and shall also be liable to fine."

Essential Ingredients:- Section 313 IPC penalizes voluntary causing of miscarriage of a woman with child without her consent. The essential ingredients of an offence under this section are:

- (i) That the accused caused miscarriage to a woman with child;
- (ii) That he do voluntarily;
- (iii) That he cause miscarriage without the consent of that woman.

16.It is submitted by the learned counsel appearing for the appellants that P.W.7/Dr.Sujatha, has given a medical report/Ex.P.3 and chemical analysis report/Ex.P.4, wherein it was specifically stated that P.W.1 is not virgin and she used to have sexual intercourse. When a suggestion was posed to P.W.7/Dr.Sujatha, that on examination of P.W.1 whether she can identify that P.W.1 had undergone abortion. For which, she has stated that it was not possible to ascertain whether she was subjected to medical termination.

17.It is also pertinent to note that P.W.8/Dr.Valli, in her evidence, has stated that on 21.10.2004 at about 12.00 noon, P.W.1 came to the hospital with bleeding and lower abdominal pain along with her husband, namely, Prabhu and since her health condition was critical, immediately P.W.8 did medical termination to P.W.1 to save her life after obtaining her consent. She issued a medical certificate/Ex.P.5. In cross-examination, she fairly conceded that P.W.1 was not in a fit state to speak. P.W.8 has stated that P.W.1 was critical and the foetus was in aborted stage. In such circumstances, the medical termination to P.W.1 was done only after obtaining consent is unacceptable because as per the evidence of P.W.8, P.W.1 came to the hospital in a critical condition with bleeding and lower abdominal pain along with her husband and thus, it has been proved that P.W.1 was subjected to miscarriage without her consent. So, I am of the view that the prosecution has proved that the ingredients of Section 313 IPC and that has been corroborated by P.W.2, P.W.3, P.W.5 and P.W.6 that the first accused taken P.W.1 to hospital and did medical termination. In such circumstances, I am of the view that the accused is found to be guilty under Section 313 IPC and hence, the conviction and sentence imposed by the Trial Court against the first accused under Section 313 IPC is hereby confirmed.

18.In respect of offence under Section 506(ii) IPC, P.W.1, in her evidence, has stated that when she forced for marriage, the

second accused/second appellant herein and the third accused threatened her and that has been corroborated by P.W.2, brother of P.W.1 and hence, they were convicted and sentenced for the offence under Section 506(ii) IPC. But, in the cross-examination, P.W.1 has fairly conceded that there was panchayat in the Police Station and since the first accused has not accepted for marriage, she gave complaint. In such circumstances, I am of the view that the offence under Section 506(ii) IPC has not been made out and hence, the conviction and sentence imposed by the Trial Court against the first and second accused/appellants herein is hereby set aside.

19.As stated supra, the conviction and sentence imposed by the Trial Court under Sections 376 IPC and 506(ii) is hereby set aside and the conviction and sentence imposed by the Trial Court under Sections 417 and 313 IPC is hereby confirmed.

20.In fine,

(i)The Criminal Appeal is Partly Allowed.

(ii)Judgment of conviction and sentence passed by the Trial Court against the first accused/first appellant under Sections 417 and 313 IPC is hereby confirmed.

(iii)Judgment of conviction and sentence passed by the trial Court against the first accused/first appellant under Section 376 IPC is hereby set aside.

(iv) Judgment of conviction and sentence passed by the trial court against the first and second accused/appellants herein under Section 506(ii) is hereby set aside.

(v)The fine amount paid by the accused is ordered to be refunded to him.

(vi)Bail bond, if any executed by the appellants/accused shall stand cancelled.

(vii)The trial Court is directed to secure the custody of the first appellant/first accused to undergo the remaining period of sentence.

Sd/-

Asst. Registrar

/true copy/

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Sub Asst. Registrar.

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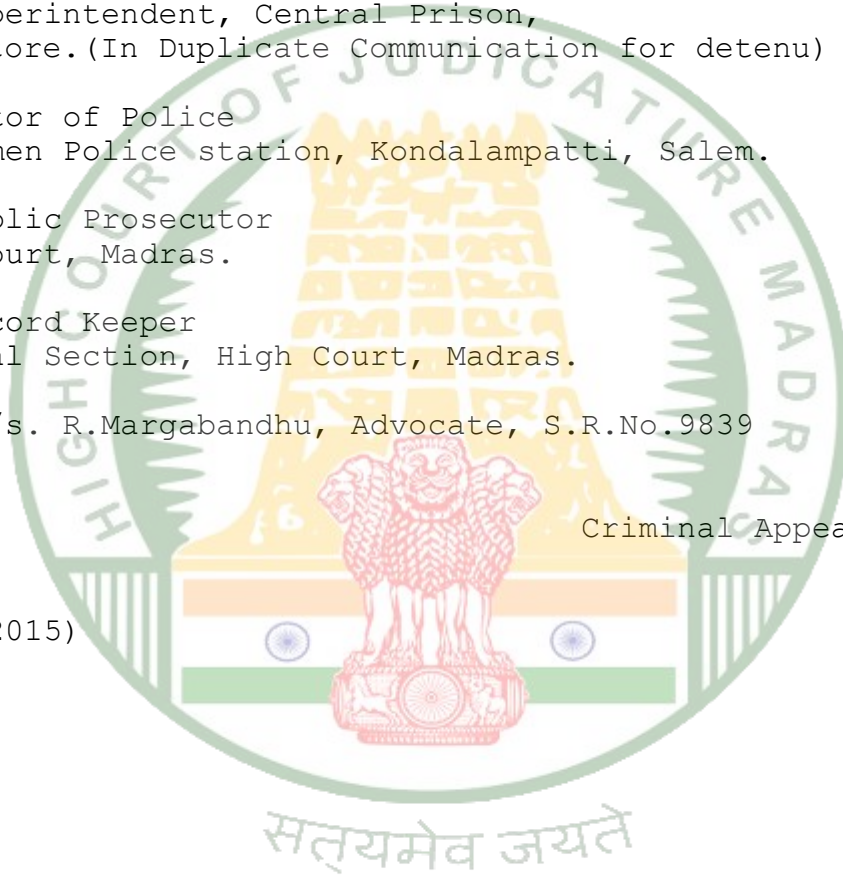
To

1. The Judicial Magistrate,
No.V, Salem
2. The Chief Judicial Magistrate,
Salem. (For Information)
3. Mahila Court (Additional District Sessions Judge, FTC-II),
Salem.
4. The Superintendent, Central Prison,
Coimbatore.(In Duplicate Communication for detenu)
5. Inspector of Police
All Women Police station, Kondalampatti, Salem.
6. The Public Prosecutor
High Court, Madras.
7. The Record Keeper
Criminal Section, High Court, Madras.

+1cc to M/s. R.Margabandhu, Advocate, S.R.No.9839

Criminal Appeal No.454 of 2007

SAI (CO)
CA(05/03/2015)



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